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TRANSCRIPT OF [illegible]

Supreme Court of the United States

OCTOBER TERM, [illegible]

No. [illegible]

THE STEWART DRY GOODS COMPANY,
APPELLANT,

vs.

JOHN B. LEWIS, W. P. SULLIVAN AND EMERSON BEAUCHAMP, INDIVIDUALLY AND AS MEMBERS OF THE STATE TAX COMMISSION OF THE COMMONWEALTH OF KENTUCKY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY

FILED OCTOBER [illegible], [illegible]

SUPREME COURT OF THE UNITED STATES

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No. 454

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JOHN B. LEWIS, W. P. SULLIVAN AND EMERSON BEAUCHAMP, INDIVIDUALLY AND AS MEMBERS OF THE STATE TAX COMMISSION OF THE COMMONWEALTH OF KENTUCKY, ET AL.

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[fols. a & 1] [Caption omitted]

[fols. 2 & 3]

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF KENTUCKY

THE STEWART DRY GOODS COMPANY, Plaintiff,

vs.

JOHN B. LEWIS, SELDEN R. GLENN, and HENRY M. CLINE, Individually and as Members of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, Individually and as Auditor of Public Accounts of the Commonwealth of Kentucky, Defendants

BILL OF COMPLAINT—Filed Jan. 24, 1931

The plaintiff, The Stewart Dry Goods Company, a corporation organized under the laws of Kentucky, brings this bill of complaint against the defendants, John B. Lewis, Selden R. Glenn and Henry M. Cline, individually and as members of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, individually and as Auditor of Public Accounts of the Commonwealth of Kentucky, and says:

[fol. 4] I

The plaintiff, The Stewart Dry Goods Company, is now and at all times herein mentioned it was, and since the year 1892 it has been, a corporation duly created, organized and existing under the laws of the Commonwealth of Kentucky, with its principal office and only place of business in the city of Louisville, Kentucky, and a citizen and resident of the Commonwealth or State of Kentucky, and an inhabitant of the Western District of Kentucky.

The defendants, John B. Lewis, Selden R. Glenn and Henry M. Cline, are the duly and legally appointed, qualified and acting members, and the only members, of the State Tax Commission of the Commonwealth of Kentucky, which is a Commission created pursuant to an Act of the General Assembly of the Commonwealth of Kentucky and

at all times herein mentioned invested by the law of Kentucky with the duty of administering and enforcing all tax laws of the Commonwealth that are validly or constitutionally enacted.

The defendant, Clell Coleman, is now the duly elected, qualified and acting Auditor of Public Accounts of Kentucky.

Said defendants, John B. Lewis, Selden R. Glenn, Henry M. Cline and Clell Coleman, are all citizens and residents of the Commonwealth or State of Kentucky. The said John B. Lewis and Seldon R. Glenn are inhabitants of the [fol. 5] Western District of Kentucky, and said defendants, Henry M. Cline and Clell Coleman, are inhabitants of the Eastern District of Kentucky.

II

Under and by virtue of the terms of an Act of the General Assembly of Kentucky at its 1930 session herein referred to, which was approved by the Governor of the Commonwealth of Kentucky on March 17, 1930, but is void for the reasons hereinafter set out (said Act being officially published as Chapter 149 of the Session Acts of 1930, at pages 475 to 482), it is provided that the defendant members of the State Tax Commission of Kentucky shall be, and they are, charged with the duty of preparing blank forms for certain retail merchants operating in Kentucky, stores as defined in said Act, and with the further duty of ascertaining from them information as to the amount and volume of gross sales made by such retail merchants, and of ascertaining and fixing the amount of license taxes due from all such retail merchants operating stores in Kentucky as defined in said Act, and with the further duty of employing clerical and other assistants to carry out the duties attempted to be imposed by said Act upon said State Tax Commission, and further charged with the duty generally to administer and to enforce the provisions of said Act as therein set out.

It is further provided in said Act that the defendant, Clell Coleman, as Auditor of Public Accounts of Kentucky, shall [fol. 6] be, and he is, charged under said Act with the duty of collecting and of directing the disbursement of all taxes that may be levied or assessed or fixed by said State Tax Commission under or pursuant to the terms of said Act.

III

This suit arises under the Constitution or laws of the United States and the amount in controversy herein exceeds the sum or value of $3,000.00, exclusive of interest and costs.

This is a suit of a civil nature and is brought in equity for the purpose of enjoining the defendants and each of them from enforcing or attempting to enforce said Act of the General Assembly of Kentucky, being Chapter 149 of the Session Acts of 1930, approved by the Governor of the Commonwealth on March 17, 1930, and for the purpose of enjoining the defendants or any of them from requiring of the plaintiff and other taxpayers similarly situated as hereinafter set forth, the reports which said Act purports to require of retail merchants as the term "retail merchant" is defined in said Act, or any information in reference to sales made by the plaintiff or any of said retail merchants similarly situated, as hereinafter set forth, or from collecting or seeking to collect from the plaintiff or any of said retail merchants similarly situated any tax purporting to be levied or assessed upon the plaintiff or any of said retail merchants similarly situated as hereinafter set forth, or from instituting any prosecution against the plaintiff or any [fol. 7] of said retail merchants similarly situated as hereinafter set forth, to recover any of the penalties sought to be imposed by said Act upon the plaintiff or any of said retail merchants similarly situated as hereinafter set forth, for a violation of any of the terms of said Act.

IV

At a regular session of the General Assembly of the Commonwealth of Kentucky held at the seat of government of the Commonwealth, beginning January 6, 1930, to-wit, on January 21, 1930, there was introduced into the House of Representatives a bill known as House Bill No. 111, which by its terms provided for a license or excise tax upon each merchant doing business in Kentucky, which term "merchant" was defined in said bill as originally introduced to mean and include every person, association, copartnership or corporation engaged in the buying and selling of goods, wares or merchandise at any store, stand or place in Ken-

tucky occupied for that purpose, said excise or license tax being graduated in said bill as introduced as follows:

For each merchant conducting not more than one store, an annual license tax of $25.00, and

For each merchant conducting his business in more than one store, an annual license tax of $25.00 for the first store; $37.50 for the second store; $50.00 for the third store; and on each additional store so conducted by him, a tax in an amount to be determined by adding $12.50 consecutively for [fol. 8] each such additional store so conducted by him.

Said House Bill No. 111 so introduced into the House of Representatives on January 21, 1930, was read on the day of its introduction by the following title as endorsed upon said original bill and as entered upon and shown by the official Journal of the House of Representatives for that day:

"H. B. 111, An Act to restrain the unfair competition of chain stores, and in aid of individual merchants in the Commonwealth."

Immediately upon its introduction in the House of Representatives and its reading by the title above set forth, said House Bill No. 111 was referred to the Committee on Kentucky Statutes in the House of Representatives, which Committee, on February 14, 1930, reported said bill with a substitute therefor, which substitute was likewise read, as shown by the Journal of the House of Representatives, in full as "An Act to restrain the unfair competition of chain stores, and in aid of individual merchants in the Commonwealth."

Thereafter a second reading of said bill was had in the House of Representatives on February 18, 1930, and a third reading thereof had on February 19, 1930, and on each of said second and third readings said House Bill No. 111, as shown by the journals of the House of Representatives, was not read in full but was read only by the title above set forth, to-wit: "An Act to restrain the unfair competition of [fol. 9] chain stores, and in aid of individual merchants in the Commonwealth."

Upon the third reading of said bill by said title, it was passed by the House of Representatives, and after its passage its title was amended, as shown by the House

Journal, and the bill was then sent to the Senate, where it was likewise read the first time in full, and the second and third times only by its title, and thereupon, on its third reading, was passed by the Senate and returned to the House of Representatives, in which it originated, where it was later, on March 7, 1930, as shown by the Journal of the House of Representatives, reported by the Committee on Enrollment, having been examined and found to be correctly enrolled under its title as hereinabove set forth, to wit: "House Bill 111, An Act to restrain unfair competition of chain stores, and in aid of individual merchants in the Commonwealth."

Thereupon the bill, having been enrolled, was signed by the Speaker of the House of Representatives and by the President of the Senate, and sent to the Governor of the Commonwealth, who on March 17, 1930, returned it to the House of Representatives with his approval in writing appended thereto.

By its terms said bill, being thus passed and approved, became effective on March 17, 1930, and it is now officially published in the Session Act of 1930 as Chapter 149 of the Acts of 1930, approved March 17, 1930.

[fol. 10] V.

Said House Bill 111 was introduced into the House of Representatives in response to a recommendation made to the General Assembly by the Governor of Kentucky in his annual message of January, 1930, that legislation be enacted to curb the competition of so-called chain stores with owners of so-called independent unit stores individually owned and operated, and in aid of such individually owned and operated stores.

While said House Bill 111 was pending before the House Committee to which it was referred upon its introduction, the case of Jackson v. State Board of Tax Commissioners of Indiana was decided on February 1, 1930, in which a measure similar in legal effect to said House Bill 111 as originally introduced was held violative of the Fourteenth Amendment to the Constitution of the United States and therefore void, as shown by the opinion in that case, reported in 38 Federal (2d) at pages 652-659.

Thereupon the nature, but not the purpose, of said House Bill 111 was changed by amendment by the Com-

mittee to which it had been referred, and that measure as so amended and passed in the manner hereinbefore set out and approved by the Governor was so framed as to contain the obnoxious and unconstitutional features hereinafter set out.

[fol. 11] VI

Said House Bill 111 as finally passed and approved and now published officially as Chapter 149 of the Acts of 1930 provides in full as follows:

"An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act.

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:.

"§ 1. The words 'retail merchant,' as used in this act, shall mean and include every person, firm, association, copartnership or corporation opening, establishing, operating or maintaining any 'store,' as defined herein, for the purpose of and selling goods, wares or merchandise at retail in this State, except those actually engaged in gardening or farming and selling garden or farm products raised by them in this State. The term 'store,' as used in this act, shall be construed to mean and include any store or stores or any mercantile establishment or establishments in this State which are owned, operated, maintained or controlled by the same 'retail merchant,' as defined herein, either domestic or foreign, in which goods, wares or merchandise of any kind are sold at retail. The provisions of this act shall be construed to apply to every 'retail merchant' and 'store,' as defined herein, which is controlled or held with others by majority stock ownership or [fol. 12] ultimately controlled or directed by one management or association of ultimate management.

"§ 2. Every retail merchant, as defined herein, shall pay an annual license tax for the opening, establishing, operating or maintaining of any store or stores, as defined

herein, determined by computing the tax on the amount of gross sales as follows:

"One-twentieth of one per cent of the gross sales of Four hundred thousand ($400,000.00) Dollars or less; two-twentieths of one per cent on the excess of the gross sales over Four hundred thousand ($400,000.00) Dollars and not exceeding Five hundred thousand ($500,000.00) Dollars; five-twentieths of one per cent on the excess of the gross sales over Nine hundred thousand ($900,000.00) Dollars and not exceeding Six hundred thousand ($600,000.00) Dollars; eight-twentieths of one per cent on the excess of the gross sales over Six hundred thousand ($600,000.00) Dollars and not exceeding Seven hundred thousand ($700,000.00) Dollars; eleven-twentieths of one per cent on the excess of the gross sales over Seven hundred thousand ($700,000.00) Dollars and not exceeding Eight hundred thousand ($800,000.00) Dollars; fourteen-twentieths of one per cent on the excess of the gross sales over Eight hundred thousand ($800,000.00) Dollars and not exceeding Nine hundred thousand ($900,000.00) Dollars; seventeen-twentieths of one per cent on the excess of the gross sales over Nine hundred thousand ($900,000.00) Dollars and not exceeding One million ($1,000,000.00) Dollars; one per cent on the excess of the gross sales over One million ($1,000,000.00) Dollars.

"§ 3. Every retail merchant, as defined herein, in order to ascertain the amount of taxes due and payable under [fol. 13] the next preceding section, shall file with the State Tax Commission on or before the first day of February each year a written report verified by the affidavit of the owner or chief officer on such forms as it may prescribe, giving the number and location of its store or stores, as defined herein, the name and post office address of its owner or principal officer, the name and address of its officer or agent in charge of its business at each separate store, the nature and kind of business, the total gross sales during the preceding year ending the thirty-first day of December, and such other facts bearing on the proper taxation as the Tax Commission may require.

"The State Tax Commission may, in any case, require such additional information as it may deem necessary to enable it to perform its duties herein. It shall be the duty of the State Tax Commission from such reports, and from

such additional information, as it may obtain, to ascertain the amount of taxes due, and to certify to every such retail merchant the amount of taxes due for the preceding year, based upon such reports and information as it may ascertain. Upon final action by the State Tax Commission, it shall certify to the Auditor of Public Accounts and to the retail merchant the amount of such tax due by each retail merchant, as defined herein, and it shall be the duty of each retail merchant to pay the amount of such tax to the Auditor of Public Accounts not later than thirty days thereafter.

"In reporting the gross sales for the year, 1930, retail merchants shall include only those sales made between the date that this act becomes effective and December 31, 1930, and the license tax due for the year 1930 shall be based on the amount of those sales only.

[fol. 14] "§ 4. The license or excise tax levied herein, shall not be in lieu of any special state license, excise, occupational or corporation license tax due under the provisions of any law now in force, or that may hereafter be enacted. Should any retail merchant, as defined herein, be liable for and pay any special state license, excise, occupational or corporation license tax under the laws now in force, or that may hereafter be enacted, credit may be taken on the tax levied in this act for the amount of such special license, excise, occupational or corporation license tax so paid not to exceed the amount of the license or excise tax levied herein.

"§ 5. If any retail merchant, as defined herein, neglects or refuses to file the verified report or pay the tax due at the time herein provided, the amount thereof with an addition of a penalty of twenty per centum thereof, with interest at the rate of six per centum per annum from the date when due until paid, shall be collected on an account settled by the State Tax Commission as other taxes are settled and collected; and if collected by proceedings in any court, an additional penalty of twenty per centum shall be collected, as is authorized to be collected in revenue agent's proceedings under Section 4263-4 of the Kentucky Statutes.

"The said twenty per centum penalty thereon and interest due shall be paid into the State Treasury as part of the tax, and the twenty per centum penalty collected in revenue agent's proceedings shall be distributed as provided in section 4263-4 of the Kentucky Statutes.

"§ 6. The State Tax Commission, or any assistant or representative thereof, appointed in writing by it, is hereby

authorized to examine the books, records, papers, files and equipment of any retail merchant, as defined herein, made [fol. 15] taxable by this act, and to that end, shall have the power to examine witnesses under oath to verify the accuracy of any return made under the provisions of this act, or to ascertain whether or not any tax is due under the provisions of this act by any retail merchant; and in the collection of said tax, the State Tax Commission shall have the power to institute legal proceedings for the purpose of ascertaining the amount of tax due and the collection thereof with the penalties thereon, and the State Tax Commission shall be vested with all the powers under the law of the State for the collection of taxes. The State Tax Commission may, at or after the commencement of an action for the purpose of collecting the amount of tax due and penalties and interest due thereon, as set out herein, have an attachment against the property of the defendant, including garnishees, without the execution of a bond upon the filing of an affidavit showing the nature of the claim, that it is just, the sum which the State Tax Commission believes the plaintiff ought to recover and that the collection of the demand will be endangered by delay in obtaining judgment or a return of no property found. Any information gained by the State Tax Commission, or any assistant, agent or representative thereof, as a result of the reports, investigations or verification herein required to be made, shall be confidential, and any person divulging such information shall be guilty of a misdemeanor, and, upon conviction, shall be fined not exceeding Five Hundred ($500.00) Dollars; provided, that this prohibition shall not extend to information required in prosecutions for making false reports or returns or in the preparation and prosecution of legal proceedings, for the collection of any tax due under the provisions of this act, or [fol. 16] any prosecutions for any other infraction of the tax laws of this State.

"§ 7. Any retail merchant, as defined herein, or any officer, director, trustee or agent, who shall fail, neglect or refuse to make the reports and pay the tax herein prescribed, or shall refuse to permit the State Tax Commission, its assistants, agents or representatives appointed by it in writing to examine the books, records, papers, files and equipment of such retail merchant, as defined herein, or who does, or attempts to do, anything whatever to avoid a full dis-

closure of the amount of business done, or to avoid the payment of the whole or any part of the tax or penalties due, shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding One Thousand ($1,000.00) Dollars, and in case the offender is an individual, he may be imprisoned in the county jail not exceeding six months, or both so fined and imprisoned. Such penalty shall be in addition to the penalty imposed in Section 5 of this act.

"§ 8. It shall be the duty of the State Tax Commission to administer and enforce the provisions of this act, and it is hereby authorized and empowered to prescribe all blanks, forms and reports necessary to carry out the provisions of this act, and all costs and expenses incurred by the State Tax Commission in the administration of this act shall be paid out of the funds collected hereunder.

"§ 9. All taxes collected under the provisions of this act shall be paid to the Auditor of Public Accounts, and of such amounts so received by the Auditor in any fiscal year, one-half part shall be set aside and credited to the Board of Charities and Corrections for the specific purpose of repairing, maintaining and constructing permanent improve-[fol. 17] ments for the use of the institutions under the control of said board. The remainder of the amounts so collected and received by the Auditor in any fiscal year shall be credited to a fund to be used for the specific purpose of liquidating any indebtedness of the Commonwealth.

"§ 10. No suit shall be maintained in any court to restrain or delay the collection or payment of the tax herein imposed upon any ground whatever but the aggrieved taxpayer shall pay the tax as and when due, and if paid under protest may at any time with- two years from the date of such payment sue the Auditor of Public Accounts in an action at law to recover the tax so paid, with legal interest thereon, from the date of payment. If it is finally determined that said tax, or any part thereof, was wrongfully collected for any reason, it shall be the duty of the Auditor of Public Accounts then in office to issue his warrant on the Treasurer of the Commonwealth of Kentucky for the amount of such tax so adjudged to have been wrongfully collected, together with interest thereon, and the Treasurer shall pay same out of the General Fund of the State. A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one

suit for as many payments as may have been made, and which are not barred by the limitation of two years herein imposed.

"§ 11. The provisions of this act are severable and if any of its provisions or any penalty provided by this act shall be held unconstitutional, such provision or the particular penalty held to be invalid may be rejected without affecting the remainder of the act or such part of the penalties as are not held to be invalid and the decisions of the courts shall not affect or impair the remaining provisions of this act or any of the other penalties anywhere in this act [fol. 18] provided. It is hereby declared as a legislative intent that this act would have been adopted had such unconstitutional provisions or such invalid penalties not been included therein.

"§ 12. All laws and parts of laws in conflict herewith are hereby repealed to the extent of such conflict.

"§ 13. Whereas, the present state revenue does not meet the immediate needs for the maintenance and development of the State government and its agencies, an emergency is declared to exist, and this act shall become a law and be effective upon its passage and approval by the Governor.

"Approved March 17, 1930."

VII

The plaintiff herein, for nearly forty years continuously last past, and its predecessors in interest since 1846, have been engaged in conducting one retail store in Kentucky, the same being located in Louisville, Kentucky, wherein it handles and sells, exclusively at retail, merchandise of the following general character:

(1) Piece dry goods, such as silks, velvets, dress goods, wash goods, linens, etc.

(2) Laces, ribbons, notions, toilet goods, books, art goods, etc.

(3) Handkerchiefs, hosiery, gloves, underwear, millinery, corsets, shoes, etc.

(4) Women's ready-to-wear garments.

(5) Men's and Boys' furnishings, etc.

(6) House furnishings.

[fol. 19] (7) And also operates two lunch rooms, in which it sells lunches.

Plaintiff is not engaged in manufacture of any kind. It has never owned or operated or conducted any other store than the one, which for 84 years past has been located in Louisville, Kentucky, and for more than twenty years past has been located at the corner of Fourth and Walnut Streets in that city.

Plaintiff conducts in its retail store what is known as a department store, embracing approximately 70 separate departments, in which separate departments it sells at retail merchandise of various kinds, of which the following are illustrations:

Silks and velvets,
Pianos,
Gloves,
Toys and Sporting Goods,
Women's Hosiery,
Chinaware,
Books,
Millinery,
Upholstery,
Muslin Underwear,
Furniture,
Rugs and Carpets,
Men's Furnishings,
Shoes.

Each of said departments is operated by the plaintiff separately from other departments, and plaintiff's books and accounts are kept so as to show separately as to each department the sales therein, the expense of operation, in- [fol. 20] cluding its proper proportion of rental, taxes, insurance and all other overhead expense, and the net results of such operation of each department, to the end that plaintiff may determine, after allocating to each department its proper proportion of overhead general expense, including rental of floor space, taxes, insurance and all other proper overhead charges, the results of operation in each such department, and the wisdom or policy of maintaining or continuing the conduct of such department, or changes of policy or management necessary to make each department self-supporting if possible.

In the conduct of its general business, plaintiff comes into competition with a large number of other stores selling merchandise of a similar character in Louisville and in

other cities in Kentucky, and the same is true as to each department operated by plaintiff in its retail store inasmuch as each of said departments is compelled to and does actively compete with specialized stores or stores dealing in similar lines of goods in the city of Louisville and elsewhere in Kentucky. Such competition extends not only to the matter of buying power but also to the matter of selling and the fixing of prices on goods sold so as to make them sell in competition with other dealers in similar goods in Louisville or elsewhere in Kentucky, and such competition applies not only to the plaintiff's conduct of its store as a whole but as to each unit or department therein.

[fol. 21]

VIII

In addition to the several departments separately conducted by plaintiff itself in its retail store building, plaintiff has for more than 30 years last past leased floor space in its said store to Herbert Tashgian, to whom it furnishes light, heat, janitor and elevator service, storage, billing, credit rating, collection and other like services, all for a valuable consideration expressed in the contract between plaintiff and said lessee, but in all other respects, said lessee conducts for himself his own retail store in his leased space. Said lessee owns and operates in said leased space his own stock for the sale of Oriental rugs. He selects his own stock of goods, and buys them for himself, employs, discharges and pays his own salesmen or assistants, fixes the selling prices of his own goods, pays his own taxes upon his own goods, and in all essential respects manages and conducts his own store as the proprietor thereof, though conducted in the same building as the store of this plaintiff and its various departments.

IX

For many years past, plaintiff has kept its entire capital invested in the retail store conducted by it in Louisville, Kentucky. For nearly 40 years it has been a large taxpayer to the State of Kentucky and the city of Louisville and the County of Jefferson. It has paid all annual ad [fol. 22] valorem taxes levied thereon by competent authority for State, County and city purposes. It has exerted itself with the utmost diligence and prudence to build up

its business as a retail merchant by all honorable means, and it has built up a large and valuable business in the face of the keenest competition with other retail merchants conducting a similar business, some of them with a larger volume of gross sales and others with a smaller volume of gross sales in the respective kinds or classes of merchandise sold by plaintiff.

To do this has required of the plaintiff the closest attention to every phase of its business, including the most careful foresight as to the class or style of goods it should stock in its store and in each department thereof to attract the public and to satify its wishes and to stimulate purchases by it, and also the most effective methods of displaying and advertising its goods so as to attract buyers, as well as the most careful consideration as to prices to be placed thereon so as to stimulate sales and thus to obtain a turnover of its stock as rapidly as possible at all times, especially as to such articles as are seasonable in character, thus avoiding the losses in business that inevitably result from carrying over old stock from one season to another, and at the same time giving to its buying public the benefit of attractive goods properly priced at the proper season for their sale and use.

In order to accomplish this result, plaintiff has been obliged to expend each year, in the community served by it, [fol. 23] large amounts of money for advertising in newspapers and for trade solicitation by personal letters to its customers, and circulars to the public generally, and has also expended large sums of money in the employment of skilled and competent persons to decorate its shown-windows and make an inviting display of its merchandise in its windows and in its store, and in the purchase of the proper equipment for such purposes. Only by such progressive methods and by the policy of continued fair dealing with the buying public, has the plaintiff been able to build up its business and to take its own proper part in building up its city and State.

Likewise plaintiff has for many years past actively interested itself in all forms of civic, cultural, religious and welfare work carried on in its City and State, and contributed largely of its means and of the time of its officers. Its Vice-President, William B. Pirtle, has been a member of the City Planning and Zoning Commission of Louisville

from its organization, serving without pay, and all its officers and employees have taken their part in public activities.

Plaintiff keeps its money on deposit in banks located in Kentucky and makes purchases of goods produced in Kentucky when practicable to do so.

Plaintiff has more than 500 employes at all times, ranging as high as 750 employes during the holiday trade. It pays them the highest current compensation for services of the kind rendered by them. Two hundred and twenty of [fol. 24] its employes have been with it continuously for more than five years. One of its employes has been with it and its predecessors 63 years. He is virtually a pensioner, and others are actually pensioned by it. Near the end of each calendar year, it gives to each employe a bonus proportioned to services rendered and their duration. Every employe in its service for as much as a year gets a vacation of two weeks on full pay, and every employe in service for as much as six months gets a vacation of one week on full pay.

X

In addition to the payment of its annual ad valorem taxes, plaintiff has paid to the State of Kentucky for the calendar year 1930 (not mentioning similar taxes paid for prior years) the following special State licenses, excises, occupational and corporation license taxes:

Corporation License Tax	$977.07
Other License Taxes	31.00
Automobile License Taxes	271.04
Total	$1,279.11

XI

There is absolutely nothing in the business conducted or property or merchandise kept in plaintiff's retail store or in plaintiff's method of conducting or managing same that is in any degree inimical to the public health, the public welfare, the public morals, or the public safety, or which to [fol. 25] any extent whatever increases any fire or police hazard beyond whatever hazard may appertain to other stores handling a similar class of merchandise with one-

twentieth the annual volume of gross sales made by plaintiff.

Moreover, Chapter 149, Acts of 1930, herein referred to, is purely a tax measure and it does not purport to be an exercise of the police power of the State. It does not relate to the public health or the public welfare, or the public morals or the public safety. It does not attempt to regulate any business that is affected with a public interest. No provision is made therein for regulation, supervision or inspection of any retail merchant upon whom or upon whose occupation it attempts to impose a tax. It is not an inspection measure in which fees are prescribed to cover the cost of inspection. No standards are set up for the conduct of the business of a retail merchant.

XII

As a tax measure, the operation or effect of said Chapter 149, Acts of 1930, is not equal or uniform as applied to the retail merchants therein sought to be taxed, and, as hereinafter more specifically shown, the classification of retail merchants therein attempted to be made is deliberately and designedly so made as to be arbitrary, unreasonable, discriminatory, oppressive and prohibitory as to this plaintiff and all other retail merchants who are thereunder sought to be taxed at rates in excess of one-twentieth of one per cent [fol. 26] upon their gross sales respectively, and moreover, in its higher brackets of taxation, confiscatory as to this plaintiff and all others similarly situated.

XIII

During the calendar year 1930, the total gross retail sales made by plaintiff in all departments conducted by it in its retail store aggregated $3,821,636.94, of which amount, gross retail sales aggregating $3,209,717.39 were made between March 17, 1930 (the effective date of said Act herein challenged), and December 31, 1930, both dates inclusive.

Applying to said gross sales, claimed by defendants to be subject to taxation under Chapter 149, Acts of 1930, the geometrically graduated rates of taxation prescribed by said challenged Act, and deducting the credits allowed by Section 4 of said challenged Act, would produce the following result:

1/20 of 1% on first $400,000 of sales	$200.00 Tax
2/20 of 1% on next $100,000 of sales	100.00 Tax
5/20 of 1% on next $100,000 of sales	250.00 Tax
8/20 of 1% on next $100,000 of sales	400.00 Tax
11/20 of 1% on next $100,000 of sales	550.00 Tax
14/20 of 1% on next $100,000 of sales	700.00 Tax
17/20 of 1% on next $100,000 of sales	850.00 Tax
1% on excess over $1,000,000 of sales	22,097.17 Tax
Total tax above computed	$25,147.17
Credits allowed under § 4 of Act as per Paragraph X of this bill	1,279.11
Net tax demanded of Plaintiff	$23,848.06

[fol. 27] If to plaintiff's own gross sales above stated, there should be added the gross sales made by plaintiff's lessee, Herbert Tashgian, in his own rug store conducted in plaintiff's retail store building, as the defendants herein construe said challenged Act to require (which construction is challenged by plaintiff and by said Tashgian, its lessee, as improper, unwarranted and, moreover, as making the challenged Act, if so construed, void in that respect as a violation of the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, and likewise violative of the Kentucky Constitution), then said lessee's gross sales during the period from March 17, 1930, to December 31, 1930, both dates inclusive, which amount to $28,929.34, will be added by defendants to this plaintiff's own gross sales, making a grand total of $3,238,646.73, and the effect will be to tax the additional sales made by plaintiff's lessee all in the highest bracket of 1 per cent, thus making an additional tax demanded of plaintiff and/or its lessee, by defendants, of $289.29, which is 20 times the amount that such lessee or plaintiff would have to pay thereon if the lessee had conducted his own store under his own roof instead of in plaintiff's retail store building or if said leased department operated by said Tashgian were treated as his own separate retail store and taxed accordingly under said Act.

[fol. 28] XIV

Each of the separate departments conducted by plaintiff in its retail store comes into direct competition with a number of other specialized individual retail stores in Kentucky dealing mainly and often exclusively in the particular kind or class of goods handled and sold by this plaintiff in the particular department of its store handling or selling that class or line of goods. In no one department conducted by this plaintiff in its retail store do the gross sales in any calendar year or for the period beginning March 17, 1930, and ending December 31, 1930, amount to as much as $250,000, nor do the gross annual sales of any specialized retail store in Kentucky competing with any of the departments in plaintiff's store, or its gross sales for the period beginning March 17, 1930, and ending December 31, 1930, exceed in any case the sum of $700,000, and practically all of them have gross annual sales not exceeding $400,000.00 in amount.

It thus results that the challenged Act of 1930, hereinabove set out, designedly, by its terms, works a discrimination against this plaintiff and denies to it the equal protection of the law, and imposes upon it a grossly unequal, oppressive, arbitrary and discriminatory burden of taxation in that the specialized single stores competing with any one department of plaintiff are in nearly every case, if not in every case, taxed under said Act in the lowest bracket at [fol. 29] 1/20 of one per cent of gross sales, subject to the credits provided by Section 4 of said Act, while, on the other hand, the gross sales of this plaintiff's department competing with said specialized single store are added to its gross sales in all other departments so as to produce an aggregate of gross sales during the taxable period, to be taxed at the highest brackets or rates of taxation provided in said Act, to-wit, at the rate of one per cent, which is 20 times in excess of the rate that in practically every case is levied under said Act upon the specialized single store competing with one of this plaintiff's departments in its retail store.

XV

Moreover, said challenged Act of 1930 contains in Section 4 thereof a provision which in effect entirely exempts from the payment of any tax thereunder all smaller retail mer-

chants having gross sales for the taxable period under said Act comparable with sales made by this plaintiff in several separate departments of its retail store actually competing with said retail merchants with the smaller volume of gross sales.

Section 4 of said challenged Act provides, in substance and effect, that while the license tax created and imposed by said Act shall not be in lieu of any special State license, excise, occupational or corporation license tax due under [fol. 30] the provisions of any law now in force or that may hereafter be enacted, yet in the case of the retail merchants having smaller volumes of sales, such credits are in actual fact provided as in effect relieve said smaller retail merchants of the payment of any tax whatever under said challenged Act and in effect provide that the special State license, excise, occupational or corporation license tax exacted from them under laws now in force or hereafter enacted shall be a substitute for any license tax otherwise exacted of them under the challenged Act.

The credits allowed under Section 4 of said challenged Act, by way of remission of the tax levied thereunder, are sufficient in practically all cases to offset entirely the relatively small tax levied under said Act on sales of retail merchants as defined therein, whose annual gross sales do not exceed $400,000, and they were known to be sufficient for that purpose at the time of the passage and approval of said Act, and the allowance of said credits by way of remission of the tax levied in the Act and the graduation of said tax were both provided for in said Act as an essential part of a legislative scheme to tax retail merchants having a large volume of gross annual sales and to exempt from taxation retail merchants having a small volume of gross annual sales.

There are very few retail merchants in Kentucky whose gross annual sales in a single or individually-owned store exceed $400,000, and the gross annual sales of practically [fol. 31] all such retail merchants are far below $100,000, and in most instances far below $50,000.

In practical effect and operation, only those retail merchants doing business in Kentucky who own or manage more than one department in a single store, or more than two stores, with or without departments, and who have gross annual sales in all their stores or departments ag-

gregating more than $400,000, are subject to taxation under said Act, and they constitute a very small class of limited number in Kentucky. There is no just or reasonable basis for the classification of retail merchants on the basis of taxing the limited class subject to taxation under said Act and exempting the overwhelmingly larger class not subject to taxation under said Act.

To illustrate: The average retail merchant conducting a general retail store in Kentucky has invested therein a capital not exceeding $25,000, and has gross annual sales aggregating less than $50,000, and such a retail merchant would, as a rule, pay to the State of Kentucky, upon the kind of stock carried in his general store, special State license or excise taxes aggregating from $10 to $15.

If such retail merchant conducts his business under form of a corporation organized in Kentucky, with an authorized capital stock of $25,000, fully paid in and invested in its single retail store in Kentucky, and has therein gross annual sales of $50,000, it could by no possibility be assessed under said challenged Act of 1930 with a tax ex- [fol. 32] ceeding $25, and as a matter of fact, in general practice it would not be assessed with any tax at all, or with a much smaller tax than $25, because its annual corporation license tax, levied under Sections 4189-1 and 4189-2, Kentucky Statutes, at the rate of 70 cents per $1,000 of authorized capital stock or capital invested in Kentucky, plus other State excise or license taxes paid by it, would largely if not completely offset any tax imposed upon it by said challenged Act, and would thus be a complete substitute for any tax so imposed upon it by said Act.

On the other hand, exactly the same volume of annual gross sales made by plaintiff in one of its departments in competition with said average retail merchant would be added to all the other gross annual sales made in all the other departments of plaintiff's store and thus subjected to a tax at the rate of one per cent as compared with a tax of 1/20 of one per cent levied by said Act upon the average retail merchant conducting an average general retail store, and the credits allowed to plaintiff under Section 4 of said Act, when proportionately allocated to said department, would amount to a very insignificant part of the tax levied upon plaintiff by reason of its annual gross sales in such department.

[fol. 33]

XVI

Section 1 of said Act provides that it shall be construed to apply to "every retail merchant" and "store" as defined therein, which is controlled or held with others by majority of stock ownership or ultimately controlled or directed by one management or association of ultimate management.

The design, intent, practical operation and effect of said provision is to require and compel the owner or management of two or more separate and distinct stores and/or departments as defined in said Act, to aggregate for the purposes of taxation the gross sales of all stores and/or departments controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management without regard to the fact that said stores and/or departments may be separate and distinct enterprises; without regard to their location and without regard to the fact that said stores, and/or departments, are each engaged in the sale at retail of wholly different merchandise and commodities unrelated to the merchandise and commodities sold in other stores, and/or departments.

The design, intent and practical operation of said Act is thereby to tax, penalize and, because of the increased rate of taxation in the higher brackets, to prohibit the employment of capital in the acquisition of stock in corporations [fol. 34] owning stores, as defined by said Act, which may result in majority stock ownership, and to tax, penalize and in effect prohibit the employment of capital, skill, efficiency and economy in the operation of such stores under one management or co-operatively under an association of management.

XVII

For many years past there have been various voluntary co-operative associations or agencies organized and successfully conducted for the purpose of affording to so-called individual or single-store retail merchants engaged in Kentucky and elsewhere in the business of selling at retail, goods, wares and merchandise of the character handled and sold by this plaintiff in its retail store and by retail merchants generally throughtout Kentucky and other States, facilities, services and advice in selecting, buying, adver-

tising and displaying the merchandise handled or sold by them at retail in their respective stores in Kentucky and elsewhere corresponding in all material respects as to price, quality or kind with the merchandise handled or sold by this plaintiff in its retail store and by other retail merchants similarly situated.

These co-operative associations or agencies, for a comparatively small fee, afford to retail merchants operating individual specialized stores throughout Kentucky and elsewhere, affiliated with them, all the facilities and advantages, in the matter of selection of goods and prices to be [fol. 35] paid therefore, that can be obtained by any large organization operating on its own account, and in many cases such co-operative associations or agencies afford to their members or patrons very much better advantages and facilities along such lines.

Likewise such co-operative associations or agencies afford to many retail merchants in Kentucky and elsewhere, affiliated with them, the benefit of their advice and experience and co-operative action in securing increased results in advertising the goods of such retail merchants to the buying public, as well as advice and suggestions as to the most approved and advanced method of selecting goods of the proper style and quality, and for displaying such goods in the retail stores of the various retail merchants affiliated with such co-operative associations or agencies.

Practically all retail merchants owning or operating in Kentucky specialized individual retail stores, who have gross annual sales aggregating as much as $100,000, for some years past, as a part of the economic development of the business of a retail merchant, have availed themselves of the services and facilities thus afforded by said co-operative associations or agencies. In this manner, such retail merchants have as great buying power as the plaintiff or any other retail merchant buying on his or its own account a stock of merchandise for sale in his or its retail store or stores, and they can buy goods of as high class [fol. 36] and quality, at similar price, as the plaintiff or any other retail merchant similarly situated, and they can and do get the benefit of the same facilities and services for advertising, displaying and handling their merchandise in their respective stores, and for effecting a rapid turnover thereof, even though the aggregate of their gross

sales may be, and in practically every case it is, less than $400,000 per annum in any retail store or stores owned or operated by them in Kentucky.

Hence this plaintiff, by reason of its operation of a department store and the larger volume of gross sales made by it therein, has no advantage whatever over the retail merchant operating a specialized individual store in competition with the store of this plaintiff or any department therein. On the contrary, many of said specialized individual stores have gross annual sales of merchandise handled by them substantially exceeding in volume the gross annual sales of such merchandise handled and sold in the department of plaintiff's store competing with such specialized individual retail merchant.

In addition thereto, the specialized individual merchant has the advantage of better facilities for displaying his merchandise, of whatever character it may be, in a smaller store located directly on the ground floor with display windows facing directly upon the street upon which his retail store is located. As a matter of fact, many of said specialized individual retail stores competing with the plaintiff [fol. 37] have, by reason of their advantages, made substantial inroads and encroachments upon the trade of this plaintiff in its various departments established and conducted for many years prior to the opening or establishment of such specialized individual stores now operating in competition with plaintiff.

Accordingly, there is no just, proper or reasonable basis whatever for discrimination in the matter of taxation against this plaintiff and in favor of the retail merchant conducting a specialized individual store.

XVIII

The classification made, as a basis for the tax imposed by said challenged Act, rests wholly upon gross retail sales and the percentage of said tax is increased with each one hundred thousand dollars of sales above $400,000.00, unequally, disproportionately, arbitrarily, and with the sole design and intent to burden, oppress, prohibit and discriminate against the ownership or ultimate management of a retail store in Kentucky having a large volume of gross sales (whether in one store or more or in one department or more in the same store), and thus unreasonably, unequally

and disproportionately to discriminate against, oppress, burden and penalize the employment of capital, skill, efficiency and the ability of retail merchants in the State of Kentucky to increase their sales above four hundred thousand dollars. The rate of tax is one-twentieth of one [fol. 38] per cent on the first four hundred thousand dollars of gross sales. The rate of tax is doubled for the next one hundred thousand dollars of sales. The rate of tax is five times as great for the next one hundred thousand dollars of sales; eight times as great for the next one hundred thousand dollars; eleven times as great for the next one hundred thousand dollars; fourteen times as great for the next one hundred thousand dollars; seventeen times as great for the next one hundred thousand dollars; and twenty times as great for all sales in excess of one million dollars. The practical operation and effect of said unequal and disproportionate increase in the percentage of tax per one hundred thousand dollars of increased sales is that a retail merchant who increases his sales one hundred thousand dollars above four hundred thousand dollars pays as much tax on said one hundred thousand dollars as a retail merchant whose sales are two hundred thousand dollars. For the next one hundred thousand dollar- increase, said merchant is required to pay an additional Two Hundred and Fifty Dollars; for the next one hundred thousand dollars increase, an additional four hundred dollars, or a greater tax on said one hundred thousand dollars of increased sales than the entire tax of a retail merchant whose total sales are five hundred thousand dollars; for the next one hundred thousand dollars of sales, five hundred and fifty dollars, which tax on said one hundred thousand dollars of sales is as great as the total tax of a retail merchant having [fol. 39] total sales of six hundred thousand dollars; for the next one hundred thousand dol-ars of sales the tax is seven hundred dollars; for the next one hundred thousand dollars of sales the tax is eight hundred and fifty dollars; for the next one hundred thousand dollars of sales and for every one hundred thousand dollars of sales thereafter, a tax is assessed of One Thousand Dollars, which is a greater tax per one hundred thousand dollars of sales than the total tax required of a merchant whose total sales are seven hundred thousand dollars. Under said Act, a retail merchant having gross sales in any amount not exceeding three

hundred thousand dollars, who increases said sales by one hundred thousand dollars, is only liable to a maximum increase in taxation of $50.00, less his permitted credits, whereas, the plaintiff is subject to a tax of $1,000.00 on every one hundred thousand dollar- increase in its sales. Said classification is unreasonable, unequal, discriminatory, oppressive, arbitrary and confiscatory as to this plaintiff and other retail merchants similarly situated.

XIX

The classification and graduation made as a basis for the tax imposed rests wholly upon the amount of gross retail sales of all stores controlled or held with others by majority stock ownership, or controlled or directed by one management or association of ultimate management. Said classi- [fol. 40] fication does not rest in any particular upon the ability of the taxpayer to pay said tax. It does not rest in any particular upon the income or earnings from any store or stores. It has no necessary relation to receipts. It is imposed regardless of whether said sales are made at a profit or loss or the amount of profit or loss therefrom. It has no relation to profits or losses, if any accrue from said sales. It has no relation whatsoever to the capital employed or invested. It does not take into account the type of business. Said Act does not make any provision for the merchandise returned, for the cancellation of sales or resales of merchandise or the net amount of sales, or sales on credits for which payment is not received, but classifies sales solely as to the gross amount thereof by dollars, and strikes at the increase in said gross sales by a geometrical increase in the rate of taxation, as heretofore set forth, per one hundred thousand dollars of increased sales up to one million dollars, after which the increase of gross sales above one million dollars, and the tax thereon is levied and collected at the highest bracket of one per cent.

Although said Act purports to classify and tax sales by dollars, it taxes the dollar of sales of certain retail merchants upon a rate and basis materially and substantially different from the dollar sales of other merchants engaged in direct competition and similarly circumstanced, and imposes upon a merchant having gross sales of eight hundred thousand dollars, a tax of fifteen hundred dollars,

[fol. 41] or seven and one-half times the tax imposed upon his competitor who does exactly one-half the volume, to-wit, four hundred thousand dollars, who is only subject to a tax of two hundred dollars.

Thereby, one retail merchant doing exactly twice the business of his competitor is required to pay seven and one-half times as much tax on his dollar of sales as his competitor, who, in the same class and similarly circumstanced, is required to pay on his dollar of sales. Said classification is unreasonable, without a rational basis, and is arbitrary, unequal, burdensome and oppressive.

XX

Such competitive stores, by reason of connection with co-operative associations, agencies or organizations, although singly or individually owned, enjoy any and all the advantages which may flow from group or co-operative buying on a large scale, the pooling of purchasing power, the ability to contract for buying their goods upon a large scale, and for the scientific and efficient arrangement of stores, window displays and the development of merchandising methods through the employment, co-operatively, of experts and others experienced therein. Said co-operative associations combine co-operatively as great or a greater number of stores and have as great or greater purchasing and buying power and have as great or greater advertising [fol. 42] and merchandising ability as the plaintiff and other retail merchants who own two or more stores in the Commonwealth of Kentucky, or conduct two or more departments in any retail store so owned or operated by them. However, said singly or individually owned stores and members of co-operative associations, as aforesaid, although similarly circumstanced and in direct competition with the plaintiff and other retail merchants owning two or more stores, are not required to aggregate or combine for the purpose of taxation or to report for taxation the total sales of all stores in Kentucky joined together in the same co-operative association or organization, and hence, said competitive stores, members of said associations or organizations, are not subject to taxation on the same basis, classification or rate as the plaintiff, but in practical operation and effect are practically exempt from any taxation

under said Act, whereas, the plaintiff is subject to taxation at the highest rate prescribed in the said Act. By reason thereof, such competitive stores are given undue and unfair economic advantages over the retail store of the plaintiff and other retail merchants similarly situated and are in effect aided, helped and subsidized by said Act in their competition with the plaintiff and other retail merchants similarly situated.

[fol. 43]

XXI

The efficient and successful method of conducting retail business in the Commonwealth of Kentucky and elsewhere in the United States, at the present time, is to sell merchandise at the lowest possible price, consistent with a small percentage of profit on each individual sale, endeavoring thereby to increase the volume of sales and to secure a more rapid turnover of merchandise and capital. The retail merchant is required by reason of small percentage of profit on a single sale to have a large volume of sales and continuously to increase his sales volume in order to secure a fair return on the capital employed by him in his business. The highly competitive character of the retail business, in which this plaintiff is engaged, and other retail business in the Commonwealth of Kentucky and elsewhere in the United States, makes it necessary for each merchant to meet such competition and to conform his business methods therewith. In conformity therewith the plaintiff and other retail merchants similarly situated have built up and developed in Kentucky for themselves respectively a large and valuable business, upon the basis of selling merchandise at retail to the public, at the lowest possible prices, consistent with a small average profit in individual sales. The plaintiff and all other retail merchants similarly situated are dependent upon a large volume of sales in order to secure a fair, reasonable and adequate return upon invested [fol. 44] capital employed in the conduct of their business. Such merchandising methods are the basis of the business of the plaintiff and all other retail merchants similarly situated, are of benefit to the general public of the Commonwealth of Kentucky and have brought to the plaintiff and all other retail merchants similarly situated a large and valuable good will and a large sales volume.

XXII

The unfair, unjust, unequal, oppressive and discriminatory rates of taxation exacted by said challenged Act, of this plaintiff and all other retail merchants similarly situated, not only imposes upon them an unjust and intolerable burden for the benefit of other retail merchants engaged in like business but having a smaller volume of annual gross sales, but will inevitably destroy or impair, and the purpose of said challenged Act is to destroy or impair, the good will and established trade or business and thereby to reduce the volume of annual gross sales made by this plaintiff and other retail merchants similarly situated and, as far as possible under said Act, to divert trade and custom from the retail stores of this plaintiff and other retail merchants similarly situated and taxed in the higher brackets of taxation, to the more numerous but less progressive and enterprising retail merchants who have very much smaller annual gross sales and therefore, if taxed under said Act at all, are taxed at rates very much lower than those exacted [fol. 45] by said Act of this plaintiff and other retail merchants similarly situated.

Said challenged Act, in its purpose and effect, is wholly lacking in uniformity in its application to the persons or occupations taxed thereunder, and it designedly transfers to and imposes upon this plaintiff and all other retail merchants similarly situated an undue proportion and practically the entire burden of the license taxes attempted in said challenged Act to be levied upon retail merchants.

Thus said challenged Act designedly discriminates in favor of retail merchants having a small or comparatively small volume of annual gross sales, and in effect levies a subsidy for their benefit to be paid wholly by this plaintiff and other retail merchants similarly situated, who have annual gross sales in larger volume. In so doing, said challenged Act denies to this plaintiff and other retail merchants similarly situated the equal protection of the laws guaranteed to it and to them by the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and also by the fundamental law of the State of Kentucky.

[fol. 46] XXIII

There is a large number of retail merchants lawfully engaged in Kentucky in the operation of one store, either with or without separate departments therein such as this plaintiff conducts in its retail store, or in the operation of two or more stores, either under the same management or controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management, which are in like situation with this plaintiff in that, under said challenged Act, each of them is subject to taxation in the higher brackets at the excessive, unjust and discriminatory rates of taxation therein levied upon them by reason of the larger volume of gross annual sales made by them, to the exclusion of an overwhelmingly large number of retail merchants competing with them respectively, who have very much smaller gross annual sales and, by reason of credits allowed under Section 4 of said Act, are required under said Act to pay no tax whatever or a wholly insignificant amount of taxes.

The retail merchants conducting stores in Kentucky who are thus situated similarly to the plaintiff are entirely too numerous to be joined in this suit as parties plaintiff, and the matters and things complained of in this bill and the questions herein raised as to the legality of the tax complained of, are all questions of common or general interest [fol. 47] to many persons, as hereinbefore set forth, constituting a class so numerous as to make it impracticable to bring them all before the Court herein, and this plaintiff brings this suit on its own behalf and on behalf of all other individuals, firms, associations, copartnerships and corporations hereinbefore mentioned, for the purpose of enjoining the defendants from enforcing or attempting to enforce said challenged Act against this plaintiff or any of the other retail merchants similarly situated, on whose behalf this suit is brought, or from attempting to collect any tax under said Act against this plaintiff or any of said other retail merchants on whose behalf this suit is brought.

While it is impracticable to bring them all before the Court, plaintiff names herein some of the other retail merchants similarly situated and belonging to the class of retail

merchants doing business in Kentucky, on whose behalf plaintiff brings this suit, as follows:

J. Bacon & Sons.
H. P. Selman Company.
Kaufman-Straus Company.
Herman Straus & Sons Company.
John C. Lewis Company.
Hook Drug Co.
Rodes-Rapier Co.
Louis Appel Co.
Hubbuch Bros. & Wellendorff.
Lemon & Sons.
S. H. Kress & Co.
Great Atlantic and Pacific Tea Co.
Montgomery, Ward & Co.

[fol. 48]

XXIV

By Section 5 of said challenged Act, any retail merchant who fails to file the report and to pay the tax as required therein is subject to an added penalty of 20 per cent. plus 6 per cent. per annum interest, with a further additional penalty of 20 per cent. if collected by proceedings in Court.

By Section 7 of said challenged Act, any retail merchant, or any officer, director, trustee, or agent, who fails, in whole or in part, to make the report or to pay the tax required under said Act, is declared to be guilty of a misdemeanor and upon conviction subject to a fine of $1,000 and/or imprisonment in the county jail not exceeding six months—all in addition to the penalties imposed by Section 5 of said Act.

XXV

Section 8 of said Act empowers the defendants, members of the State Tax Commission, to incur expenses and costs for the enforcement and administration of said Act, to be paid out of the funds collected thereunder.

Plaintiff is informed and believes and alleges upon such information and belief, that the defendants are preparing for the administration and enforcement of said Act, and have already expended monies out of the State Treasury for the purpose of preparing blank forms and reports nec-
[fol. 49] essary to carry out the provisions of said Act, and unless enjoined and restrained by this Court, all of the

defendants hereto will administer said law and expend funds raised by taxation in an amount in excess of Five Thousand ($5,000.00) Dollars for the enforcement thereof, and will require the plaintiff and all other retail store owners not exempt under the provisions hereinbefore set forth, to pay the taxes prescribed by said Act, and upon the failure of said store owners, including the plaintiff, to make said payments, the said defendants will attempt to enforce against them, including this plaintiff, the drastic penalties provided for by Sections 5 and 7 of said Act, and will attempt to enforce against them, including the plaintiff, any other penalties or causes of action provided for by the statutes or General Laws of the Commonwealth of Kentucky, all to the irreparable injury and damage of plaintiff and other retail merchants similarly situated.

XXVI

By Section 55 of the Kentucky Constitution it is provided that no Act of the General Assembly shall become a law until 90 days after the adjournment of the session at which it was passed, except in cases of emergency, and the reasons for such emergency must be set out at length in the Journal of each House.

Section 13 of the challenged Act sets forth an alleged emergency as the basis for making said Act effective immediately upon its passage and its approval by the Governor, [fol. 50] which took place on March 17, 1930. It contains the only assignment of any reason for an emergency justifying the enactment of Section 13 that is set out at length or at all in said Act or in the Journal of either House of the General Assembly.

Section 13 being the emergency clause of said Act, is void in that the so-called emergency therein recited has no connection with or relation to the purposes for which said challenged Act was enacted by the General Assembly, and under the decision of the Kentucky Court of Appeals in McIntyre v. Commonwealth, 221 Kentucky, 16, and other decisions by the same Court, no reason whatever, meeting the requirements of Section 55, Kentucky Constitution, has been assigned for making said Act take effect upon its approval by the Governor on March 17, 1930, instead of according to the constitutional method and time prescribed

by Section 55, under which said Act could not and did not become effective prior to June 17, 1930.

The reasons for the emergency assigned in Section 13 deal solely with the inadequacy of the present State revenue to meet the immediate needs for the maintenance and development of the State Government and its agencies. The taxes to be levied and collected under said Act are to be levied and collected, one-half for the purpose of liquidating the indebtedness of the Commonwealth of Kentucky, and the other one-half is to be levied and collected for the [fol. 51] specific purpose of repairing, maintaining and constructing permanent improvements for the use of institutions under the control of the State Board of Charities and Corrections.

Neither of these purposes is related to or connected with the maintenance or development of the State Government or its agencies which are referred to in Section 13 of said Act as the reason for the alleged emergency therein declared.

Plaintiff says that in no event, under Section 55 of the Kentucky Constitution, could said challenged Act become effective prior to June 17, 1930.

XXVII

Plaintiff says that said Act, in the various particulars hereinbefore pointed out, is void because it violates the provisions of the Constitution of the United States and of the Fourteenth Amendment thereof, and because it violates the provisions of the Constitution of Kentucky as herein set forth, and plaintiff now specially sets up and claims herein the rights, benefits, privileges, immunities and exemptions secured to it by said provisions of the Fourteenth Amendment to the Constitution of the United States and by said Constitution of the Commonwealth of Kentucky hereinbefore set forth and especially in the following particulars:

(1) Said Act, for the reasons hereinbefore set forth, is void in the several particulars and respects hereinbefore pointed out.

[fol. 52] (a) It denies to this plaintiff and all other retail merchants similarly situated, due process of law, and is an attempt to levy upon them a tax that is confiscatory of their property, and moreover is an attempt to take their

property without due process of law, as an arbitrary exaction, particularly insofar as any tax levied thereunder is measured by gross sales of retail merchants made prior to June 17, 1930.

(b) It denies to this plaintiff and other retail merchants similarly situated, the equal protection of the laws in that it exacts of the plaintiff and other retail merchants similarly situated, an unreasonable, unjust, discriminatory, oppressive and prohibitive rate of taxation, based upon a classification that is unreasonable, unjust and discriminatory against the plaintiff and all other retail merchants similarly situated, and in that it taxes this plaintiff and other retail merchants similarly situated, at geometrically increased rates, graduated according to increased volume of gross sales, without reference to any other consideration whatever and without any reasonable basis of classification, and at the same time imposes upon other retail merchants, doing the same kind of business in substantially the same way, a very much lower rate and burden of taxation, and, as to an overwhelming number of such retail merchants, wholly exempts them from any taxation whatever under said Act.

(c) For the reasons hereinbefore set forth, said Act abridges the privileges and immunities guaranteed to plaintiff by the said Fourteenth Amendment, in the particulars hereinbefore set forth, and is therefore illegal and void.

(2) Said Act violates the fundamental principles of uniformity in the matter of taxes levied upon occupations, [fol. 53] persons or property upon some reasonable basis of classification as such principles of uniformity are recognized by Sections 171 and 181 of the Constitution of the Commonwealth of Kentucky.

XXVIII

Section 10 of said Act contains provisions designed to deny to plaintiff and other retail merchants attempted to be

taxed under said Act, any remedy whatever in advance of the payment of said tax, and likewise to deny any remedy whatever, after the payment of the tax imposed thereunder, except that where the tax is paid under protest, the taxpayer may, within two years after such payment, bring in a court of competent jurisdiction in the Commonwealth of Kentucky an action for mandamus against the Auditor of Public Accounts to compel him to draw his warrant upon the State Treasurer for the amount of such tax as may be adjudged to have been wrongfully collected from such taxpayer.

Such action could only be brought where the tax is paid under protest and after its payment, and could only be brought or prosecuted in the Courts of Kentucky, and a judgment therein in favor of the complaining taxpayer could only result in obtaining a warrant upon the General Fund of the State in the hands of the State Treasurer, to be paid if and when funds were available for the payment of such warrants in the usual and orderly course.

[fol. 54] Plaintiff says that the taxes collected under said Act do not go into the General Fund of the Commonwealth, but are immediately appropriated and applied as provided in said Act; that there are now outstanding many State warrants drawn by the Auditor of Public Accounts upon the General Fund in the hands of the State Treasurer which have been outstanding since June, 1927, and can not be collected by the owners or holders thereof, for lack of funds in the State treasury during such period, for the payment of such warrants.

Plaintiff says that, as shown by a monthly financial statement officially issued by the State Treasurer of Kentucky as of January 1, 1931, the amount of money in the General Fund on January 1, 1931, less minor accounts, was $12,565.81 as against which there were at the time outstanding warrants aggregating $9,880,502.76 drawn by the Auditor of Public Accounts upon the State Treasurer and presented for payment but not paid for lack of funds.

By reason of the facts herein set forth, the plaintiff has no remedy whatever in the State Courts of Kentucky, and no remedy whatever at law in the courts of the United States.

[fol. 55] XXIX

Plaintiff says that the defendants and each of them are threatening to, and unless enjoined or restrained by order of this Court they will, take steps, by prosecution of the plaintiff and its officers and, through such prosecution, by the infliction of penalties of fines and/or imprisonment, provided by said challenged Act, to enforce against this plaintiff and its officers and agents the severe penalties provided in said Act, and also to enforce the collection from this plaintiff of said illegal tax, in the sum of $23,848.06 as hereinbefore computed and stated, and also to compel this plaintiff and its officers, under said void Act, to make reports to the State Tax Commission of Kentucky of all its gross sales as therein provided, and also will attempt to enforce against this plaintiff, by prosecution and the infliction of penalties provided in said void Act, the payment of an illegal tax upon the gross sales of this plaintiff amounting of $3,209,717.39, upon which, under said Act, a tax would result against this plaintiff of $23,848.06 as hereinabove set out, in addition to the tax of $289.29 hereinabove set out as resulting from the inclusion with plaintiff's gross sales of gross sales made by its lessee, Herbert Tashgian, and will also proceed to enforce the excessive penalties provided in said Act for failure of a taxpayer assessed thereunder to [fol. 56] make prompt payment of the taxes assessed against him as provided therein, and in like manner and with like results will proceed against all other retail merchants similarly situated.

XXX

Unless the defendants, after notice and hearing, are enjoined and restrained from enforcing or attempting to enforce said Act, the plaintiff and all others similarly situated, will sustain irreparable loss and injury for which it has no plain, adequate and complete remedy at law, or any remedy at all in the Courts of Kentucky, in each of the following particulars:

(1) The plaintiff and all others similarly situated, will be compelled to pay taxes pursuant to an invalid and un-

constitutional enactment, and for which they are not legally liable.

(2) Upon the failure of the plaintiff, and others similarly situated, to pay said illegal taxes, the drastic penalties provided by said Act will be attempted to be enforced by the defendants against the plaintiff, and others similarly situated, and as a result thereof, plaintiff, and others similarly situated, will be compelled to defend innumerable prosecutions brought to recover said taxes and penalties and criminal proceedings brought to impose the criminal penalties provided in Section 7, of said Act, all at great expense and damage to it and them.

[fol. 57] (3) The defendants will expend public funds raised by taxation for the purpose of preparing to enforce and carry out the provisions of said Act to the irreparable injury and damage of the plaintiff as a taxpayer of the Commonwealth of Kentucky.

(4) If plaintiff and others similarly situated should pay said taxes under protest and be compelled to commence actions to recover the same as provided in Section 10 of said Act, they would be put to large expense for attorneys' fees and court costs, and would be required to bring a multiplicity of actions in order to recover said monies, and said Act contains no provisions of any kind for the reimbursement to plaintiff and others similarly situated, of said large sums which it would be required to expend in prosecuting such actions for attorneys' fees, expenses, court costs and other expenses.

(5) No waiver is provided of the right of the Commonwealth of Kentucky to defend any action brought in the courts of the United States as a suit against a State within the meaning of the Eleventh Amendment to the Constitution of the United States. In consequence whereof, the plaintiff and others similarly situated, do not have a plain, adequate and complete remedy in an action at law in the courts of the United States.

The only remedy afforded by said Act, or by any law of the Commonwealth of Kentucky, is a suit at law in the Franklin Circuit Court against the Auditor of Public Ac-

counts for a mandamus to compel him to draw his warrant [fol. 58] upon the Treasurer for the amount of taxes erroneously exacted of the taxpayer and paid by him under protest, all of which appears from Section 10, of said challenged Act of 1930, and from Section 162, Kentucky Statutes, these being the only statutes of the State of Kentucky which afford any remedy in such cases to the taxpayer from whom illegal taxes have been collected by the State of Kentucky.

By no other statute has the Commonwealth of Kentucky ever consented in any way to be sued itself or through any of its officers for the recovery of taxes illegally exacted from a taxpayer and covered into the Treasury of the State.

(6) Said Act is ambiguous and doubtful as to its application and meaning, and as to the procedure and requirement thereunder, and has never been interpreted by the Court of Appeals of the Commonwealth of Kentucky.

(7) The amount of said annual tax which the plaintiff would be required to pay under the terms of said Act will be a substantial portion of the capital invested by the plaintiff in the Commonwealth of Kentucky, and needed by the plaintiff to carry on its business therein. The payment of so large a sum of money will impair the ability of the plaintiff to operate its business in Kentucky and will possibly decrease the amount of annual business which it will be enabled to do, and will give competitors of the plaintiff who are not required to withdraw any money from their re- [fol. 59] spective businesses or who are not required to withdraw a proportionate sum therefrom, an unfair and undue advantage over the plaintiff, for which the plaintiff has no plain, adequate and complete remedy at law, and the same is true as to all other retail merchants similarly situated.

(8) The enforcement of said Act will have the effect of injuring and impairing all lawful business in which the plaintiff and others similarly situated are engaged and in which they have the undoubted right to engage, and which right is guaranteed and protected by the State and Federal Constitution.

Prayer for Relief.

Inasmuch, therefore, as the plaintiff is without adequate remedy at law, and can obtain relief only in a Court of equity, the plaintiff prays:

1. That writs of subpœna be issued to each of said defendants, requiring each of them to answer this complaint fully and truthfully, but not under oath, an answer under oath being hereby expressly waived as to each and all of said defendants.

2. That a temporary restraining order be issued, restraining the defendants and each of them, from enforcing said Act against the plaintiff and all others similarly situated, under the provisions of said Act hereinbefore set out, and that each and all of said defendants and their successors in office be enjoined and restrained, after final hearing, [fol. 60] from enforcing against the plaintiff and all others similarly situated, the provisions of House Bill No. 111 of the General Assembly of Kentucky (Chapter 149, Acts of 1930, pages 475-482), directly or indirectly; from instituting or maintaining any actions at law or suits in equity to recover of or from the plaintiff, and others similarly situated the tax complained of, or for the recovery of any of the penalties prescribed in said tax for the nonpayment thereof; from expending any monies received by taxation or otherwise; from enforcing or preparing for the enforcement of said Act complained of, and from taking any steps looking to the exclusion of the plaintiff and/or other persons similarly situated, from carrying on its and/or their business in the Commonwealth of Kentucky, and from taking any steps looking to the prosecution of the plaintiff, its agents, servants or employees, or any person, firm or corporation similarly situated in the Commonwealth of Kentucky, and their agents, servants and employees for a violation of said Act, and from in any manner interfering with the carrying on and operation of such business in the Commonwealth of Kentucky.

3. That upon the final hearing of said cause, this Court will order, adjudge and decree that House Bill No. 111 of the General Assembly of Kentucky at a session of 1930 (Chapter 149, Acts of 1930, Pages 475 to 482 entitled: "An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail [fols. 61 & 62] merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in

conflict with the provisions of this Act,") be declared unconstitutional, null and void, as violating the Constitution of the United States and of the Commonwealth of Kentucky, in the particulars hereinbefore pointed out, and that the enforcement thereof be perpetually enjoined; and for all other and further and general relief, as may be just and equitable in the premises.

Nichols, Morrill, Wood, Marx & Ginter, Cincinnati, Ohio; Trabue, Doolan, Helm & Helm, Louisville, Ky., Solicitors for Plaintiff.

Duly sworn to by Robert T. McKim. Jurat omitted in printing.

[fol. 63] IN UNITED STATES DISTRICT COURT

ORDER PERMITTING PLAINTIFF TO SUE AS REPRESENTATIVE OF CLASS—January 24, 1931

On motion of plaintiff, based upon its verified petition herein, it appearing that the issues and questions raised in plaintiff's Bill of Complaint are of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the Court, it is now ordered, pursuant to Equity Rule 38, that plaintiff may sue on behalf of all other persons similarly situated, as well as on its own behalf, as to any issue or question presented by said Bill of Complaint that is of common or general interest to other taxpayers similarly situated, who are affected by said Chapter 149 of the Acts of 1930.

Chas. I. Dawson, Judge.

[fol. 64] IN UNITED STATES DISTRICT COURT

MOTION FOR TEMPORARY RESTRAINING ORDER—Filed January 24, 1931

The plaintiff, The Stewart Dry Goods Company, by counsel comes and moves the court, upon its verified Bill of Complaint herein showing that immediate and irreparable injury, loss or damage will result to plaintiff before notice upon defendants can be served and a hearing had

upon its application this day made for an interlocutory injunction, to grant it a temporary restraining order, without notice, enjoining and restraining the defendants herein and each of them, peding the hearing and determination of plaintiff's application for an interlocutory injunction upon notice as required by law for such interlocutory or preliminary injunction.

(1) For enforcing or executing, either directly or indirectly, against this plaintiff and/or other taxpayers similarly situated, the provisions of chapter 149 of the Acts of the General Assembly of Kentucky at its 1930 session, entitled:

"An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act;"

on the ground that said Act is unconstitutional, null and void in that it denies to plaintiff and other taxpayers similarly situated, rights, privileges and immunities guaranteed to plaintiff and such other taxpayers by the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and by the Constitution of Kentucky.

(2) From instituting or maintaining against this plaintiff and/or other taxpayers similarly situated, and prose-
[fol. 65] cution or action at law, or any suit or suits in equity, to recover of or from the plaintiff or other taxpayers similarly situated any portion of the alleged tax sought to be exacted of them under said Act, or for the infliction of any of the penalties prescribed in said Act for the nonpayment of such tax or for failure to make or file any reports or returns required thereunder.

(3) From further expending any moneys, received by taxation or otherwise, in the attempted enforcement of said Act, and also from further enforcing or preparing for the enforcement of said Act, or from taking any steps looking to the prosecution of the plaintiff or any of its agents or

servants or employes, or any other person, firm or corporation similarly situated, or any of their agents or servants or employes, for a violation of said Act in any of its provisions.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors for Complainant.

[fol. 66] IN UNITED STATES DISTRICT COURT

MOTION FOR INTERLOCUTORY INJUNCTION—Filed January 24, 1931

The plaintiff, The Stewart Dry Goods Company, by counsel, comes and moves the Court, upon its verified Bill of Complaint herein, for an interlocutory injunction, to be granted after notice as required by law, enjoining and restraining the defendants herein and each of them until further order of Court herein:

(1) From enforcing or executing, either directly or indirectly, against this plaintiff and/or other taxpayers similarly situated, the provisions of Chapter 149 of the Acts of the General Assembly of Kentucky at its 1930 session, entitled:

"An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act,"

on the ground that said Act is unconstitutional, null and void in that it denies to plaintiff and other taxpayers similarly situated, rights, privileges and immunities guaranteed to plaintiff and such other taxpayers by the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and by the Constitution of Kentucky.

(2) From instituting or maintaining against this plaintiff and/or other taxpayers similarly situated, any prosecu-

tion or action at law, or any suits or suits in equity, to recover of or from the plaintiff or other taxpayers similarly situated any portion of the alleged tax sought to be exacted of them under said Act, or for the infliction of any of the penalties prescribed in said Act for the non-payment [fol. 67] of such tax or for failure to make or file any reports or returns required thereunder.

(3) From further expending any moneys, received by taxation or otherwise, in the attempted enforcement of said Act, and also from further enforcing or preparing for the enforcement of said Act, or from taking any steps looking to the prosecution of the plaintiff or any of its agents or servants or employes, or any other person, firm or corporation similarly situated, or any of their agents or servants or employes, for a violation of said Act in any of its provisions.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors for Complainant.

[fol. 68] IN UNITED STATES DISTRICT COURT

ORDER GRANTING TEMPORARY RESTRAINING ORDER—January 24, 1931

This day came the plaintiff, The Stewart Dry Goods Company, by counsel, and upon its verified Bill of Complaint herein, entered its motion, without notice thereof to defendants or any of them, for a temporary restraining order pending the hearing of its application herein made for an interlocutory injunction because of immediate and irreparable injury, loss or damage shown by said verified Bill of Complaint to result to the plaintiff before notice of such application for an interlocutory injunction can be served upon defendants and a hearing thereon had, inasmuch as

(1) It is impossible to convene a statutory court of three Judges as required by Section 266 of the Judicial Code as amended (U. S. Code, Title 28, Section 380) until after February 1, 1931, and

(2) Before such statutory court of three Judges can be convened to hear plaintiff's application for an interlocutory injunction,

(a) The penalties prescribed by said Chapter 149 of the Acts of 1930 of the Commonwealth of Kentucky will have accrued, and plaintiff and other taxpayers similarly situated, under said Act assailed herein as unconstitutional and void, will, on and after February 1, 1931, be subject to the fines and penalties in said Act prescribed for failure to make the reports or returns required of it or them under said Act, and will be subject to prosecutions and suits thereunder to recover the fines and penalties thereby imposed for failure to make such reports or returns, and [fol. 69] (b) Any officer, director, trustee or agent of said plaintiff and/or other taxpayers under said Act, similarly situated, will be subject to prosecution or to fine or imprisonment and other penalties denounced by said Act for failure to make such reports or returns, and otherwise will be without remedy for the protection of the constitutional rights of the plaintiff and such other taxpayers similarly situated, or of any officer, director, trustee or agent of plaintiff or such other taxpayers.

Thereupon the Court, being sufficiently advised, now finds that immediate and irreparable injury, loss or damage will result to plaintiff and/or other taxpayers similarly situated, before notice upon defendants can be served and a hearing had upon said application for an interlocutory injunction, and therefore the Court now sustains said motion for a temporary restraining order without notice, and hereby grants to plaintiff a temporary restraining order without notice, enjoining and restraining the defendants herein, and each of them, pending the hearing and determination of plaintiff's application for an interlocutory injunction upon notice as required by law for such interlocutory or preliminary injunction.

(1) From enforcing or executing, either directly or indirectly, against this plaintiff and/or other taxpayers similarly situated, the provisions of Chapter 149 of the Acts of the General Assembly of Kentucky at its 1930 session, entitled:

"An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the reve-

nue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act,"

[fol. 70] on the ground that said Act is unconstitutional, null and void in that it denies to plaintiff and other taxpayers similarly situated, rights, privileges and immunities guaranteed to plaintiff and such other taxpayers by the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and by the Constitution of Kentucky.

(2) From instituting or maintaining against this plaintiff and/or other taxpayers similarly situated, any prosecution or action at law, or any suit or suits in equity, to recover of or from the plaintiff or other taxpayers similarly situated any portion of the alleged tax sought to be exacted of them under said Act, or for the infliction of any of the penalties prescribed in said Act for the non-payment of such tax or for failure to make or file any reports or returns required thereunder.

(3) From further expending any moneys, received by taxation or otherwise, in the attempted enforcement of said Act, and also from further enforcing or preparing for the enforcement of said Act; or from taking any steps looking to the prosecution of the plaintiff or any of its agents or servants or employes, or any other person, firm or corporation similarly situated, or any of their agents or servants or employes, for a violation of said Act in any of its provisions.

The temporary restraining order herein granted shall expire in ten (10) days from this date unless, within the time so fixed, said temporary restraining order is extended for a like period, for good cause shown, the reasons for which extension shall be entered of record.

Before such temporary restraining order herein granted shall issue, the plaintiff shall give bond with good security, to be approved by this Court or the Judge thereof, in the penal sum of -2500.00 conditioned upon the payment of such costs and damages as may be incurred or suffered by the defendants or any of them who may be found to have been [fol. 71] wrongfully enjoined or restrained thereby.

Chas. I. Dawson, Judge.

[fol. 72] IN UNITED STATES DISTRICT COURT

ORDER POSTPONING HEARING AND CONTINUING RESTRAINING ORDERS—January 29, 1931

The above styled three cases having been set for hearing at Louisville on Monday, February 2, 1931, at ten o'clock A. M., upon application of the respective plaintiffs for an interlocutory injunction, and a restraining order in each case having been granted, to continue in effect until said date, and it now appearing that a statutory court of three Judges cannot be convened for the hearing of said motions for a preliminary injunction before Saturday, February 7, 1931, at which time the case of Kroger Grocery & Baking Company vs. John B. Lewis et al., now pending in the United States District Court for the Eastern District of Kentucky, will come on for hearing upon a similar motion for injunction against the same defendants, wherein the validity of the same law is assailed, and the Judge of this Court has been requested by Honorable A. M. J. Cochran, Judge of the District Court for the Eastern District of Kentucky, to sit with him and with the Honorable A. C. Denison, United States Circuit Judge, in the hearing of said motion for an interlocutory injunction in the Kroger Grocery & Baking Company case,

Now come the defendants herein, by Honorable J. W. Cammack, Attorney-General of Kentucky, and Honorable S. H. Brown, Assistant Attorney-General, and enter their appearance herein, and by agreement between parties plaintiff and defendant in each of the above styled cases,

It is now ordered that the hearing of plaintiffs' motion for an interlocutory injunction in each of the above-styled three actions be now postponed from February 2, 1931, to February 7, 1931, and that the hearing thereof on February 7, 1931, shall be held at the Federal Court Hall in Covington, Kentucky, simultaneously with the hearing of a similar motion in the case of Kroger Grocery & Baking Company against the same defendants, now pending in the Eastern District of Kentucky.

[fol. 73] By further agreement of parties, it is now ordered that the restraining order heretofore issued in each of the above-styled three cases be continued in effect be-

yond February 2, 1931, and until the motion for an injunction in each such case shall be heard and determined by the statutory court of three Judges to be convened for that purpose at the time and place above stated.

Chas. I. Dawson, Judge.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors for Plaintiffs.

J. W. Cammack, Attorney General; S. H. Brown, Assistant Attorney General, Solicitors for All Defendants.

[fol. 74] In United States District Court

Motion to Strike from Bill of Complaint—Filed February 14, 1931

Come now the defendants and move the Court to strike from the Bill of Complaint herein the following:

1. Beginning with the word "immediately" at line 12 from top of page 6, and on page 6, down to and including the figures "1930" on page 7 of the Bill of Complaint.

2. All of paragraph 5 on page 8 of the Bill of Complaint.

3. All of paragraph 8 on page 19 of the Bill of Complaint.

4. Beginning with the word "likewise," line 14 from top of page 21, on page 21, down to and including the word "pay" on page 22 of the Bill of Complaint.

5. Beginning with the words "said Act," line 10 from top of page 38, on page 38, down to and including the word "dollars" on line 15 from top of page 38, on page 38, of the Bill of Complaint.

6. All of paragraph 21, on pages 41 and 42 of the Bill of Complaint.

7. All of paragraph 26, on pages 47 and 48 and 49 of the Bill of Complaint.

8. All of paragraph 28, on pages 51 and 52 of the Bill of Complaint.

And, upon this motion, the defendants pray the judgment of the Court.

J. W. Cammack, S. H. Brown, Batson, Cary & Welch, Leslie W. Morris, Howard S. Gentry, Attorneys for Defendants.

[fol. 75] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed February 14, 1931

* * * * * * *

Now comes the defendants, John B. Lewis, Seldon Glenn and H. M. Cline, members of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, Auditor of Public Accounts of the Commonwealth of Kentucky, and move the Court to dismiss the bill of complaint filed in the above entitled case upon the grounds and reasons therefore as follows:

1. Because it appears in the bill of complaint filed in this case that this action is prosecuted by a citizen and resident of the State of Kentucky and that no diversity of citizenship exists between the parties hereto, and that the bill shows on its face that complainants are being deprived of no rights guaranteed them under the Constitution or laws of the United States.

2. That there is insufficiency of fact to constitute a valid cause of action in equity against these defendants.

3. Because it appears in the bill of complaint that plaintiffs have plain, adequate and complete remedy at law.

4. Because it appears in the bill of complaint that plaintiffs are, by the act under consideration, prohibited from maintaining any suit in equity to restrain the collection of the tax complained of.

J. W. Cammack, Attorney General; S. H. Brown, Assistant Attorney General; Howard S. Gentry, Solicitors for Defendants. Leslie W. Morris, Batson, Carey & Welch, of Counsel.

[fols. 76 & 77] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed Febr. 14, 1931

Come the defendants John B. Lewis, Seldon R. Glenn and Henry M. Cline, Members of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, Auditor of Public Accounts for the Commonwealth of Kentucky, and for their answer to the Bill of Complaint filed in the above styled action, plead as follows:

I

For answer to paragraph one said defendants admit all of the allegations contained in paragraph one of the bill of complaint.

II

For answer to paragraph two said defendants admit all of the allegations contained in paragraph two of the bill of complaint.

[fol. 78]

III

For answer to paragraph three defendants deny that this suit arises under the Constitution or laws of the United States, or that the amount in controversy herein exceeds the sum and value of $3,000, exclusive of interest and costs. They deny that this suit is of a civil nature, or is brought in equity for the purpose of enjoining the defendants, or any of them from enforcing or attempting to enforce said Act of the General Assembly of Kentucky, being Chapter 149 of the session Acts of 1930, or for the purpose of enjoining the defendants, or any of them, from requiring of the plaintiff or other taxpayers similarly situated as hereinafter set forth, the reports which said act purports to require of retail merchants as the term "retail merchants," is defined in said Act, or any information in reference to sales made by the plaintiff or any of said retail merchants similarly situated, or from the plaintiff or any of said retail merchants similarly situated any tax purporting to be levied or assessed upon the plaintiff or any of said retail merchants similarly situated, or from instituting any

prosecution against the plaintiff or any of said retail merchants similarly situated, to recover any of the penalties sought to be imposed by said Act upon the plaintiff or any of said retail merchants similarly situated for a violation of any of the terms of said Act.

IV

For answer to paragraph four defendants deny that House Bill 111, introduced on January 21, 1930, at the regular session of the General Assembly of Kentucky, which provided by its terms for a license or an excise tax upon each merchant doing business in Kentucky, was introduced as "An act to restrain the unfair competition of [fol. 70] chain stores, and aid of individual merchants in the Commonwealth." They deny that such bill was referred to the Committee on Kentucky Statutes, or that it was reported on as "An Act to restrain the unfair competition of chain stores, and aid of Individual merchants of the Commonwealth." They deny that on each of the second and third readings of said bill it was read by the title, "An Act to restrain the unfair competition of chain stores, and in aid of individual merchants in the Commonwealth." They deny that upon the third reading of said bill by said title it was passed by the House of Representatives, or that after its passage its title was amended, or that it was enrolled after being reported by the enrollment committee under the title "House Bill 111, An Act to restrain unfair competition of chain stores, and aid of individual merchants in the Commonwealth," or that said bill was voted on, signed, passed or enrolled under any other title than that appearing on the enrolled bill in the office of the Secretary of State of the Commonwealth of Kentucky, a certified copy of which is filed herein.

V

For answer to paragraph five defendants do not have sufficient information as to the allegations in paragraph five, and therefore, neither admit nor deny but require strict proof thereof.

VI

For answer to paragraph six defendants admit the allegations contained therein.

VII

For answer to paragraph seven defendants do not have sufficient information as to the allegations contained in [fol. 80] paragraph seven, and therefore, neither admit nor deny but require strict proof thereof.

VIII

For answer to paragraph eight defendants do not have sufficient information as to the allegations contained in paragraph eight, and therefore, neither admit nor deny but require strict proof thereof.

IX

For answer to paragraph nine defendants do not have sufficient information as to the allegations contained in paragraph nine, and therefore, neither admit nor deny but require strict proof thereof.

X

For answer to paragraph ten defendants do not have sufficient information as to the allegations contained in paragraph ten, and therefore, neither admit nor deny but require strict proof thereof.

XI

They deny that there is nothing in the business conducted or property or merchandise kept in plaintiff's retail store or in plaintiff's method of conducting or managing same that is in any degree inimical to the public health, public welfare, public morals, or public safety, or which, to any extent whatever, increases any fire or police hazard beyond whatever hazard may appertain to other stores handling similar classes of merchandise with one-twentieth of the sales or any volume of gross sales made by plaintiff.

They deny that Chapter 149, Acts of 1930 General Assembly, is purely a tax measure or that it does not purport to be an exercise of the police power of the State, or that [fol. 81] it does not relate to the public health, or the public morals, or the public welfare or the public safety, or that it does not attempt to regulate any business that is affected with a public interest.

They deny that there is no provisions for regulation, supervision or inspection of any retail merchant upon whom or upon whose occupation it attempts to impose a tax, or that no standards are set up for the conduct of the business of a retail merchant.

XII

For answer to paragraph twelve defendants deny that as a tax measure, the operation or effect of said Chapter 149, Acts of 1930, is not equal or uniform as applied to the retail merchants therein sought to be taxed, or that, hereinafter more specifically shown, the classification of retail merchants therein attempted to be made is deliberately or designedly or otherwise so made as to be arbitrary, unreasonable, discriminatory, oppressive or prohibitory as to this plaintiff or other retail merchants who are thereunder sought to be taxed the rates in excess of one-twentieth of one per cent upon their gross sales respectively, or that it is in its higher brackets of taxation, confiscatory as to this plaintiff or any others similarly situated.

XIII

For answer to paragraph thirteen defendants deny that during the calendar year of 1930, the total gross retail sales made by plaintiff in all or any departments conducted by it in its retail stores aggregated $3,821,639.94, of which amount, gross retail sales aggregating $3,209,717.39 were made between March 17, 1930, (the effective date of said Act herein challenged), and December 31, 1930, both dates inclusive.

[fol. 82] They deny that in applying said gross sales, claimed by said defendants to be subject to taxation under Chapter 149, said Acts of 1930, the graduated rates of taxation prescribed by said Act, or deducting the credits allowed by Section 4 of said Act, would produce the following result:

	Tax.
"1/20 of 1% on first $400,000 of sales	$200.00
2/20 of 1% on next $100,000 of sales	100.00
5/20 of 1% on next $100,000 of sales	250.00
8/20 of 1% on next $100,000 of sales	400.00
11/20 of 1% on next $100,000 of sales	550.00
14/20 of 1% on next $100,000 of sales	700.00
17/20 of 1% of next $100,000 of sales	850.00
1% on excess over $1,000,000 of sales	22,097.17
Total tax above computed	$25,147.17
Credits allowed under Section 4 of Act as per Paragraph X of this bill	1,279.11
Net tax demanded of Plaintiff	$23,848.06"

They deny that if to the plaintiff's own gross sales above stated, there should be added the gross sales made by plaintiff's lessee, Herbert Tashgian, in his own rug store conducted in plaintiff's retail store building, then said lessee's gross sales during the period from March 17, 1930, to December 31, 1930, both dates inclusive, which amounts to $28,929.34, will be added by defendants to this plaintiff's own gross sales, making a grand total of $3,238,646.73, or that the effect will be to tax the additional sales made by plaintiff's lessees all in the highest bracket of 1%, thus making an additional tax demanded of plaintiff or its lessee, of $289.29, or that it is 20 times the amount that said lessee of plaintiff would have to pay thereon if the lessee had conducted his own store under his own roof instead of in plaintiff's retail store building or if said leased department operated by said lessee were treated as his own retail store or taxed accordingly under said Act.

[fol. 83] XIV

For answer to paragraph fourteen defendants deny that each of the separate departments conducted by plaintiff in its retail store comes into direct or into any competition with any other specialized individual retail stores in Kentucky dealing mainly or exclusively in any kind or particular class of goods handled or sold by this plaintiff in the particular department of its store handling or selling that class or line of goods.

Defendants not having sufficient information as to the amount of gross annual sales in the departments of plaintiff's retail stores require strict proof as to the allegation in paragraph fourteen herein.

XV

For answer to paragraph fifteen defendants deny that Section 4 of said challenged Act of 1930 contains a provision that in effect, or otherwise, exempts from the payment of any tax thereunder any smaller retail merchants having gross sales for the taxable period under said Act comparable with sales made by this plaintiff in several separate departments in its retail store competing with said retail merchants with the smaller volume of business.

Deny that Sec. 4 of said Act provides in substance, or otherwise, that while the license tax created or imposed by said Act shall not be in lieu of any special State license, excise, occupational or corporation license tax due under the provisions of any law now in force or that may hereinafter be enacted; that in the case of retail merchants having smaller volumes of sales, such credits are in actual fact or otherwise provided so as to in effect relieve such smaller retail merchants of the payment of any tax whatever under said Act, or in effect provide that the special State license, excise, occupational or corporation license tax exacted from [fol. 84] them under the laws now in force or hereafter enacted shall be a substitute for any license tax otherwise exacted of them.

Deny that credits allowed under Sec. 4 of said Act are sufficient in any case to offset entirely or in any part the tax levied under said Act on sales of retail merchants as defined therein, whose annual gross sales do not exceed $400,000, or that they were known to be sufficient for that purpose at the time of the passage and approval of said Act, or that the allowance of credit by way of tax levied in said Act or graduation of said tax were both or either as provided for in said Act, any part of a legislative scheme to tax retail merchants having a large volume of gross annual sales or to exempt from taxation retail merchants having a small volume of gross annual sales.

They deny that there are very few merchants in Kentucky whose gross annual sales in a single or individually-owned

store exceed $400,000, or that the gross annual sales of practically all such retail merchants are far below $100,000, or that in any instance, are below $50,000.

They deny that in practical effect or operation, or otherwise, only those retail merchants doing business in Kentucky who own or manage more than one department in a single store, or more than two stores with two or more, or without departments, or who have gross annual sales in all their stores or departments aggregating more than $400,000, are subject to taxation under said Act; or that they constitute a small class of limited number in Kentucky, or that there is no just or reasonable basis for the classification of retail merchants.

They deny the average retail merchant conducting a general store in Kentucky has invested therein a capital not exceeding $25,000, or has gross annual sales aggregating less than $50,000, or that such retail merchant would pay the State of Kentucky, upon the kind of stock carried in his [fol. 85] general store, special State license or excise taxes aggregating from $10 to $15.

They deny that if such retail merchant conducts his business under form of a corporation organized in Kentucky, with an actual capital stock of $25,000, fully paid in and invested in its single retail store in Kentucky, and has therein gross annual sales of $50,000, that it could not or would not be assessed under said Act with a tax exceeding $25, or that it would in any instance be assessed with no tax at all, or that any excise or license tax would in any case be substituted for any tax so imposed upon it by said Act.

They deny that exactly the same annual gross sales made by the plaintiff in one of its departments in competition with said average retail merchants would be added to all other retail gross annual sales made in all other departments of plaintiff's store and subjected to a tax at a rate of 1/20 of one per cent levied by said Act upon the average retail merchant, or that the credits allowed to plaintiff under Section 4 of said Act, when proportionately allocated to said department, would amount to a very insignificant part of the tax levied upon plaintiff by reason of its annual gross sales in such department.

XVI

For answer to paragraph sixteen defendants deny that the design, intent, practical operation or effect of Sec. 1 of said Act is to require or compel the owner or management of two or more separate or distinct stores or departments as defined in said Act, to aggregate for the purpose of taxation the gross sales of any stores or departments, although separate or distinct enterprises; or without regard to their location or to the fact that said stores or departments are each engaged in sale at retail of wholly different merchandise or commodities unrelated to the store or [fol. 86] merchandise sold in other stores or departments.

They deny that the design, intent or practical operation of said Act is to tax, penalize, or because of the increased rates of taxation in the higher brackets, is to prohibit the employment of capital in the acquisition of stock in corporations owning stores, as defined by said Act, which may result in majority stock ownership; or to tax, penalize or in effect to prohibit the employment of capital, skill, efficiency or economy in the operation of such stores under one management or co-operatively under an association of ultimate management.

XVII

For answer to paragraph seventeen defendants deny that for many or any years past there have been various or any voluntary co-operative associations or agencies organized or successfully conducted for the purpose of affording the so-called individual or single-store retail merchants engaged in Kentucky or elsewhere in the business of selling at retail, goods, wares or merchandise of the character handled or sold by this plaintiff in its retail store or by retail merchants generally throughout Kentucky or other States, facilities, services or advice in selecting, buying, advertising or displaying the merchandise handled or sold by them at retail in their respective stores in Kentucky, or elsewhere, corresponding in material respects as to prices, quality, or kind with merchandise handled or sold by this plaintiff in its retail store or by other retail merchants similarly situated.

They deny that these co-operative associations or organizations, for a small fee, or for any fee, afford to retail mer-

chants operating individual specialized stores throughout Kentucky or elsewhere, affiliated with them, any or all the facilities or advantages in the matter of selection of goods [fol. 87] or prices to be paid therefor, that can be obtained by any large organization operating on its own account, or in any cases such co-operative associations or organizations afford to their employees, members or partons any advantages or facilities along such lines. They deny that such co-operative associations or agencies afford to any retail merchants in Kentucky or elsewhere, affiliated with them, the benefit of their advice or experiences in co-operative action in securing increased results in advertising the goods or such retail merchandise to the buying public, as well as advice or suggestions as to the most approved or advanced methods of selecting goods of the proper style or quality, or for the displaying of such goods in the retail stores of various retail merchants affiliated with such co-operative associations or agencies.

They deny that any retail merchants, owning or operating in Kentucky specialized individual retail stores, who have gross annual sales aggregating as much as $100,000, for some years past, or for any time, as part of the economic development of the business of a retail merchant, have availed themselves of the services or facilities thus afforded by such co-operative associations or agencies, or that such retail merchants have as great buying power as the plaintiff or any other retail merchant buying on his or its own account a stock of merchandise for sale in his or its retail store, or stores, or that they can buy goods of as high class or quality at similar prices as the plaintiff or any other retail merchant similarly situated, or that they can or do get the benefit of the same facilities or services for advertising, displaying or handling their merchandise in their respective stores, or for effecting a rapid turnover thereof, even though the aggregate of their gross sales may be less than $400,000 per annum in any retail stores owned or operated by them in Kentucky.

[fol. 88] They deny that the plaintiff, by reason of its operation of a department store or the large volume of gross sales made by it therein, has no advantage over the retail merchants operating a specialized individual store in competition with the store of this plaintiff or any depart-

ment therein, or that any of the said specialized individual stores have annual gross sales of merchandise handled by them exceeding in volume the gross annual sales of such merchandise handled or sold in the department of plaintiff's store competing with such specialized individual retail merchant.

They deny that the specialized individual merchant has the facilities or better advantages for displaying his merchandise, of whatever character it may be, in a small store located directly on the ground floor with display windows facing directly upon the streets upon which the retail store is located, or that any of the said specialized individual retail stores competing with the plaintiff have made substantial or any inroads or encroachments upon the trade of its plaintiff in its various departments established in Kentucky for any years prior to the opening or establishment of such specialized individual stores. They deny that there is no just, proper or reasonable basis for the classification in matters of taxation between this plaintiff and the retail merchants conducting specialized individual stores.

XVIII

For answer to paragraph eighteen defendants deny that the classification made as a basis for the tax imposed by said Act rests upon the gross retail sales or that the percentage of said tax is increased with each $100,000 of sales above $400,000.00 unequally, disproportionately or arbitrarily, or tends to discriminate against, oppress, burden or penalize the employment of capital, skill, efficiency, or the ability of [fol. 89] the retail merchant in the State of Kentucky to increase his sales above $400,000.00.

They deny that the practical operation or effect of the alleged unequal or disproportionate increase in the percentage of tax per one hundred thousand dollars of increased sales is that the retail merchant who increases his sales one hundred thousand dollars above $400,000 pays as much tax on said one hundred thousand dollars as a retail merchant whose sales are $200,000.00; or that for the next $100,000.00 increase, said merchant is required to pay an additional $250.00; or for the next $100,000 increase, an additional $400.00; or a greater tax on said one hundred thousand dol-

lars of increased sales than the entire tax of a retail merchant whose total sales are $500,000.00; or for the next $100,000 of sales, $550.00, which tax on said $100,000 of sales is as great as the total tax of a retail merchant having a total sales of $600,000.00; or for the next $100,000, the tax is $700.00; or for the next $100,000 of sales the tax is $850.00, or for the next $100,000 of sales, or for every $100,000 of sales thereafter, the tax assessed is $1,000.00, or that it is a greater tax for $100,000 of sales than the total tax required of a merchant whose total sales are $700,000.00.

They deny that under the said Act that a retail merchant having gro sales in any amount not exceeding $300,000.00, who increases his sales $100,000, is only liable to a maximum increase of taxation of $50.00, less his permitted credits, or that the plaintiff is subject to a tax of $1,000.00 on every $100,000.00 increase in sales. They deny that said classification is unjust, discriminatory, oppressive, arbitrary or confiscatory as to this plaintiff or other retail merchants similarly situated.

XIX

For answer to paragraph nineteen defendants deny that the classification or graduation made as a basis for the tax [fol. 90] imposed rests wholly or in part upon the amount of gross retail sales of all stores, controlled or held with others by majority stock ownership, or controlled or directed by one management or association of ultimate management. They deny that said classification does not rest upon the ability of the taxpayer to pay such tax, or that it does not rest upon the income or earnings from any store or stores, or that it does not have a relation to receipts. They deny that it imposes a tax regardless as to whether said sales are made at a profit or loss, or the amount of profit or loss therefrom, or that it has no relation to profit or loss, if any is derived from said sales, or that it has no relation to capital employed or invested, or that it does not take into account the type of business. They deny that said Act does not make any provision for the merchandise returned, for the cancellation of sales or resales of merchandise or the net amount of sales, or the sales on credit for which payment is not received, or that it classifies sales solely as to the gross amount thereof by dollars, or that it strikes at the increase in said gross sales by a geometrical increase in the rate of taxation. They deny that said Act taxes the

dollar of sales of certain retail merchandise upon a rate and basis materially different from the dollar of sales of other merchandise by merchants engaged in direct competition or similarly circumstanced.

They deny that the rate of taxation is unreasonable, without a rational basis or that it is arbitrary, unequal, burdensome or oppressive.

XX

For answer to paragraph twenty defendants deny that such competitive stores, by reason of connection with co-operative associations, agencies or organizations, although singly or individually owned, enjoy any of the advantages [fol. 91] which flow from group or co-operative buying on a large scale, the pooling of merchandising power, the ability to contract for buying goods upon a large scale, or for the scientific or efficient arrangement of stores, window displays or the development of merchandising methods through the employment, co-operatively, of experts or others experienced therein or that said co-operative associations combine cooperatively as great a number of stores or have as great purchasing or buying power, or have as great advertising or merchandising ability as the plaintiff or other retail merchants who own two or more stores in the Commonwealth of Kentucky, or conduct two or more departments in any retail store owned or operated by them. They deny that singly or individually-owned stores or members of co-operative associations are similarly situated or circumstanced, or that they are in direct competition with the plaintiff or other retail merchants owning two or more stores or are not required to aggregate or combine for the purpose of taxation or to report for taxation the total sales of all stores in Kentucky joined together in the same co-operative association or organization, or that such competitive stores, members of said associations or organizations, are not subject to taxation on the same basis, classification or rate as the plaintiff, or that in practical operation or effect they are exempt from taxation under said Act.

They deny that such competitive stores are given undue or unfair or any economic advantages over the retail stores of the plaintiff or other merchants similarly situated or that they are in effect aided, helped or subsidized under said Act

in their competition with the plaintiff or other retail merchants similarly situated.

XXI

They deny that the efficient or successful method of conducting retail business in the Commonwealth of Kentucky or elsewhere in the United States, at the present time or at [fol. 92] any time, is to sell merchandise at the lowest possible price consistent with a small percentage of profit on each individual sale, endeavoring thereby to increase the volume of sales or to secure a more rapid turnover of all or any merchandise or capital; or that the retail merchant is required by reason of a small percentage of profit on single sales to have a large volume of sales or to continuously increase his sales volume in order to secure a fair turnover or return on the capital employed by him in his business. They deny that the highly competitive character of the retail business in which this plaintiff is engaged, or other retail business in the Commonwealth of Kentucky, or elsewhere in the United States, makes it necessary for any merchant to meet such competition or to conform his business methods therewith, or, that in conformity therewith, the plaintiff or other retail merchants similarly situated have built up or developed in Kentucky for themselves respectively a large or valuable business, upon the basis of selling merchandise to the public at the lowest prices consistent with a small average profit in individual sales, or that the plaintiff or any other retail merchants similarly situated are dependent upon a large volume of sales in order to secure a fair or reasonable or adequate return upon the invested capital employed in the conduct of their business, or that such merchandising methods are the basis of the business of the plaintiff or other retail merchants similarly situated, or that they are of benefit to the general public of the Commonwealth of Kentucky, or that they have brought to the plaintiff or any other retail merchants similarly situated a large or valuable good will or a large sales volume.

XXII

For answer to paragraph twenty-two defendants deny that the Act is unfair, unjust, unequal, oppressive or dis- [fol. 93] criminatory in the matter of taxation, or that it has imposed upon this plaintiff or other retail merchants simi-

larly situated, an unjust or intolerable or any burden for the benefit of other retail merchants engaged in like business but having a smaller volume of annual gross sales, or that it will destroy or impair, or that the purpose of said Act is to destroy or impair, the good will or established trade or business or thereby reduce the annual gross sales made by this plaintiff or other retail merchants similarly situated, or to divert trade or custom from the retail stores of this plaintiff or other retail merchants similarly situated to the more numerous but less progressive retail merchants who have very much smaller annual gross sales. They deny that such Act in purpose or effect is in any way lacking in uniformity of application to persons or occupations taxed thereunder, or that it designedly or otherwise, transfers to or imposes upon the plaintiff or any other retail merchants similarly situated an undue proportion of license taxes attempted in said Act to be levied upon retail merchants. They deny that the Act designedly or otherwise discriminates in favor of retail merchants having a small or comparatively small volume of annual gross sales, or that it in effect levies a subsidy for their benefit to be paid by the plaintiff or other retail merchants similarly situated who have annual gross sales in large volume, or that said Act denies to this plaintiff or other retail merchants similarly situated the equal protection of the laws guaranteed to it or to them by the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States or the fundamental law of the State of Kentucky.

XXIII

For answer to paragraph twenty-three defendants deny that there is a large number of retail merchants lawfully engaged in the operation of one store, either with or with-[fol. 94] out separate departments such as this plaintiff conducts in its retail store, or in the operation of two or more stores, either under the same management or controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management, which are in like situation with this plaintiff, or that each of them is subject to taxation in the higher brackets at any discriminatory or unjust rate of taxation, or that such is done to the exclusion of any number of retail merchants competing with them

respectively, who have much smaller gross annual sales or that any of such merchants are not required to pay a tax.

They deny that the retail merchants conducting stores in Kentucky, who are thus similarly situated are entirely too numerous to be joined in this suit as parties plaintiff, or that the matters and things complained of in the bill of complaint or the questions raised herein, as to the legality of the tax complained of, are all questions of common or general interest to any persons constituting a class so numerous as to make it impracticable to bring them all before the Court herein, or that this plaintiff brings this suit on its own behalf and on behalf of all other individuals, firms, associations, copartnerships and corporations herein mentioned.

They deny that this plaintiff brings this suit on its own behalf and in behalf of the following:

J. Bacon & Sons,
H. P. Selman Company,
Kaufman-Straus Company,
Herman Straus & Sons Company,
John C. Lewis Company,
Hook Drug Company,
Hubbuch Bros. & Wellendroff,
Lemon & Sons,
S. H. Kress & Co.,
Great Atlantic and Pacific Tea Co.,
Montgomery, Ward & Co.

[fol. 95] XXIV

For answer to paragraph twenty-four said defendants admit all of the allegations contained in paragraph *paragraph* twenty-four of the bill of complaint.

XXV

For answer to paragraph twenty-five, defendants deny that any drastic penalties will be assessed against plaintiff for nonpayment of tax, or that any penalty will be assessed against plaintiff, or any action instituted, or that any irreparable injury or damage or any injury or damage will result to plaintiff or other retail merchants similarly situated.

XXVI

For answer to paragraph twenty-six defendants deny that section 13, setting forth the emergency clause of said Act is void, or that it has no connection with or relation to the purposes for which said Act was enacted, or that said Act did not nor could not become effective prior to June 17, 1930.

They deny that neither of the purposes for which this Act was passed, namely, one-half for the purpose of liquidating the indebtedness of the Commonwealth of Kentucky, and one-half for the specific purpose of repairing, maintaining and constructing permanent improvements for the use of the institutions under the control of the State Board of Charities and Corrections, is not related to or connected with the maintenance or development of the State Government.

XXVII

For answer to paragraph twenty-seven defendants deny that said Act is void or that it violates any provisions of the Constitution of the United States or the Fourteenth [fol. 96] Amendment thereof, or that it violates any provisions of the Constitution of the State of Kentucky as herein set forth.

(1) They deny that said Act, for reasons hereinbefore set forth, is void in any particulars or respects hereinbefore pointed out.

(a) They deny that it denies to this plaintiff or any other retail merchants similarly situated, due process of law, or that it is an attempt to levy upon them a tax that is confiscatory of their property, or that it is an attempt to take their property without due process of law, as an arbitrary exaction.

(b) They deny that it denies to the plaintiff or any other retail merchants similarly situated, the equal protection of the laws in that it exacts of the plaintiff or other retail merchants similarly situated, any unreasonable, unjust, discriminatory, oppressive or arbitrarily prohibitive rate of taxation, or that it is based upon a classification that is unreasonable, unjust or discriminatory against this plaintiff herein or other retail merchants similarly situated; or

that it taxes this plaintiff or any other retail merchants similarly situated, at geometrically increased rates, graduated according to the increased volume of gross sales, or that such graduation is without reference to any consideration or without any reasonable basis of classification, or that it imposes upon other retail merchants, doing the same kind of business in substantially the same way, a lower rate or burden of taxation, or that it wholly exempts any retail merchants under said Act.

(c) They deny that said Act abridges the privileges or immunities guaranteed to plaintiff by the Fourteenth Amendment, or that it is illegal or void.

(2) They deny that said Act violates any fundamental principles of uniformity in the matter of taxes levied upon occupations, persons or property upon a reasonable basis of classification as such principles of classification or uniformity are recognized by Section 171 and 181 of the Con-
[fol. 97] stitution of the Commonwealth of Kentucky.

XXVIII

For answer to paragraph twenty-eight, defendants deny that the plaintiff or other merchants similarly situated do not have an adequate remedy in the State Courts of Kentucky, or no remedy at law in the courts of the United States; or that such taxes would not be refunded if paid under protest and found to be illegally exacted.

They deny that the amount of money for the general fund on January 1, 1931, was $12,565.81, or that there were outstanding warrants aggregating $9,880,502.76 drawn by the Auditor of Public Accounts upon the State Treasurer, or that such were presented for payment but not paid.

XXIX

For answer to paragraph twenty-nine of the bill of complaint, defendants admit that they will attempt to enforce the provisions of the Act referred to in accordance with its terms, but say that they have no information sufficient to form a belief as to the other allegations contained in said paragraph, and therefore neither admit nor deny same but require strict proof thereof.

XXX

For answer to paragraph thirty defendants deny that unless they are enjoined or restrained from enforcing or attempting to enforce said act the plaintiff or any other so situated, will sustain irreparable loss or injury for which it has no plain, adequate and complete remedy at law in the courts of Kentucky, or that

[fol. 98] 1. Deny that plaintiff or any others similarly situated, will be compelled to pay taxes pursuant to an invalid or unconstitutional enactment, or for which they are not legally liable.

2. Deny that upon the failure of plaintiff, and others similarly situated, to pay said illegal taxes, that drastic penalties will be attempted to be enforced against plaintiff and others similarly situated, or that as a result thereof plaintiff or others similarly situated will be compelled to defend innumerable or any prosecutions brought to recover said tax and penalties or will be subject to criminal proceedings at any expense or damage to it or them.

3. Deny that defendants will expend public funds raised by taxation for the purpose of preparing to enforce and carry out the provisions of said Act to any irreparable injury or damage or any injury or damage to the plaintiff as a taxpayer of the Commonwealth of Kentucky.

4. Deny that if plaintiff or other similarly situated should pay the taxes under protest and commence actions to recover as provided in Section 10, of said Act, that they would be put to a large expense for attorneys' fees and court costs, or would be required to bring a multiplicity of actions in order to recover said moneys.

5. Deny that no waiver is provided of the right of the Commonwealth of Kentucky to defend any action brought in the courts of the United States as a suit against a State within the meaning of the Eleventh Amendment of the Constitution of the United States.

Deny that in consequence whereof, the plaintiff and others similarly situated, do not have a plain, adequate and complete remedy in an action at law in the courts of the United States.

6. Deny that said Act is ambiguous and doubtful as to its application and meaning, or as to the procedure or require-
[fol. 99] ment thereunder, or that it has never been interpreted by the Court of Appeals of the Commonwealth of Kentucky.

7. Deny that the amount of said annual tax which the plaintiff will be required to pay under the terms of said Act, will be a substantial portion, or any portion of the capital invested by plaintiff to carry on its business therein.

8. Deny that the payment of such sum of money will impair the ability of the plaintiff to operate its business in Kentucky, or will decrease the amount of annual business which it will be enabled to do, or will give competitors of the plaintiff any fair or undue advantage over plaintiff for which the plaintiff has no plain, adequate and complete remedy at law, or that the same is true of all other retail merchants so similarly situated.

9. Deny that the enforcement of said Act will have the effect of injuring or impa-ring any lawful business in which the plaintiff and others similarly situated are engaged and in which they have the undoubted right to engage which right is guaranteed and protected by the State and Federal Constitutions.

XXXI

For further answer defendants deny each and every allegation contained in plaintiff's bill of complaint not heretofore specifically denied, controverted or admitted.

For further answer the defendants aver and allege as follows:

1. The Act in question (H. B. 111, now Chapter 149 of the Acts of the General Assembly of Kentucky, 1930 session) levies a tax, graduated progressively as to rates upon all sales of goods at retail in this Commonwealth.

2. The classification, made as a basis for the tax imposed by said act, rests on the volume of gross retail sales and
[fol. 100] also upon ability of those affected by the various gradations of said act to pay the tax at the rate levied, it being a well recognized law of merchandising that the percentage of income of capital invested increases progres-

sively in the same, or approximately the same, ratio to the volume of sales as does the rate levied by said act; that is to say, those merchants having a great volume of sales have a much greater ability to pay the higher rates levied under said act than merchants having a smaller volume of sales; for example, this plaintiff, and those similarly situated, have as a class an income upon the capital invested in the retail business in this state of —% while individual merchants competing with plaintiff and those similarly situated, having gross annual sales of less than $400,000.00, earn an income on their capital invested in the retail business of only —%. The defendants further say that the example set out above is illustrative of the progressive increased ratio of earning power of invested capital to volume of sales.

3. The defendants say that the progressive increase of earning power of invested capital, based on volume of sales, as illustrated heretofore, conclusively proves a proportionate increase of ability to pay the tax levied by the act in question.

4. The defendants further allege that the plaintiff, Stewart Dry Goods Company, and others similarly situated, have for many years enjoyed a large and prosperous retail business in this state, and that the gross annual retail sales in many instances have exceeded $— per annum, and that they have, for many years, made a profit of more than —% on the aggregate of said annual sales, and that this represents a net income on capital, invested in the retail business in this state, of more than —%. They say, however, that merchants affected by the lower graduation of said [fol. 101] tax earn a much lower return on the amount of capital invested, and that this is especially true of those having gross annual business of less than $400,000.00.

5. The defendants further allege that the great volume of business enjoyed by the plaintiff, and those similarly situated, and the consequent progressive increase in ratio of income from invested capital to volume of business, is brought about by the operation of natural and well recognized economic laws as follows:

(a) Purchasing power increases progressively with volume of sales.

(b) As purchasing power increases, prices decrease.

(c) As volume increases, expenses decrease.

(d) As volume increases the ratio of turnovers or volume of sales to capital invested progressively increases.

6. Defendants further allege that the tax imposed by the Act in question was designed, intended and, in practical operation and effect, does equalize the tax burden heretofore borne by retail merchants in this Commonwealth and that said equalization is brought about by reason of the fact that the individual merchants in this State, competing with this plaintiff, have heretofore and are now bearing an unjust and disproportionate share of the tax burden and that the imposition of the graduated tax levied by this Act will equalize said burden in that those who are now paying the greatest amount of taxes in ratio to the capital invested will be taxed at the minimum rate under said Act, while those merchants having a great volume of sales and paying a small percentage of taxes on invested capital will be taxed at the higher rates under said Act.

7. Defendants further say that the above result is brought about in part by the fact that property is assessed [fol. 102] for ad valorem taxes in this State on July 1st in each year, and that the amount of goods, wares and merchandise on hand in this State on that date determines the amount of taxes to be paid for State purposes. They say that this plaintiff and others similarly situated by reason of the fact that they do a maximum amount of business on a minimum stock of goods, are enabled to and do pay a much smaller tax rate, based on volume of retail business, than that paid by merchants having a small annual gross business but are forced to compete directly with this plaintiff and others similarly situated; that this plaintiff and others similarly situated are enjoying a great volume of business in this Commonwealth and are not now paying and have never paid their just and due proportion of the taxes levied upon retail merchants, and are not now paying and have never paid for State purposes taxes at a greater rate than —% upon their volume of sales, while their smaller competitors have been forced to pay —% on their volume of sales.

8. Defendants say that House Bill 111, Chapter 149 of the Acts of the General Assembly of 1930, was introduced, passed, enrolled, and signed in the manner shown by the certified copies of the entries in both House and Senate Journals relating to said bill. Such certified copies are filed herewith and made a part hereof as if copied in full, marked for identification "Exhibit A."

Defendants further say that said bill was introduced, passed, enrolled, and filed in exact conformity with the Constitution and laws of the State of Kentucky.

9. For a separate and distinct defense in point of law arising upon the face of the Bill of Complaint herein, the defendants say that the facts alleged in said Bill of Complaint are insufficient to constitute a valid cause of action.

[fol. 103] Wherefore defendants pray judgment that the Bill of Complaint be dismissed and held for naught; and the prayer thereof denied; for all costs about this action expended and for all proper relief.

J. W. Cammack, Attorney General; S. H. Brown, Assistant Attorney General; Howard Smith Gentry, Frankfort, Kentucky, Solicitors for Defendants. Batson, Cary & Welch, Louisville, Kentucky; Leslie W. Morris, Frankfort, Kentucky, of Counsel.

[fol. 104] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE STATEMENT OF EVIDENCE

In is stipulated between the parties, plaintiff and defendants, that the attached "Statement of Evidence" correctly presents, in condensed narrative form, all material evidence offered by plaintiff upon the hearing of its (or their) motion for an interlocutory injunction, and likewise correctly presents in full the evidence offered by defendants upon the hearing of said motion—the affidavits introduced on behalf of the defendants being copied into the record verbatim, at the request of the defendants.

The filing of said "Statement of Evidence" is agreed to, and further notice and formalities are waived.

Bailey P. Woottan, Atty. Gen. Ky; S. H. Brown, Asst. Atty. Gen. Ky.; H. W. Batson, J. Whitcomb Welch, Leslie W. Morris, Solicitors for Defendants. Robert S. Marx, John C. Doolan, James W. Stiles, Frank E. Wood, Solicitors for Plaintiff.

[fol. 105] IN UNITED STATES DISTRICT COURT

[Title omitted]

Statement of Evidence

AFFIDAVIT OF ROBERT J. MCKIM

He is 35 years of age, and President and chief officer of the Stewart Dry Goods Company (hereinafter called Stewart's), a corporation organized under the laws of the State of Kentucky, with its principal office and place of business in Louisville. Has been president of Stewart's since March 10, 1930, and prior to assuming that position has been in the retail dry goods and department store business for sixteen years. Before entering this business was a student at Tulane University. By virtue of his position and experience in the dry goods and department store business, he is familiar with the methods customarily employed in conducting said business, and with the general retail situation in Louisville.

By virtue of said fact and by making comparison with the sales of his own store, of which he, as president, has personal knowledge, he is qualified to estimate the approximate gross retail sales in other stores in Louisville.

He is familiar with the location and type of all of the [fol. 106] larger retail stores in Louisville, and has had an opportunity and has observed the nature, extent and character of their business. He is likewise acquainted with many of the smaller establishments, and has made a survey of the city and consulted with various department managers, buyers and executive officers of Stewart's with a view to fortifying his information in regard to the stores hereinafter referred to.

2. There are seventy separate departments in Stewart's, each of which is charged in bookkeeping with its own floor space, advertising, payroll, taxes and other items of overhead as though they were so many separate and distinct stores. Each department is in practice, and in fact, a separate unit, distinct from the other departments in Stewart's. The figures for the various departments are continually examined and analyzed with a view to improving our business methods and our service to our customers, as well as to determine whether or not a particular department is, or is not, profitable. The continuance, enlargement or contraction of a department is determined by its showing, as indicated. For example, for many years Stewart's handled linoleum in a distinct department. After several years of unprofitable business in that department it was entirely discontinued in December, 1928, and has not since that time been handled.

The annual sales do not exceed $400,000.00 in any single department; the maximum sales of any one department in Stewarts is approximately $250,000.

[fol. 107] 3. In many instances the sales of particular departments in Stewarts are approximately the same as the sales of one or more specialized stores selling the same line of goods, and in many instances the sales of a particular department in Stewarts will be considerably less than the sales of specialized stores competing with Stewarts in the particular line of goods handled.

As a basis for the survey which he has made, as mentioned above, he has made use of the classified section of the 1930 City Directory of the City of Louisville, supplemented by the last classified Telephone Directory, together with his personal knowledge and the knowledge of the various department managers with whom he has consulted with a view to presenting wherever possible the entire field of competition with the specific departments mentioned, showing the discrimination against Stewarts, and other stores similarly situated, and in favor of specialized stores competing with only one or more departments in Stewarts which results from the threatened tax levied under the 1930 Kentucky Sales Tax Law. It is not practicable to list all of the stores competing with each individual department in Stewarts for the reason that the directories, naturally, do not have the same classification in each instance which

Stewarts makes of its departments. Therefore, he has carefully examined the classifications made by the City Directory and in every instance reasonably possible, he has listed all of the stores competing with Stewarts. This results in a classification of about ten different kinds of [fol. 108] competition, thereby furnishing as accurate an analysis of the general retail situation as he knows how to make.

In the lists following he has in general omitted other department stores unless for particular illustration where he has noted their situation:

A. Books and Stationery

The following stores are all of the specialized book and stationery stores in the City of Louisville that he knows of:

(Affiant here lists eight stores by name and address.)

Of the above stores that of W. K. Stewart Company has undoubtedly the largest volume of sales of books and stationery in the City. The annual gross sales of no one of said stores, including its sales of stationery, etc., are in excess of $300,000.00.

The tax based upon this estimated figure would be $150.00, less the amount of its corporation license tax and any other license taxes, such as playing cards, etc., which said companies may have to pay. As compared with this tax the share of the threatened tax which would have to be borne by the stationery and book departments of The Stewart Dry Goods Company would be $465.70 on sales made in those departments approximately only one-fourth in amount of those of the largest store in this class.

The largest store, as well as most of the others named above, is located in the downtown shopping district in [fol. 109] Louisville, and is in active, continuous competition with the book and stationery departments of Stewarts for the business of the public. Furthermore, the sale of books, particularly, is usually upon a fixed basis as to price, and it would be impossible for Stewarts to pass on to the consumer the amount of tax based on its sale of books, and successfully to continue to compete with specialized book stores.

B. Clothing Dealers—Men's and Boys'—Retail

Under this heading the Directory lists the following fifty-four specialized stores:

(Affiant here lists fifty-four stores by name and address.)

In his opinion the following are the only stores in the above list having annual sales in excess of $400,000.00:

Louis Appel Company	425 South Fourth Street
Levy Brothers	Market—Cor. Third Street
Lovenhart & Co.	Cor. Third and Market
Rodes Rapier Co.	Fourth and Walnut Streets

None of the others will pay a tax under the 1930 Sales Tax Law at a rate higher than 1/20th of 1%. An accurate comparison of the estimated sales and tax of these stores with the men's furnishings, men's hosiery and underwear, boys' clothing and boys' furnishings departments of Stewarts, is not possible because of the fact that Stewarts has no men's clothing department, and this item represents a large part of the sales of the stores listed. However, the tax per dollar of sales in Stewarts amounts to approximately .00743% after all deductions. While the tax upon [fol. 110] the dollar of sales of each of the above fifty-four stores, with the exception of four of them, will be only .0005% without considering the deductions permitted by the law. In other words, there is a discrimination against Stewarts and in favor of the great majority of specialized stores of at least 14.86 times. In all essential respects these specialized stores use the same methods of operating as do the corresponding departments of Stewarts.

C. Clothing Dealers—Women's and Misses—Retail

Under this heading the directory lists thirty-one stores to which he has added from other sources of information sixteen additional stores with the result that the following list is, in his opinion, complete:

(Affiant here lists forty-seven stores by name and address.)

Of these stores more than one-half of them are located in the downtown shopping district where the competition

for trade is strenuous, and these stores are competing actively with Stewarts, and others similarly situated, for this character of business.

The following stores, only, in the above list have sales in excess of $400,000.00:

Du Rand Perry Co.	538 So. Fourth Street.
Besten-Langen Company	518 So. Fourth Street.
Byck Bros. Co.	532 So. Fourth Street.
Mangels, Inc.	528 So. Fourth Street.
H. P. Selman Co.	4th St., at Walnut.

There is no essential difference between the methods of doing business of the above stores located in the downtown [fol. 111] shopping district and Stewarts, but the discrimination against Stewarts and in favor of the large majority of the specialized stores selling the same character of goods in the same way is approximately fifteen times per dollar of sales in the amount of tax threatened.

D. Draperies

The Directory lists four drapery stores to which he has added eight others, making the following complete list:

(Affiant here lists twelve stores by name and address.)

The sales of the largest store of this kind in the City are approximately $400,000.00, including their sales of rugs and furniture.

Based on this estimate their tax would be $200.00 less such deductions as they may be entitled to, while the tax for the drapery department in Stewarts would amount to $589.27 after all deductions on approximately one-fifth of the amount of business of the largest store in this line, conducted in all essential respects in the same way.

E. Dry Goods—Retail

The Directory Lists 152 stores other than department stores which handle dry goods.

The following department stores have, in his opinion (in all departments, including dry goods) sales in excess of $400,000.00:

[fol. 112] J. Bacon & Sons..... 334 West Market Street.
Jefferson Dry Goods Company. Fourth & Jefferson Streets.
Kaufman-Straus Company.... 427 South Fourth Street.
John C. Lewis Company..... 450 South Fourth Street.
Sears-Roebuck Company..... 820 West Broadway.
W. T. Grant & Company..... 424 South Fourth Street.
Ben Snyder Department Store 522 West Market Street.
Herman Straus & Sons..... Fourth & Market Streets.

With the exception of the above, none of which are specialized stores, there is no store in Louisville, in his opinion, doing a retail dry goods business of $400,000.00, or more.

The following is a complete list of specialized dry goods stores as shown by the directory:

(Affiant here lists one hundred and fifty-two stores by name and address.)

Accurate comparison between Stewarts and the above stores having sales of less than $400,000.00 is not possible because of variations in the class and kinds of goods handled, and the materials furnishing the basis of competition.

However, the discrimination against Stewarts, and others similarly situated, and in favor of the 152 small independent stores, above mentioned, is approximately fifteen to one, per dollar of sales, although the dry goods business is conducted by both groups in the same way in all essential respects.

F. Fur Dealers and Furriers

The following list includes to the best of his knowledge all of the stores in the City of Louisville other than [fol. 113] Stewarts, handling furs. Due to the small number involved he has included department stores in this list with the specialized stores:

(Affiant here lists twenty stores by name and address.)

None of the above specialized stores nor fur departments of department stores have as much as $400,000.00 annual sales. In fact, none of them, in his opinion, have sales aggregating as much as $150,000.00 in furs.

The discrimination against Stewarts, and others similarly situated, and in favor of the specialized shops listed above, is here, again, approximately fifteen to one.

It is further to be noted that, due to the unreasonable graduated feature of the 1930 Sales Tax Law, the fur department of each of the various department stores will pay at a different rate per dollar of sales on this class of goods (and the same is, of course, true of other departments) when the sales of furs of one department store may be greatly above or greatly below those of the others. In other words, the rate per dollar of sales has no connection whatever with the volume of sales of a particular department.

G. Furniture Dealers—Retail

The city directory and the classified section of the telephone book list sixty-nine retail furniture dealers. This list has been carefully checked and those stores whose business is entirely or mostly in second-hand furniture have [fol. 114] been eliminated. The following list of fifty-six stores includes all of the specialized retail furniture dealers competing with Stewarts and others similarly situated.

(Affiant here lists fifty-six stores by name and address.)

Of the above, the sales of the following six stores exceed $400,000.00:

Bensinger Outfitting Co.	315 W. Market Street
Central Furniture Co.	226 W. Market Street
Denhard Co.	219 W. Market Street
Great West. Furn. Co.	720 W. Market Street
Fred W. Keisker & Son	315 W. Walnut Street
United Furniture Co.	900 W. Market Street

Only eleven of the above fifty-six stores, and only one of the larger stores, are located off of Market Street. It is apparent, therefore, that the center of activity in retail furniture is on said street, which is three blocks north of the location of Stewarts and rents and taxes on said street are considerably lower. Against this factor of cheaper location, the furniture department of Stewarts, and others similarly situated, must likewise carry the burden of this threatened tax which is approximately fifteen times the amount, per dollar of sales, that will be paid by fifty of the above fifty-

six merchants and larger per dollar of sales than any of the remaining six although these six merchants each do a much larger volume of business than the furniture department of Stewarts.

The sales of the store having the largest volume of sales in said list do not exceed $700,000.00. Based on this estimate their tax under the 1930 Sales Tax Law, would be [fol. 115] $950.00 less deductions. Compared with this the tax on the furniture department at Stewarts would be $1,097.96 after deductions on approximately 1/5th the volume of business. In other words, the tax per dollar of sales in the furniture department of Stewarts is at least five times greater than the tax per dollar of sales of the largest store in this line.

H. Music Dealers

For purposes of comparison here he has lumped together the stores listed under the following headings in the directory: Piano Dealers, Phonographs and Records, Radio Sets and Supplies and Radio Equipment and Supplies. In his opinion the following list includes all of the recognized music stores in the city:

(Affiant here lists fifty-nine stores by name and address.)

None of the above stores have sales in excess of $400,000.00. The largest has annual sales which do not exceed $150,000.00, upon which the tax would be $75.00 less deductions. Compared with this the tax on the music departments at Stewarts is $549.23 after all deductions and on a volume of sales approximately one-half of those of the largest specialized store in this line. In other words, on half the volume of sales the tax against Stewarts is more than seven times greater.

I. Milliners

The following list of thirty-eight specialized millinery shops is in his opinion complete:

(Affiant here lists thirty-eight stores by name and address.)

[fol. 116] Two stores located on Fourth Street which, he is advised, are owned by the same merchant have together

probably the largest volume of sales of any of the stores listed. Their joint sales are not in excess of $150,000.00.

Based upon this estimate their tax, under the 1930 Sales Tax Law, would be $75.00, with deductions. Compared with this the tax chargeable to the millinery department of Stewarts would be $549.95, after all deductions, on approximately half the volume of business above set out.

Approximately half of the stores which he has listed are in the downtown shopping district where they are in continuous active competition with the millinery department of Stewarts, and others similarly situated. In this class of goods the discrimination against Stewarts and in favor of the specialized stores is, again, 15 times per dollar of sales.

J. Shoes

The following sixty-six stores specialize in the handling of women's and children's shoes as are handled by the shoe department of Stewarts:

(Affiant here lists sixty-six stores by name and address.)

The sales of the largest of these stores does not exceed $500,000.00, upon which the tax would be $300.00, or .0006% per dollar of sales, without taking deductions into account. [fol. 117] Compared with this the tax after deduction of .00743% per dollar of sales by Stewarts is more than twelve times greater. Approximately a third of these sixty-six stores are in the downtown shopping district where they are in continuous active competition with Stewarts for the trade of the public. As to the great majority of all of said stores the discrimination is again fifteen times on the dollar of sales.

4. The above lists do not, by any means, cover all of the stores in the city with which Stewarts is in active competition in its various departments. It is, however, the most complete list as to classes of merchants that he knows how to make from the sources of information available to him.

Various specific instances as to other department- occur to him, demonstrating the discrimination against Stewarts, and others similarly situated, and in favor of the more or less specialized stores and smaller stores. For example, the Sutcliffe Company, which specializes in sporting goods

and toys competes actively with the toy department at Stewarts. No tax is paid by Sutcliffe Company. Based upon his estimate of their sales their tax would be $300.00 which is completely offset by its corporation license taxes and license taxes paid for handling pistols, playing cards, and so forth, aggregating $318.50. Compared with this, Stewarts, on toys alone is chargeable with a tax of $313.10 after all deductions on sales approximately 1/5th in amount of those made by said company.

[fol. 118] Again, Stewart's china and glassware department competes with Edward Dolfinger, Inc. Dolfinger's, for many years, conducted a large business in china and glassware. Some years ago they discontinued business but reopened again two years ago and now are doing an annual business not exceeding $100,000.00. Here, as in the case of all smaller stores, Stewarts is required to pay fifteen times the amount per dollar of sales in taxes under the threatened levy of the 1930 Sales Tax Law.

The directory lists 487 restaurants in the City of Louisville. Stewarts serves only luncheon in its restaurant while the majority of those listed serve three meals. Here again the discrimination is fifteen times on the dollar of sales in every instance that he knows of.

There is no essential difference between the methods of conducting the business of Stewarts, and others similarly situated, and the other stores mentioned in this affidavit. Many of these stores carry more than one type of goods and divide their business into two or more departments, some of which compete with one or more departments of Stewarts and others, perhaps, do not.

In every essential respect these smaller stores are doing a similar business to that that is being conducted by Stewarts, appealing to much the same public, buying, in many cases, in equal or larger quantities, sometimes from the same wholesalers, and selling in the same way to the same people on credit and for cash.

[fol. 119] Stewarts now pays more in taxes than any other retail merchant in Louisville—approximately $80,000.00 in direct taxes during 1930—not considering this threatened tax. It is called upon for contributions to numerous civic and charitable enterprises, and takes a leading part in many such activities either as a store or through its officers and employees.

Stewarts' trade is not confined to the city of Louisville, but it attracts customers from all nearby cities in this and other states. Many of the smaller stores profit directly from the shoppers who are attracted to Stewarts from outside the city and it, therefore, enhances real estate values in its neighborhood.

A substantial volume of Stewarts' sales are made in interstate commerce to customers residing in other States and buying merchandise by telephone, mail or personally from Stewarts, to be delivered to the buyers at their residences in such other States.

Stewarts has over 2,000 regular charge accounts with persons residing in the State of Indiana alone, and numerous charge accounts with persons residing in States other than Kentucky and Indiana.

Merchandise sold on all such accounts is regularly delivered by Stewarts to the buyers at their residences, in the regular course of interstate commerce. In fact, Stewarts makes daily deliveries to its customers residing in Jeffersonville and New Albany, Indiana.

[fol. 120] In nearly all of the cases which he has mentioned the specialized stores competing with one or more of Stewarts departments have the great advantages of ground floor location and window space for permanent displays. Stewarts, of course, cannot make permanent window displays of the goods of all its departments but must allot such space at intervals throughout the year. Also, the departments located in the basement or on the six floors above the ground floor obviously do not have the same advantages that come from ground floor location.

Stewarts and other retail merchants in Kentucky are also brought into direct competition with mail order houses located in other States who secure by mail and catalogue, orders for goods to be shipped into Kentucky to buyers resident in Kentucky.

Another type of competition which is felt by Stewarts is with the sales of prominent New York and Chicago shops who send representatives to Louisville and makes sales from sample. These exhibitors include such stores as Best & Company, Saks-Fifth Avenue, Brooks Brothers, Delman, De Pinna, Crossways Shop, Frank Brothers, McCutcheon, Peck and Peck, and numerous others. While the sales made by these shops are free from taxation throughout Ken-

tucky, it is apparent that their competition is felt only in cities large enough to attract their exhibtions. It is only in the larger cities that there are stores of sufficient size [fol. 121] to pay any substantial tax under the 1930 Sales Tax Law. Consequently the large stores in Kentucky must meet this outside competition and also suffer the discriminations of this law upon every sale which they make.

The principles and results apparent from the comparisons which he has made are equally applicable for other years than 1930, and to other lines of trade than those which he has expressly mentioned herein. There are no stores competing with Stewarts in the city of Louisville other than those listed herein that have sales in excess of $400,000.00. He knows of no reasonable basis upon which the classification made by the 1930 Sales Tax Law can be justified.

Robert J. McKim.

(Duly verified.)

AFFIDAVIT OF FRED LEVY

He is senior member of the partnership Levy Bros., plaintiffs in a suit for injunction against John B. Lewis, et al., brought in the United States District Court for the Western District of Kentucky, at Louisville, being No. 610 on the equity docket.

He is 53 years of age, and all his life has been in touch with the business of Levy Bros., founded by his father and his father's brothers about 70 years ago and from the beginning conducted in one store at the same location, hav- [fol. 122] ing been connected with this firm for over 36 years. After the death of his father and his brothers, he became the senior member of the firm, and in that capacity he has had for more than 20 years the most intimate knowledge of the business of the firm and the conditions affecting it, such as the problems of financing, development, competition, buying, selling display of goods, advertising and the many other questions of vital importance that determine the success or failure of a retail store, and especially of a store like that of Levy Bros., handling lines of merchandise

in which the taste of the buying public must be trained as well as indulged.

He knows the recurring problems of ever-changing conditions and keen competition constantly facing retail merchants in such a business as that of Levy Bros. He knows the value of a good name and a good business reputation in developing and preserving the goodwill of a business. His firm has devoted 70 years of its business life to building up a reputation for integrity and fair dealing with the buying public and for selling goods of high quality at the lowest prices consistent with successful operation of its business.

At the same time, he knows that, year by year, they have met new problems in changing tastes, styles and modes of dress, and new as well as old competition. Sometimes this competition comes from old-established business houses doing business under fairly similar conditions. Sometimes it comes from the small merchant with a store and stock of [fol. 123] such size that he can handle it at small expense by himself of members of his family with little outside expense.

Sometimes the competition comes from a large organization operating a branch store in Louisville under conditions that favor such competitor at the expense of this affiant's firm. This is particularly emphasized under the so-called "Gross Sales Tax Law" enacted in 1930—at the 1930 session of the Kentucky Legislature.

Under equal conditions Levy Bros. welcome any fair competition, but they cannot afford to concede any tax advantages.

For example: Levy Bros. are the largest retail dealers in ready-made clothing in the State of Kentucky. In that branch of their business, for the calendar year of 1930, their gross annual sales were over a million dollars. If the Kentucky "Gross Sales Tax Law" of 1930 be upheld as valid and enforced against Levy Bros., they will be put to a great disadvantage and subjected to a great handicap in the way of taxation discriminatory against them and in favor of 52 other retail stores in Louisville dealing specially in men's and boys' clothing, to say nothing of similar stores located elsewhere. Taxes properly chargeable against and allocated to the clothing department in the store of Levy Bros. will be greatly augmented under the

1930 Gross Sales Tax Law, and the discrimination resulting therefrom, in favor of their competitors and against Levy Bros., is fully, fairly and correctly stated in the bill of [fol. 124] complaint filed by them in their suit against John B. Lewis, et al., above mentioned.

In addition to the competition above pointed out, a new business rival has entered the field of compensation with Levy Bros. Richman Bros. Co., a corporation, which is a very large chain store organization, has within the last few months established a store for the sale at retail of men's ready-to-wear clothing, suits, overcoats and similar articles of clothing, on Fourth Street between Liberty and Walnut Streets, within the central retail business district of Louisville. The Richman Bros. Co. does not own or operate any other store in Kentucky. Its gross annual sales in the store established by it in Louisville will not exceed $400,000, and hence it would be taxed under the 1930 law in the lowest bracket, whereas the men's clothing department of Levy Bros. would, as set forth in their bill of complaint, be taxed in much higher brackets.

Such discriminatory and unequal burden of taxation is imposed by the 1930 Act upon Levy Bros., and especially upon their men's clothing department, in the conduct of their business in competition with Richman Bros. Co., who will be actually taxed under said Act at less than one-twentieth of one per cent., when approximately thirty to forty times that rate of taxation will be imposed by the same Act upon Levy Bros.' clothing department.

There is no conceivable or justifiable reason for such dis- [fol. 125] crimination. For example, Richman Bros. Co. is a chain organization conducting in other States a great many stores for the handling of a similar line of merchandise. Its aggregate volume of business in all of its stores is many times larger than the volume of Levy Bros.' business. It advertises and displays its merchandise for sale in the most effective and up-to-date methods. Its business is owned by non-residents of Kentucky, and the earnings derived from the conduct of its business are sent out of Kentucky to be spent or invested in other States.

Every conceivable argument, whether sound or fallacious, that could possibly be urged in favor of a heavy tax upon chain stores and for the relief of individual mer-

chants is flouted by a law which imposes upon Levy Bros. a rate of taxation approximately forty times that imposed upon Richman Bros. Co. as one of its competitors.

Likewise, the same situation exactly exists with respect to other chain stores, such as Wilson Bros., National Shirt Company, and others that deal in men's furnishings in competition with similar departments conducted by Levy Bros.

Many other instances could be cited in shoes and hats as well as the above clothing and furnishings, but these are typical examples of clear and hostile discrimination against Levy Bros. effected by the 1930 Gross Sales Tax Law.

[fol. 126] Affiant has for many years been active in the business life of Louisville, and particularly has taken his part in studying and promoting the interests of retail merchants generally in Louisville and throughout the State and country. He has not only been President of the Louisville Retail Merchants' Association and of the old Louisville Commercial Club, now merged with the Louisville Board of Trade, but he has also been President of the Kentucky State Clothiers' Association and President of the National Association of Clothiers and Furnishers, composed of over 8,000 members. By virtue of his experience and training in his business and the allied lines of his activities, affiant has now and for years past he has been quite familiar with the general retail situation in the city of Louisville, and particularly with the nature and extent of business done by stores conducting the same type of business as Levy Bros. He has had an opportunity to observe and he has observed the nature and extent of the business done by the competitors of his firm, and by reason of his study of conditions he is qualified to state approximately the amount of business done by them.

Affiant has read the affidavit of Robert J. McKim, filed in these suits to enjoin the enforcement of the 1930 Kentucky Gross Sales Tax Law. Based upon his own survey and careful and long-continued study of local retail conditions in Louisville affecting retail stores generally, as well as retail stores conducting a business similar to that [fol. 127] of Levy Bros., affiant is enabled to state and he does state from his own study and observation and his own knowledge gained thereby:

(1) That the statements set forth in said McKim's affidavit are all true with respect to the gross annual sales of retail merchants in Louisville dealing in articles similar to those handled and sold by Levy Bros. in their various departments as set forth in their bill of complaint in this litigation.

(2) That the statements set forth in said McKim's affidavit are all true with respect to the operations and gross annual sales of other retail merchants in Louisville dealing in merchandise of various kinds other than the kinds of merchandise handled and sold by Levy Bros.

(3) That the statements set forth in said McKim's affidavit are true with respect to the number of retail merchants of all classes and kinds in Louisville who have gross annual sales exceeding in volume the sum of $400,000.

The business of selling motor vehicles of various kinds in the city of Louisville is so essentially different from other forms of merchandising (if automobiles should be properly classed as merchandise or dealers therein should be properly classed as retail merchants operating retail stores in Louisville) that the affiant has no personal knowledge as to [fol. 128] the gross annual sales of vendors of motor vehicles in Louisville, and therefore he does not undertake in this affidavit to make any statement with respect to their gross annual sales, and no statement on that subject is made in the affidavit of said McKim.

The same is true of dealers in various kinds of commodities and manufactured articles not usually handled by retail merchants of the class specified in said McKim's affidavit, and the same is true with respect to retail grocers and other merchants in Louisville handling lines of goods that do not come in competition with Levy Bros. as retail merchants.

Fred Levy.

(Duly verified.)

AFFIDAVIT OF DANN BYCK

He is President and General Manager of Byck Bros. & Co., a corporation organized under the laws of Kentucky, which operates a retail establishment in the heart of Louisville which specializes in women's clothes. This store is an independent store, that is, the owners do not own or control

any other store. The establishment is divided into 10 departments each of which handles a different type of article from that handled by any other department. Each department is a separate unit and is entirely distinct from any other department. Each department is charged with its floor space, its electric light, its payroll, etc., and in effect [fol. 129] each department is a separate store under the same roof. The competition for each department is offered by outside stores selling similar articles and in many instances outside competitors who sell only a single type of goods have greater sales than the department in Byck's store handling that article.

Byck Bros. & Company has annual sales of approximately $700,000 each year where the sales of all departments are added together but the sales of any single department does not exceed $300,000. These departments as stated before compete directly with stores which handle the same type of article and nothing else, and since their volume of sales is no larger than the sales of these competitors they should not be subjected to a higher rate of taxation. However the Kentucky Gross Sales Tax law fixes the rate of taxation by adding the sales of these departments, thereby subjecting each department to a tax which approaches 1%. Competitors on the other hand are only subjected to a nominal tax.

For example, we operate a millinery department which has annual sales of $15,000. This store meets the competition of The Gordon Shop, Marjdon and Shenley's. All three of these establishments are in the immediate vicinity and their sales tremendously exceed the sales of our millinery department. Their tax, however, would only be 1/20 of 1% since their sales do not exceed $400,000, whereas our millinery department doing the same kind of business as [fol. 130] these competitors must bear a much heavier burden.

He has spent the last 10 years in the employ of Byck Bros. & Co. and he is familiar with the general rules governing the operation of stores carrying on this type of business. In Byck's case, they operate on the basis of a small margin of profit. This is one of the outstanding features of efficient merchandising. Byck's records show that they make 1% profit for each dollar of sale. Investigations which have been made by the Harvard Bureau of Research show that this is about the average that can be expected from a store

of this type. It can be readily seen that the Kentucky Gross Sales Tax takes a large percentage of this profit.

This store was established 30 years ago by affiant's father. At that time he had three employees. Today the establishment is doing about $700,000 worth of business annually and is giving employment to 100 people. Its growth is due to the adoption of efficient merchandizing methods and it would be discarding these methods if it attempted to secure a larger profit than it is making. It will have to content itself, therefore, with the 1% profit it is making. If it increases its sales the per cent of profit to sale will not increase but the tax would. For example, assume that through intense effort and application it is able in 1930 to increase its business an additional one hundred thousand dollars, on which it would earn, figuring on a 1% basis, a net profit of [fol. 131] $1,000. Under the confiscatory terms of this tax, $700 of this $1,000 profit would be taken. If, in the course of another year, it gains another $100,000 volume and its accompanying $1,000 profit, $850 of this additional $1,000 profit will be taken as tax. And finally in the third year, if it is able to reach its goal of $1,000,000 by adding another $100,000 volume, the entire $1,000 profit derived from this increase will be taken as additional tax.

Departments selling a special article are so distinct from the remainder of the store that they are often leased out to persons who operate them much in the same way as they would operate their own store. In addition to operating the store in Louisville, Byck Bros. & Co. lease a department in the store operated by the Wolf Wile Co. in Lexington, Ky. This department, of course, is in no way affected by the sale of goods in Louisville. It competes directly with stores in Lexington which sell the same type of goods. Its volume of sales is $47,000 a year and its competitors having an equal volume would only have to pay 1/20 of 1%. Under the gross sales tax law, this department would be taxed at a much higher rate. In order to determine the rate of taxation, the statute requires that the sales of this department should be added either to the sales of all other departments in the establishment operated by the Wolf Wile Co. or else to the sales of the store operated by Byck's in Louisville. [fol. 132] He is not certain whether the sales of this department will be added to Wolf Wile's sales or to the sales of the Louisville store but he is certain that the sales will not

be taxed without reference to any other sales. No matter how the gross sales tax statute is construed in this regard this department is discriminated against. If its sales are added to Wolf Wile's it will fall in the higher brackets and Bycks will have to pay approximately 1% on its sales merely because somebody else sells another type of goods under the same roof. If the sales of this department are added to the sales in Louisville then it increases Byck's sales and places it in a bracket where its tax approaches 1% and as a result this department would be subjected to a higher tax merely because Byck's operate a store selling a great many different items in a different city. Persons competing with this department in Lexington who sell nothing but ladies' shoes and who have as great or a greater volume of sales pay a tax of 1/20 of 1% or a tax which is about 19/20 of 1% below the tax on the department operated by us.

This 1% tax which is imposed upon Byck's and not upon competitors who sell the same goods but who confine themselves to the sale of only one type of goods enables those competitors to undersell it in their particular line and take away its business without subjecting themselves to the tax. It must be borne in mind that these persons have the same [fol. 133] buying facilities that Byck's has. About 95% of them belong to buying organizations and they purchase for their store as much or more than Byck's buy for the department which competes with them. Our Inexpensive Dress department has sales of about $50,000 per year. The Hollywood Shop operating on the same block sells Inexpensive Dresses and is in direct competition with this department. This competitor sells nothing else and his sales are greater than the sales of Byck's department. If Byck should increase the sales of this particular department or any department the increased sales would be subjected to a tax which would approximate 1%. On the other hand The Hollywood Shop could undersell Byck's because of the fact that Byck's had to pay a heavy tax not imposed on him. He could, therefore, take away all this business and increase his sales to about $150,000 but he would not have to pay more than 1/20 of 1%.

The same sales would be taxed at 1% if Byck would make them and only 1/20 of 1% if its competitor would make them.

Dann C. Byck.

(Duly verified.)

AFFIDAVIT OF C. B. TURLEY

He is President of the Kaufman-Straus Company, Incorporated, hereinafter called "Kaufmans," which operates a Department Store in the City of Louisville. It sells Shoes, Dressgoods, Stationery and Household Goods. The Kaufman-Straus Store is divided into twenty-five Depart-
[fol. 134] ments, each of which handles a specialized article. Each Department is a separate unit and is entirely disconnected from every other Department in the Store. Each Department is charged with its floor space, its advertising, its Pay Roll, its lighting, etc. Most of the Departments have special Buyers, who attend to the matters of that Department and are not concerned with any other Department.

Each Department competes with stores selling similar articles. Many of these stores are operated by persons and corporations who do not operate any other stores and who do not handle in their one store anything but an article similar to the article handled by a particular Department of this store. The sales in any one Department of the Kaufman-Straus Store do not exceed Four Hundred Thousand Dollars ($400,000.00) and as a matter of fact, the maximum sales of any particular Department are $100,000.00. Many competitors who operate only a single store and who sell at that store articles which are handled by particular Departments in this store and nothing else, have sales which are equal to or exceed the sales of the Department in this store with which it competes.

For example, Ladies' Shoes has sales of approximately $55,000.00 annually. It competes directly with Boston Shoe Store and Walk-Over Shoe Company, who sell nothing but Shoes. The sales of these competitors are equal to the sales in this Department, but they do not exceed $400,000.00, [fol. 135] and as a result, these competitors would only have to pay at the rate of one-twentieth of one per cent under the Gross Sales Tax Law of Kentucky. On the other hand, Kaufmans Ladies' Shoes would have to pay approximately one per cent on its sales, although they only amount to $55,000.00. This is due to the fact that the Gross Sales Tax Law of Kentucky compels Kaufmans to add the sales of the Shoe Department to the sales of the other Departments in the Store, thus throwing it into the higher bracket.

Another example is the Silk Department, which has sales of approximately $100,000.00 annually. It competes directly with the Miles Silk Shop, which sells nothing but silks, and the same tax bracket would apply as above.

Thirty-two Departments are leased out to different Corporations, which operate them in the same manner that they would operate their own stores. These Departments are no different than the other Departments which are operated by the Kaufman-Straus store, except that these are owned by corporations which do not own or operate any other Department in this store. He is informed and believes that these leased Departments would only be subjected to a tax of one-twentieth of one per cent, whereas, other Departments would be subjected to a one per cent tax.

The provision of the Gross Sales Tax Law of Kentucky compels the aggregation of all the sales in all Departments [fol. 136] operated by the Kaufman-Straus store. The total sales will exceed $400,000.00, thus placing it in a higher bracket.

If the Taxing Statute is construed in such manner that the sales of the leased departments would be added to Kaufman's sales, its tax would be increased by the outside sales. Under either construction, the addition of sales in unrelated Departments and the imposition of a graduated tax on the total discriminates against Department Stores and is in favor of individual stores which handle only one line of goods. Departments in such a store as the Kaufman-Straus Company are operated on the basis of a small margin of profit, which does not exceed one per cent. The increase of Departments in a particular store would not add to the per cent of profit per dollar of sales in another Department. The per cent of profit, therefore, does not increase with the increased sales of the entire store. The per cent of profit for each dollar of sale is less than one per cent and the imposition of an additional one per cent tax would take all of this profit and would be prohibitive and confiscatory. The proposed tax could not be shifted to the consumer. An increase in price would enable competing stores to undersell Kaufmans and deprive it of business. However, these competitors would only subject themselves to a tax of one-twentieth of one per cent as a result of this increased business. For example, a Depart-

ment Store operates ten Departments, each of which has [fol. 137] sales of $200,000.00; the total sales in the store would be two million dollars ($2,000,000.00) and each Department would have to pay a one per cent tax. On the other hand, the ten competitors, each of which sells an article similar to that sold in one Department and each of which has sales of Two Hundred Thousand Dollars ($200,000.00) per year, would only have to pay a tax of one-twentieth of one per cent. Each competitor could take away the business from a Department store in the particular line in which he is engaged, and as a result each competitor would have sales of Four Hundred Thousand Dollars ($400,000.00) and still be subject to the lowest rate of taxation. In other words, although all Kaufmans business is taxable at a high rate, its competitors could take it all away and only be liable for a tax of one-twentieth of one per cent.

C. B. Turley.

(Duly verified.)

AFFIDAVIT OF ARCH B. DAVIS

He is vice-president of the Citizens-Union National Bank in Louisville, Kentucky. Has held that position for approximately fifteen years.

By virtue of his position he has bought, sold and collected a large number of State Warrants of all varieties, particularly Highway, Institutional and General Warrants. He [fol. 138] believes that he has handled as large a number of Warrants through the Citizens-Union National Bank as any individual in the State.

His experience in dealing with warrants against the General Fund has been that said warrants are seldom paid in less than twenty months from the time when they are stamped interest bearing, and he estimates that the average time within which said warrants are paid is two and a half to three years from the date when so stamped. Warrants are paid, in practice, in the order of their being so stamped. The last call by the State Treasurer included General Warrants stamped interest bearing on June 11, 1927, which

would indicate that no warrants against the General Fund stamped since that date have been paid.

The financial statement issued by the State Treasurer as of December 31st, 1930, shows the state of the General Fund to be as follows:

Amount of warrants outstanding against the General Fund	$9,880,502.76
Amount in General Fund available to pay off same	12,565.81

The length of time probably elapsing before the payment of a warrant is, of course, an element to be considered in determining its value.

Arch B. Davis.

(Duly verified.)

[fol. 139] AFFIDAVIT OF G. H. PARKER

He is the manager and officer actively in charge of the business of the Kentucky Actuarial Bureau; that one of the functions of said Bureau is the determination of fire insurance rates on property insured against fire in the State of Kentucky; that said Bureau fixes or approves fire insurance premium rates throughout the entire State of Kentucky, and that affiant is familiar with the factors entering into the determination of the various rates fixed.

Affiant states that under the Kentucky Insurance Laws no rating bureau shall fix any fire insurance rate which discriminates unfairly between the risks of essentially the same hazard and having substantially the same degree of protection against fire. The rates as fixed by the Kentucky Actuarial Bureau are based upon the potential fire hazard in each individual risk in accordance with the requirements of the Kentucky statutes and the fact that a particular store is owned by or leased to a corporation, partnership or individual owning or operating more than one store has no bearing on the premium rate for fire insurance on such building, or in any way affects the fire hazard.

Affiant states that, in his opinion, the fact that one owner owns or operates more than one store or more than one

department in a single store does not affect the fire hazard in any way, as to any particular store.

G. H. Parker.

(Duly verified.)

[fol. 140] NARRATIVE OF TESTIMONY OF SHIRLEY E. HAAS, GIVEN BEFORE CLARENCE E. WALKER ON THE TENTH DAY OF FEBRUARY, 1931

[Title omitted]

SHIRLEY E. HAAS testified as follows:

That he is a resident of Louisville, Kentucky, and is the Secretary of the Kentucky Food Distributors' Association, the Retail Grocers Association and the National Association of Retail Grocers.

That as Secretary of the Kentucky Food Distributors' Association he sent out about December the 6th, 1930, a bulletin to the grocery trade of the state of Kentucky, a copy of which bulletin was introduced in evidence as Exhibit 1, and which bulletin reads as follows:

"To the Grocery Trade of the State of Kentucky:

The retail sales tax law (anti-chain store bill) is being contested in the courts. If the courts decide against us it will be a victory for the chains and will cost you plenty. Read this letter and act quickly.

At the last session of the Kentucky Legislature that august body passed a retail sales tax law. That law is effective now and Kentucky merchants are compelled to file a schedule during January of 1931 indicating their sales for 1930.

This new law subjects you to the payment of a sales tax as follows:

[fol. 141] 1/20 of 1% on the first $400,000 of sales.
2/20 of 1% on the next $100,000 of sales.
5/20 of 1% on the next $100,000 of sales.
8/20 of 1% on the next $100,000 of sales.
11/20 of 1% on the next $100,000 of sales.
14/20 of 1% on the next $100,000 of sales.
17/20 of 1% on the next $100,000 of sales.
1% on all sales over $1,000,000.

This law, as originally planned was to be a straight 1% on all sales. The Kentucky Food Distributors Association insisted on the sliding scale indicated above. In addition, the Association was successful in writing into the bill a paragraph to the effect that all special state licenses could be credited against the sales tax.

For instance: If you pay $10.00 to handle oleomargarine; $10.00 to handle tobacco and $10.00 to handle soft drinks, this $30.00, or any part thereof, may be deducted from the amount of tax you may be subject to under the new law.

To illustrate: If your sales are $60,000 annually, your sales tax, according to the above schedule at 1/20 of 1%, would be $30.00. If you paid the three special licenses referred to heretofore, you will be given a credit of $30.00, consequently you will file a return showing your sales and by taking advantage of your credits the account will balance and you will pay nothing under the new law.

If the Association had not stepped in and insisted on a sliding schedule and credits for special licenses the tax would have been as follows:

1% of sales on a $60,000 business or $600.00 tax.

If your business amounts to $25,000 annually you would have been subject to a tax of $250.00. Using $25,000 as a basis of sales and with the schedule finally adopted of 1/20 of 1% your tax will be $12.50, subject of course to the deduction of any special licenses you might pay.

Now here is the crux of the situation and the reason that this letter is being sent you.

Any one knows that the State Legislature has a perfect right to instigage any legislation to take care of the state government expenses. One half of the amount derived from this tax is to go to the Penal and Charities Board for the upkeep and extension of our penal and charities institutions. The other half of the money derived under the law will go to retire the state debt.

This law is to be contested in the courts of the State of Kentucky and will unquestionably be carried to the Supreme Court of the United States. Those who are seeking to prove that the law is unconstitutional are taking it into the courts on the grounds that the sliding scale is discriminatory and thereby violates both the State and Federal Constitutions.

It is up to this Association to prove in the Courts that the sliding scale is not discriminatory and does not conflict with either the State or Federal Constitution.

[fol. 142] In order to do this we must have funds to carry the case into the courts. Suit is being filed now in the Franklin Circuit Court testing the constitutionality of the sliding scale end of this law. If the grocery trade does not supply legal talent to defend the sliding scale, the measure will have no champion. Consequently our opponents (chain stores) will use the best legal talent money can buy to set the law aside.

Each merchant in the State of Kentucky must subscribe $2.00 in order that the Association may engage the proper legal talent and thereby insure the independent merchants of this commonwealth appropriate representation in presenting its argument that the sliding scale is constitutional and should be upheld.

If this sliding scale is thrown out there is no doubt but what a flat 1% Sales tax law will be enacted and then the independents will be subject to the maximum tax instead of the minimum tax as is in evidence in the sliding scale.

Firms having two or more stores must couple their sales as one individual firm or institution. You can therefore readily see that chain institutions will be subject to the maximum tax while the independent will be subject to the minimum tax.

Our investigation has shown that very few independent retailers enjoy business in excess of $400,000. Our further investigation indicates that 92% enjoy a volume of less than $60,000, hence 92% of the independents will pay nothing under this new law and 8% will pay a very small tax. What a wallop the chains get by having to pay the maximum 1% under the sliding scale.

We know that one chain institution alone (and one in the grocery business by the way) will be subject to a tax under this new law in excess of $150,000.

The case is being taken into the courts this week and the emergency calls for immediate action. The Association has therefore made arrangements for proper legal talent to represent the grocers' interests. Your share in this is $2.00. Send it now. Do not wait a day. It is either pay $2.00 now or many many times that amount later.

Action please!

Very truly yours, Shirley E. Haas, Secretary.

That the statements contained in the bulletin are true to the best of his knowledge; that few independent retailers enjoy business in excess of $400,000 and that 92% enjoys a volume of less than $60,000 and that for that reason 92% of the independent retailers would pay nothing under the Gross Sales Law of Kentucky, and that the remaining 8% of the independents would pay a very small tax under the Act; that his figures apply particularly to the Grocery trade; that one grocery concern, viz: The Great Atlantic [fol. 143] & Pacific Tea Company, would be subject to a tax in excess of $150,000 under the law.

That about 2% of the merchants in the grocery business do above a quarter million dollars' worth of sales; that there is a breakdown at $249,999 and another from $250,000 to $499,999 and that the next breakdown is $500,000 to $1,000,000 and over $1,000,000; that there is no breakdown figure at $400,000; that he could not point out any independent retailer outside of multiple outlet stores and department stores that enjoyed a business in excess of $400,000 aside from Byck Brothers, in Louisville.

That about 800 or 1,000 bulletins similar to the one introduced in evidence were sent out to members of the Association; that upon request he attended the sessions of Kentucky Legislature at the time the Gross Sales Tax Law was passed, and that he attended one meeting of the Committee when the Bill was considered; that as a result he had personal knowledge of the statements made in the Bulletin with reference to the action of the Legislature.

That the sliding scale written into the Act was the one advocated by the Kentucky Food Distributors Association; that the Association suggested the paragraph in regard to crediting of special state licenses against the Sales Tax.

That the statement in the bulletin "suit is being filed in the Franklin Circuit Court attacking the constitutionality of the sliding scale and of this law" did not have reference to any particular suit but that at the time the statement was made he knew that suit was going to be filed; that the Chairman of the Penal and Charities Board, Judge Haswell, personally informed him that the Board was attempting to made certain purchases of land and certain alterations and improvements in Penal institutions and that they wanted to ascertain the amount of money that [fol. 144] they could expect from the law in order to lay out their plans.

That this information was given to him some time in October or November of 1931 and that Haas was of the opinion that his assistance was desired; that suit was eventually brought in the Franklin Circuit Court of Kentucky by a Mr. Moore against the State Board of Charities and Corrections of Kentucky; that Mr. Forrest Moore, the plaintiff, was a member of the Association of which Mr. Haas was Secretary, prior to and at the time the suit was instituted; that Mr. Haas never communicated with Mr. Moore about the suit; that Mr. Haas did not know whether Mr. Moore was present at the trial of the suit filed by him in Frankfort, and that Mr. Haas never communicated with Mr. Briggs, who was Mr. Moore's lawyer.

That the reference in the bulletin to suit being filed in the Franklin Circuit Court was not made in contemplation of the Moore suit, but was made with regard to a similar one on behalf of another man who had been picked out to file the suit; that Mr. Haas was informed through Leslie Morris, who represented the penal and Charities Board, that they would pick out someone as plaintiff to bring an action to test the law; that he mailed out a bulletin on December 27, 1930, which was addressed to the Grocery Manufacturers and Wholesalers in the State of Kentucky, which bulletin was introduced in evidence and reads as follows:

"To Grocery Manufacturers and Wholesalers in the State of Kentucky:

On December 9th we wrote you stating that a test suit had been filed in the Franklin Circuit Court to test the legality of House Bill No. 111, more appropriately termed 'the 1930 retail sales tax law.'

Since that time you doubtlessly have read in the press, confirmation of the above statement. You may think you are not interested in the outcome of this case, due to the fact that the law specifically states that the sales tax is to be levied only on retailers.

[fol. 145] While our state lawmakers were considering this sales tax measure, a Committee from this Association worked with them in an attempt to create a measure that would be of the most value to independents—were engaged in manufacturing, wholesaling or retailing.

One of the hardest battles, fought and won by this Committee, was to have our State law makers insert in the measure the word "retail". We fought over this one word from ten o'clock one evening until five o'clock the next morning before we could convince our State Representatives and Senators that a straight sales tax on all branches of business would be unsound.

Here is another copy of the bulletin we enclosed with your letter of December 9th which is written primarily to appeal to retail distributors. It sets forth the final bill enacted by the 1930 General Assembly.

House Bill No. 111 was the only tax measure passed by the 1930 Assembly. The State must have money to retire its public debt and to take care of the overcrowded condition in the State Penal and Charitable institutions. If this law fails to run the gauntlet of the courts, a special session of the Legislature will unquestionably be called and just what new measure will be passed we will leave to your imagination.

We have evidence from the best legal authorities in the United States that the law as it is written is constitutional, but we will have to supply the necessary legal talent to prove it. Won't you therefore not only send us your check for the $10.00 that we asked you for in our last letter, but get your sales force to work collecting $2.00 from the retailers as outlined in the enclosed bulletin?

A few wholesalers and manufacturers in Kentucky have responded gloriously and we thank them from the bottom of our heart-, but not enough to take care of the task at hand. If you want to save yourself an abundance of grief in the future, send $10.00 now and get your sales force busy collecting $2.00 from each retailer.

For your own protection, act at once.

Very truly yours, Shirley E. Haas, Secretary."

and that he sent out bulletin dated December 9, 1930, to the Wholesale trade, which bulletin was introduced in evidence, marked Exhibit 3 and reads as follows:

[fol. 146] December 9, 1930.

"To the Wholesale Trade:

A test suit has been filed in Franklin Circuit Court to test the legality of House Bill No. 111, which, as you know,

is the so-called Anti-Chain Store Tax Bill, passed at the last session of the Kentucky Legislature.

Independent wholesale and retail grocers have been called on to meet the emergency and supply legal counsel for the defense of this measure. The chain stores will use every measure at their command to have the bill declared unconstitutional. If we are not represented by competent legal counsel, there is a likely possibility of the chains finding some flaw that will reduce the law to a flat rate of 1% tax on all sales, whereas the present status of the bill protects independent retail grocers on a graduated scale of low rates.

The necessity for quick action on the part of the Kentucky Food Distributors Association in securing legal counsel made it impossible to consult all interested parties before obligating ourselves for the cost of defending this case through the courts. Those of us in position to know the importance of having legal representation felt safe in authorizing The Kentucky Food Distributors Association to employ legal counsel, and pro rata the cost among wholesale and retail grocers.

An assessment of ten dollars against each wholesale grocer, and two dollars against retail grocers will be ample to carry the case through the courts. Of course, all who realize the importance of winning this case will be more than glad to contribute the small per capita sum needed to supply legal counsel. However, the real problem is getting the message to the retail grocer, and collecting the two dollars. This obligation must be final on wholesale grocers, who are doubtless in better position to make the collections, through their salesmen, than any one else.

The enclosed bulletin, treating the case from the retailers point of view, explains the whole proposition in detail. Please read carefully, and arrange to get your salesmen at work with retail grocers as soon as possible. Just a few days of well directed effort on the part of your salesmen will clear up your financial needs, and protect independent wholesale and retail merchants against the likelihood of tremendous losses which might be the result of our failure to defend the measure.

More of the enclosed bulletins will be supplied you if desired for your salesmen to use in presenting the case to the retail trade.

We must get our money together not later than December 20. Please mail your check for ten dollars at once, and

get your salesmen to work with the least possible delay. It would be nothing short of a calamity to individual merchants if we fail to meet this emergency, and the cost would [fol. 147] be many times more than our present investment should we fail to keep House Bill No. 111 a law.

Yours respectfully, Shirley E. Haas, Secretary."

That he sent out bulletin dated January 24, 1931, addressed to the Wholesale Grocery Trade of the State of Kentucky; which bulletin was introduced and marked Exhibit 4, and reads as follows:

"To the Wholesale Grocery Trade of the State of Kentucky:

Some of the wholesalers in the State of Kentucky have received retail sales tax blanks from the State Tax Commissioner at Frankfort with instructions from the Commission that wholesalers must pay a retail sales tax on all sales made by them at retail. The instructions seem to imply that merchandise sold to restaurants, hotels, and institutions constitute a retail sale. This is not the case, according to a statement made to this office January 23rd, 1931, by Commissioner Glenn.

If you sell hotels, restaurants or institutions in wholesale quanties and at wholesale prices you are not subject to tax under the retail sales tax law. Therefore, you should not file a return with the Tax Commission, unless you actually carry on retail business.

This information is being passed on to you in order that you may thoroughly understand that the sales tax law passed by the last session of the Kentucky Legislature is purely a tax on retail sales only.

Respectfully yours, Shirley E. Haas, Secretary.

P. S.—Have you solicited your retail customers for $2.00 each as a subscription to the fund being created to furnish legal talent to our state authorities to prove the retail sales tax law constitutional? Assistance please!

S. E. H."

That to the best of his knowledge these were all the bulletins sent out to members of the Association relative to the [fol. 148] Gross Sales Law.

[fol. 149] AFFIDAVIT OF JAMES R. KARIBO

He is manager of Liggett's Drugstore, owned and operated by Louis K. Liggett Company, at 302 South Fourth Street, in Louisville, Kentucky. Has held that position since the store was opened at that point on October 14, 1930.

The Louis K. Liggett Company owns and operates throughout the United States what is known as a system of chain drug stores, but it owns and operates only one drug store in the State of Kentucky.

As Manager of Liggett's Louisville Store, affiant on February 4, 1931, received through the United States mail, in due course, the attached circular letter written upon a letterhead of the Kentucky Pharmaceutical Association, Secretary's Office, 228 West Main Street, Frankfort, Kentucky, which was enclosed and received in the attached envelope, postmarked as mailed at Frankfort, Kentucky, on February 3, 1931, at 6 P. M., and bearing the return address of J. W. Gayle, Secretary, Kentucky Pharmaceutical Association, 228 West Main Street, Frankfort, Kentucky. Such letter and envelope are filed herewith and made part of this affidavit, marked "Exhibit 1."

The attached letter speaks for itself, as to its terms, and therefore affiant will make no comment upon it further than to say that the letter bears the facsimilie signature of J. W. Gayle, Secretary of the Kentucky Pharmaceutical Association, with which signature affiant is familiar because he has [fol. 150] repeatedly seen it upon the licenses issued to registered pharmacists employed in the drug store managed by affiant, said licenses being issued and signed by said J. W. Gayle in his capacity as Secretary of the State Board of Pharmacy of Kentucky.

James R. Karibo.

(Duly verified.)

EXHIBIT 1 TO AFFIDAVIT OF JAMES R. KARIBO

(Kentucky Pharmaceutical Association)

January 16, 1931.

To the Druggists of the State of Kentucky:

The retail sales tax law (anti-chain store bill) is being contested in the courts. If the courts decide against us it

will be a victory for the chains and will cost you plenty. Read this letter and act quickly.

At the last session of the Kentucky Legislature that august body passed a retail sales tax law. That law is effective now and Kentucky merchants are compelled to file a schedule during January of 1931 indicating their sales for 1930.

This new law subjects you to the payment of a sales tax as follows:

1/20 of 1% on the first $400,000 of sales.
2/20 of 1% on the next $100,000 of sales.
5/20 of 1% on the next 100,000 of sales.
8/20 of 1% on the next 100,000 of sales.
11/20 of 1% on the next 100,000 of sales.
14/20 of 1% on the next 100,000 of sales.
17/20 of 1% on the next 100,000 of sales.
1% on all sales over $1,000,000.

[fol. 151] The sliding scale, as indicated above, was inserted in the measure for our benefit. Credit for special license taxes was also made a part of the measure to lessen our burden under the act.

For instance: If you pay $5.00 to operate a soda fountain; $10.00 to handle tobacco and $10.00 to handle soft drinks and ice cream, this $25.00 or any part thereof, may be deducted from the amount of tax you may be subject to under the new law. Prescription liquor sales are not taxable. State restaurant license and playing card licenses are also deductible from the tax.

To illustrate: If your sales are $50,000 annually, your sales tax, according to the above schedule of 1/20 of 1%, would be $25.00. If you paid the three special licenses referred to heretofore, you will be given a credit of $25.00, consequently you will file a return showing your sales and by taking advantage of your credits the account will balance and you will pay nothing under the new law.

If the sliding scale had not been adopted and credits were not allowed for special licenses, the tax would have been as follows:

1% of sales on $50,000 business or $500.00 tax.

If your business amounts to $25,000 annually you would have been subject to a tax of $250.00. Using $25,000 as a basis of sales and with the schedule finally adopted of 1/20

of 1% your tax will be $12.50, subject of course to the deduction of any special licenses you might pay.

Any one knows that the State Legislature has a perfect [fol. 152] right to instigate any legislation to take care of the state government expenses.

One half of the amount derived from this tax is to go to the Penal and Charities Board for the upkeep and extension of our penal and charitable institutions. The other half of the money derived under the law will go to retire the state debt.

The law is being contested in both State and Federal courts and will unquestionably be carried to the Supreme Court of the United States. Those who are seeking to prove that the law is unconstitutional are taking it into the courts on the grounds that the sliding scale is discriminatory and thereby violates both the State and Federal Constitutions.

In order to do this we must have funds to protect the law in the courts. The case has already been heard in the Franklin Circuit Court but no decision has as yet been handed down. Another suit has been filed in the United States District Court at Covington. One of the courts will no doubt throw the case out on the grounds that it has no jurisdiction or the cases will be consolidated. The battle is being waged on the sliding scale end of the law and if the independent trade does not supply legal talent to defend the sliding scale the measure will have no champion. The opponents (chain stores) will use the best legal talent money can buy to set the law aside.

Each merchant in the State of Kentucky must subscribe [fol. 153] $2.00 in order that we may engage the proper legal talent and thereby insure the independent merchants of this commonwealth appropriate representation in presenting its argument that the sliding scale is constitutional and should be upheld.

If this sliding scale is thrown out there is no doubt but what a flat 1% sales tax law will be enacted and then the independents will be subject to the maximum tax instead of the minimum tax as is in evidence in the sliding scale.

Firms having two or more stores must couple their sales as one individual firm or institution. You can therefore readily see that chain institutions will be subject to the

maximum tax while the independent will be subject to the minimux tax.

Our investigation has shown that very few independent retailers enjoy business in excess of $400,000. Our further investigation indicates that 90% enjoy a volume of less than $50,000, hence 90% of the independents will pay nothing under this new law and 10% will pay a very small tax. What a wallop the chains get by having to pay the maximum of 1% under the sliding scale.

We know that one chain institution alone will be subject to a tax under this new law in excess of $150,000.

The case was taken into the courts last week and the emergency calls for immediate action. Arrangements have been made for proper legal talent to represent the independent interests. Your share in this is $2.00. Send it [fol. 154] now. Do not wait a day. It is either pay $2.00 now or many, many times that amount later.

Action please!

Very truly yours, J. W. Gayle, Secretary.

P. S.—Make all checks payable to the Kentucky Pharmaceutical Association and mail to J. W. Gayle, Secretary, Frankfort, Kentucky.

(Envelope)

After 5 days return to J. W. Gayle, Secretary Kentucky Pharmaceutical Association, 228 West Main Street, Frankfort, Ky.

Frankfort, Ky., Feb. 3, 1931, 6 P. M.

Liggetts Drug Store, 302 S. 4th Str., Louisville, Ky.

AFFIDAVIT OF N. A. BASH

He is District Manager at Louisville, Kentucky, of the Hook Drug Company, which operates five retail drug stores in Louisville, Kentucky, four known as Hook Drug Company stores and one known as the E. H. Bennett Drug Company store, these being the only stores operated by it in the State of Kentucky. Has held his position since September, 1927.

[fol. 155] The Hook Drug Company owns and operates in Kentucky and Indiana what is known as a system of chain

drug stores, embracing 38 stores in Indiana, to which should be added 5 stores in Louisville, making 43 stores in all operated by it.

He is a registered pharmacist in Kentucky, and by virtue of such registration he is, pursuant to Section 2627, Kentucky Statutes, a member of the Kentucky Pharmaceutical Association, which includes all registered pharmacists in the State.

He has read the affidavit of James R. Karibo and the circular letter attached thereto as "Exhibit 1," which is addressed under date January 16, 1931, "To the Druggists of the State of Kentucky" and signed by J. W. Gayle, Secretary, on behalf of the Kentucky Pharmaceutical Association, the said Gayle being also Secretary of the State Board of Pharmacy of Kentucky. By way of explaining the circumstances under which said circular letter was sent out, affiant makes the following statement:

In the retail drug trade in Louisville and in the larger cities of Kentucky there is keen competition among the so-called "National Chains," several of which own and operate retail drug stores in Kentucky, namely, Hook's, Walgreen's, Liggett's, Dow's, and Whelan's, the latter being known locally as Taylor Drug Company Stores. There is also competition in the retail drug business between the so-called "chain" drug stores on the one hand and the so-[fol. 156] called "independent" drug stores (that are owned or operated either as individually-owned drug stores or as locally-owned chains) on the other hand. Accordingly the so-called independent or individually-owned drug stores have attempted in every way to secure an advantage to themselves by advocating the enactment and enforcement of such legislation as the 1930 Kentucky "Gross Sales Tax Law" in order to handicap chain drug stores and other drug stores having a large volume of sales, with a heavy burden of taxation, from which all the so-called independent drug stores or locally-owned chains are practically exempt. In fact, fully 90 per cent of them will pay no tax under the law, and the remaining 10 per cent will pay but a very small tax.

To that end, the Secretary of the Kentucky Pharmaceutical Association has sent out to its members, who are widely scattered throughout the State and who include all pharmacists and assistant pharmacists registered in Kentucky, and even to some druggists who are not members,

the circular letter addressed under date January 16, 1931, "To the Druggists of the State of Kentucky," a signed copy of which letter is attached to the affidavit of James R. Karibo.

Noah A. Bash.

[fol. 157] AFFIDAVIT OF H. C. AMUSTUTZ

H. C. Amstutz states that he is the manager of the J. C. Penney Company retail dry goods store at Paducah, Kentucky; that he has been a resident of said city since January 1, 1928; that by virtue of his employment he is familiar with the general retail situation in the city of Paducah and particularly with the retail dry goods and specialty business in said city; that he is familiar with the location, management and type of the various other stores in said city; that he has had an opportunity to observe the amount and character of their business; that basing his opinion upon these various factors and his own experience and general knowledge of the retail trade and by comparison with his own store and sales therein he is able to estimate the sales made by the particular stores hereinafter mentioned. Affiant states:

1. That the Paducah store of the J. C. Penney Company is divided into the following departments, to-wit:

A. Wash Goods, Draperies, Rugs and House Furnishings.

C. Knitwear—All kinds including Hosiery, Underwear, and Lingerie.

D. Better dress and Silk yard fabrics.

E. Women's and children's Ready-to-Wear, including Coats, dresses and accessories.

F. Complete line of rubber, Felt and Leather Footwear for the entire family.

G. Toilet articles, notions and miscellaneous accessories.

H. Men's and boys' clothing.

[fol. 158] K. Women's Millinery, Men's Hats and caps.

L. Work Clothes, dress shirts and general haberdashery.

2. That the names and estimated gross sales and number of employees of all other department and specialty retail stores known to affiant in the city of Paducah are as follows, to-wit:

	Estimated sales
Paducah Dry Goods Company	$350,000
Rudy's Department Store	250,000
Lawenthal Ready-to-Wear	80,000
Wallerstein Men's Shop	90,000
Weille's Men's & Women's Apparel	200,000
Finkle Store	100,000
Bright Bros.	100,000
Guthrie Dept. Store, F. W. Woolworth Co., Montgomery Ward Co., Kresge Co., Sears, Roebuck & Co., W. T. Grant & Co., New System Dept. Store	Excess of 50,000
Approximately 10 others	Below 50,000

3. That of the other retail merchants in the city of Paducah in other lines than dry goods and specialties as set out above, there are the following:

Name and type of store	Estimated sales in excess of
None	$1,000,000
None	900,000
None	800,000
None	700,000
None	600,000
None	500,000
None	400,000

Approximate number below 400,000 as shown by directory.

4. That affiant has lived in the city of Paducah with his family, and now owns his own home, since January 1, 1928.

That he is a member of the following local civic organizations:

[fol. 159] Rotary Club.

Member of Local Masonic Lodge.

Manager and Wife member of Local Eastern Star.

Entire family liberal contributing members of local church.

Red Cross.

Member of Municipal Golf Club.

Member of Y. M. C. A. (just recently closed).

Retail Merchants Association

5. That the Paducah store of the J. C. Penney Company has contributed to the following organizations and charities during the year 1930 in the amounts set opposite to their names:

Cousin Molly	$15.00
Volunteer Prison League	10.00
Paducah Board of Trade	25.00
Paducah Boys Scout	25.00
Christian Record Publishing Co.	2.00
Augusta Tilghman High School	5.00
Kentucky Children Home Society	3.00
Noble Park Playground	50.00
McKee Button Factory (New Industry Committee)	35.00
Retail Merchants Association	49.50
Salvation Army	5.00
Cumberland Presbyterian Church	2.50
Cousin Molly Milk Fund	5.00
Retail Merchants Assn. (Fire Convention Funds)	4.00
Kentucky Progress Commission	25.00
Mammoth Cave Natl. Park Association	50.00
Paducah, Mother Club	5.00
American Red Cross	5.00
Settlement House	5.00
McCracken County Public Health League	15.00
Christmas Decoration—Main Street	12.50
Total	$353.50
City License	50.00
	$403.50

6. That affiant, as manager of the Paducah store of the J. C. Penney Company, has charge of practically all matters relating to said store as though he was the sole proprietor thereof; that he keeps a bank deposit on behalf of [fol. 160] the J. C. Penney Company in a local bank of Paducah from which he pays the employees of the store and other expenses and remits at intervals to the J. C. Penney Company head office; that he has charge of all buying and the selection of all merchandise for the Paducah store from the general purchases of the J. C. Penney Company buyers; that he determines what lines and what departments he

can handle to the best advantage and all other matters of local concern.

That each department in the Paducah store is run practically apart from other departments, as though it was itself a separate store, competing with similar departments in other stores and with specialty stores selling that character of goods exclusively. For example: The millinery department competes with purely millinery stores, the shoe department with shoe stores, the men's furnishings department with haberdashery stores, etc.

That each department is charged, in bookkeeping, with its floor space, its proportion of advertising, payroll, taxes, rent, heat, light and other items of general overhead expense like so many separate stores under one management.

That no department in the Paducah store has sales in excess of $400,000.00, the sales for the whole store aggregating only $312,400.00 for the year 1930; that the sales since March 17, 1930, for the remainder of the year amount to [fol. 161] approximately $262,140.00; that if each department was taxed only as a separate unit the minimum rate of 1/20th of one per cent would be applied to sales in said store, whereas by virtue of the fact that the departments are operated by the same company and not by different owners and by virtue of the fact that the J. C. Penney Company owns twenty-one stores in the State of Kentucky the tax chargeable to said Paducah store amounts to almost 1% of its entire gross sales, and considerably more than 1% of the net sales thereof; that said tax amounts to almost twenty times the amount paid by practically all of affiant's competitors.

Affiant states that under his contract as manager of the Paducah store for the J. C. Penney Company, he receives a percentage of the profits of said store in addition to his salary; that he is further given the privilege of purchasing stock in the said company at a price below the current market quotations thereon with the result that he is practically a partner with his employer in the operation of said store; that the imposition of this tax would directly affect the income which affiant receives from said business by reducing the profits therefrom and also reducing the amount of sales made by said store due to the inability of said store to meet competition in various highly competi-

tive lines if this tax must be added to the price of articles sold in said lines.

Affiant states that all of the foregoing statements are true, as he verily believes.

H. C. Amstutz.

(Duly verified.)

[fol. 162] STATEMENT RE SIMILAR AFFIDAVITS

Similar affidavits to that of H. C. Amstutz were filed by the following managers of the J. C. Penney Company stores in Kentucky covering the same facts in their application to their particular communities:

Cities of the Second Class:

L. M. Ross	Lexington, Ky.

Cities of the Third Class:

C. R. Leininger	Bowling Green, Ky.
E. R. Probasco	Corbin, Ky.
B. E. VanAntwerp	Frankfort, Ky.
W. G. Howell	Henderson, Ky.
E. C. Purvis	Hopkinsville, Ky.
M. S. Gesley	Maysville, Ky.
A. C. Miller	Middlesboro, Ky.
O. A. Rhodes	Owensboro, Ky.

Cities of the Fourth Class:

W. T. Morgan	Central City, Ky.
W. G. Jenkins	Georgetown, Ky.
Robert Wright	Madisonville, Ky.
H. H. Craven	Mayfield, Ky.
T. B. Jones	Mt. Sterling, Ky.
P. O. Wolverson	Paris, Ky.
C. W. Gowin	Princeton, Ky.
B. E. Willis	Richmond, Ky.
J. D. Delano	Winchester, Ky.

Cities of the Fifth Class:

J. A. Gude	Glasgow, Ky.
B. A. Aistrop	Lancaster, Ky.

The testimony of the foregoing 20 witnesses is in all essential respects identical with the testimony of H. C. Amstutz, and the effect thereof is simply cumulative—hence these affidavits are omitted for the sake of brevity.

[fol. 163] AFFIDAVIT OF DOLPH WILE

He is the President and chief officer of the Wolf-Wile Company of Lexington, Kentucky. The Wolf-Wile Company operates the largest retail department store in Lexington. He has been in the department store business for thirty years and was one of the organizers of the Wolf-Wile Company.

By virtue of his employment and experience in the department store business and in the retail dry goods business, he is familiar with the general retail situation in the City of Lexington, Kentucky. He is familiar with the location, management and type of the various other stores in Lexington and over a period of a great many years he has had an opportunity to observe the amount and character of their business. Basing his opinion upon these various factors and his own experiences and general knowledge of the retail trade, and by comparisons with his own store and the sales made therein, he is qualified to estimate the sales made by the particular stores herein mentioned.

He has made a survey of the City of Lexington, using the classified telephone directory as a basis for obtaining the names of the various stores, and in his opinion the following are the only stores in the City of Lexington, having annual sales in excess of $400,000.00:

(Affiant here lists seven stores by name and address.)

[fol. 164] Basing his opinion as aforesaid, he estimates that there are approximately 650 other retail stores in said city having annual sales of less than $400,000.00.

He has read the affidavit of Mr. Robert J. McKim, President of the Stewart Dry Goods Company in Louisville, and the facts which he has set out therein in regard to the discrimination against department stores under the 1930 Kentucky Sales Tax Law are true in principle, and are applicable to the situation in Lexington, in the same manner

in which he has demonstrated their application to the City of Louisville.

Dolph Wile.

(Duly verified.)

AFFIDAVIT OF C. H. PARSONS

He is the President and chief officer of the Parsons-Faulkner Company of Ashland, Kentucky. The Parsons-Faulkner Company operates the largest retail department store in Ashland. He has been in the department store business for eleven years and was one of the organizers of The Parsons-Faulkner Company.

By virtue of his employment and experience in the department store business and in the retail dry goods business, of Ashland, Kentucky, he is familiar with the location, management and type of the various other stores in Ashland, and over a period of a great many years he has had an opportunity to observe the amount and character of [fol. 165] their business, basing his opinion upon these various factors and his own experience and general knowledge of the retail trade, and by comparisons with his own store and the sales made therein, he is qualified to estimate the sales made by the particular stores herein mentioned.

He has made a survey of the City of Ashland, using the classified telephone directory as a basis for obtaining the names of the various stores, and in his opinion his is the only store in the City of Ashland, having annual sales in excess of $400,000.00; his sales amounting to approximately $450,000.00.

Basing his opinion as aforesaid, he estimates that there are approximately 300 other retail stores in said city having annual sales of less than $400,000.00.

He has read the affidavit of Mr. Robert J. McKim, President of the Stewart Dry Goods Company in Louisville, and the facts which he has set out herein in regard to the discrimination against department stores under the 1930 Kentucky Sales Tax Law are true in principle, and are applicable to the situation in Ashland in the same manner in which he has demonstrated their application to the City of Louisville.

C. H. Parsons.

(Duly verified.)

[fol. 166] AFFIDAVIT OF MILTON MARX

He is a member of the partnership of Louis Marx and Brothers. They conduct retail stores for the sale of furniture in the cities of Covington and Newport, Kentucky, and he has had charge of the Newport store for the last forty years. Because of his experience in business in the city of Newport he is familiar with the general retail situation in that city. He is acquainted with the location and type of all the larger retail stores in Newport, and he has had an opportunity to, and has observed the nature, extent and character of their businesses.

In his opinion there is not a single store in the city of Newport which has sales over $400,000.00. There are some merchants, however, in this city who have sales in Kentucky which exceed $400,000.00, but this volume is only caused by virtue of the fact that they operate stores in the city of Covington in addition to the store operated by them in the city of Newport. In his opinion the number of such merchants does not exceed five.

Milton Marx.

(Duly verified.)

AFFIDAVIT OF ROBERT W. LYONS

He is executive vice president of the National Chain Store Association, and has had extensive experience as a lawyer, economist and financier, qualifying him as expert [fol. 167] to testify as to the facts set out in his affidavit.

The best available records disclose that retailing in the United States is accomplished through approximately 1,500,000 retail stores, of which number approximately 150,000 retail stores are units in some "chain" of stores. Study further discloses that these 1,500,000 retail outlets do approximately forty-four billion dollars worth of business annually. Study further discloses that these 150,000 "chain stores" do a known volume of approximately 13.5% of the total annual volume of retail business in the United States, or approximately six billion dollars annually exclusive of petroleum products sale. These 150,000 "chain store" retailing units are owned and controlled by approxi-

mately 8,000 unrelated and distinct management companies with a nation-wide distribution of stock ownership among several hundred thousand shareholders. Competition among the many chain store operating companies is very intense and keen and no cooperation or confederation of any kind exists or has existed for the purpose of lessening such competition.

There are approximately 25,000 retail stores in the State of Kentucky, doing an annual volume of sales of approximately $535,000,000. Of the total number of retail stores in the State of Kentucky, about 24,000 are single stores of "individual merchants" and 976 are "chain stores." The annual volume of sales of the single stores of "individual merchants" in Kentucky is approximately $462,750,000, [fol. 168] and the annual volume of sales of "chain stores" in Kentucky is approximately $72,225,000. There are about 24,108 retail merchants in the State of Kentucky doing an annual volume of sales of $535,000,000. In the recent retail and wholesale trade census for eleven cities, commonly known as the Eleven Cities Census, conducted by the United States Bureau of the Census, an analysis was made of the signifigant facts of retail trade in an area embracing roughly, 10% of the retail sales of the United States. This study disclosed that 98.23% of all independent retail stores do an annual business of less than $250,000 and that only 1.77% of all independent retail merchants do an annual volume of business in excess of $250,000 each. Applying these ratios to the State of Kentucky, it is mathematically certain that 23,682 merchants do an annual business of less than $250,000 each and less than 400 merchants do an annual business in excess of $250,000. While no definitive study has been made to show what percentage of retail merchants do an annual volume of business in excess of $400,000, yet it is mathematically certain to be only a fraction of 1% of the total number of merchants. Only 14 of the "chain store" merchants operating in Kentucky do an annual volume of business in that state in excess of $400,000. From available information, it is my belief that not more than 25 other merchants in Kentucky do an annual volume in excess of $400,000.

The chain store system of retail merchandising does not present any inherent or fundamental advantages over the

[fol. 169] single store unit of merchandising. Repeated study under the auspices of the U. S. Government, the U. S. Chamber of Commerce, various universities and many independent research organizations have emphasized that retail merchandising success is determined not by the type of merchandising structure or mechanism, but by the degree of the merchant's adherence to well established principles of merchandising. The fundamental requirements of successful merchandising which apply equally and are available equally to "chain store" and single stores of "individual merchants" are as follows:

1. A retail store must be well located, must have ready access to consumers.
2. The store must be attractive in its interior design and must constitute a pleasant trading place for its consumers.
3. It must maintain a steady supply of adequate stocks of goods and salable merchandise.
4. The factor of service must be carefully weighed and measured in relation to the needs and demands of customers and the requirements of competition.
5. The relations of employees to consumers must be carefully studied and developed.
6. Good management must be present.
7. Prices must be fair.

The "individual merchant," through his familiarity with the community and through the co-operation of established [fol. 170] realtors, is perhaps better able to secure attractive leases than the "chain stores."

In the matter of store design, a great many independent organizations exist to assist the owner of one store in making his place modern and attractive. The service departments of the widespread buying and selling organizations are giving expert guidance to the individual merchant in this field. Manufacturers of store fixtures and equipment, with their designing and engineering departments, are also assisting in this work.

The "chain stores" have no monopoly or control of merchandise of any character. There is not a single class or quality of merchandise in which they deal that is not available to the "individual merchant" operating the single unit store, nor does the factor of large scale buying differen-

tiate the "chain store" operator from the "individual merchant" in respect to this element. It is clear, that the advantage of buying in quantity arises from the amount of capital employed and the amount of consumption available and not from the fact that the sales are made through multiple outlets rather than through one outlet. The economies in quantity buying do not continue beyond a certain point. A "chain store" owner or an "individual merchant" may acquire a car load of merchandise at a more reasonable figure both as to price and as to transportation cost, but the second car load so acquired will not necessarily represent a additional saving in price and in freight.

[fol. 171] Economists have generally recognized that the industrial prosperity of the United States rests upon the production of standardized articles in large volume, at low cost per item. While there are several distinct practices in retailing as it relates to volume and price, yet it is well recognized that a very important modern trend in retailing has been the development of large volume sales at the lowest possible prices. Other retailers have attained marked success by specialization in service and products at higher prices. The "chain stores" have been conspicuous in developing distribution on a large volume and low cost price per item basis with the resulting benefit to the great mass of the American consuming public. The introduction of efficient methods in the distribution of merchandise has necessarily resulted in stimulating general competitive conditions; has resulted in reducing operating expenses which, in turn, has made it possible to sell the goods to the public at lower prices with the result that the entire public has benefited from the competition instituted by the "chain stores."

In order to accomplish large volume sales at a low price per unit sale, the retailer is required to accept a small percentage of profit on individual sales which is illustrated by the fact that during the year 1930 the average earnings of all department stores handling great varieties of merchandise were only 1½% of their net sales and an even smaller percentage of gross sales because of the established practice of department stores in accepting the return of unsatis-

[fol. 172] factory merchandise and the fact that such merchandise represents a substantial volume which is neces-

sarily deducted from gross sales, thereby inevitably modifying the percentage above given. In this connection it should be noted that the best managed companies in the retail grocery field are able to earn on their large volume of sales only from 1½ to 2% net. Figures from the extensive department store studies for 1928 of the Harvard Bureau of Business Research show that department stores with set sales of less than a million dollars are not able to earn as much as 1% on sales and that the earnings of stores with sales above $1,000,000 average only 1.96% of sales.

Because of the wide variation between gross sales and net sales, it is obvious that a tax of 1% on gross sales will command a tax payment greatly in excess of 1% on net sales. Such a tax will consume a large proportion of the net earnings of "chain stores" and department stores; the amount consumed by such a tax will vary from 50% to 66⅔% of all the net earnings of stores falling within the above averages.

Furthermore, a sales tax so accelerated as to place disproportionate burdens upon various classes of retailers cannot as a practical matter be shifted to the consumer because of the fact that those who pay the highest rate are forced to compete with those who pay the lowest rate or nothing.

Furthermore, the retail price of many products is determined by Interstate or even International competition and [fol. 173] the Kentucky retailer is powerless to successfully establish prices out of line with the market price so fixed. Kentucky retailers must also compete with various non-resident mail order and catalogue houses and all Kentucky retailers located in cities close to the State line are forced to compete with merchants across the State line who suffer from no such tax.

A disproportionately accelerated tax results in the further inequality of requiring the Kentucky department store, with a million dollars of aggregate sales, to compete at a disadvantage to its various departments with "chain store" specialty shops doing a larger volume of net sales in their particular line than does the department store while being required to pay only 1/20th as much tax, or

perhaps none. This is illustrated by the case of Levy Brothers of Louisville, Kentucky, whose sales exceed a million dollars and who must compete on the sale of men's clothing with the Louisville store of the Richman Brothers Company, which is the only store of this company in Kentucky, but directly related to many other large stores in a national system. In the face of such competition, Levy Brothers cannot possibly raise their men's clothing prices to the consumer in order to offset the 1% tax which they will pay. Such a tax would necessarily come out of earnings and frequently out of capital and would be prohibitory and confiscatory on retail grocery store and department store enterprises.

The best available figures indicates that the average operating expense in retail grocery enterprise is about 18% [fol. 174] of gross sales. It is manifest, therefore, that a tax of 1% on gross sales would, at a single stroke, increase the operating expenses of retail enterprise by 5.55%. Because of the intense price competition which characterizes all branches of present-day retail trade, it would be impossible for a limited group of retailers to readjust their retail price so as to absorb an additional operating expense of 5.55%.

There is a common notion, which is quite unfounded, that certain types of retailing establishments enjoy special advantages not available to other types of retailers and that certain taxes should be based upon distorted graduations designed to correct existing inequalities. An examination of competition in the retail grocery field will indicate the fallacy of such reasoning. The "chain stores" were the first to reduce food retailing to a basis of operating efficiency. It appeared temporarily that by the introduction of scientil-c management into the field of retailing, "chain stores" had secured a distinct advantage over competitive retailers. Almost immediately, however, there began to develop a nation-wide movement among independent retailers to group themselves into co-operative organizations known as "voluntary chains." Such organizations perform for their members much the same function performed by the regular "chain stores" in all matters of group buying, sales and display service, equipment, layout, advertising, accounting and stock control systems, etc. There are at the present time, more than 500 of these so-

called "voluntary chains" of independent retailers, com-
[fol. 175] prising more than 60,000 retail stores. A number of such "voluntary chain" store organizations operate in the State of Kentucky, among which are the following:

Independent Grocers' Alliance.
Associated Community Stores.
James Grocery Company.
Ohio Valley Grocery Company.
Merchants Wholesale Grocery Company.
National Grocery Company.

The advantages derived by membership in the "voluntary chain" are practically identical with the advantages enjoyed by the regular "chain store." Each represents a fundamental attempt to bring organized intelligence and scientific methods to the operating problems of retail distribution. By pooling their buying resources, the members of the so-called "voluntary chains" are able to purchase their supplies on an equal footing with any existing competition. The development of the "voluntary chain" has made it possible for the jobber to materially reduce his handling, warehousing, shipping, unloading, clerical and selling expenses, and the savings thus effected are passed on to the retailer in the form of reduced prices, dividends or bonuses.

The retailer member of the "voluntary chain," furthermore, gets the advantage of the very best supervision and advice, with the result that his stock of merchandise does not exceed that of the average regular "chain store" and his turnover of inventories is quite often more rapid than that of the regular "chain store," thus saving him sub-
[fol. 176] stantial interest on invested capital. Like the regular "chain stores," the members of the "voluntary chain" are able to economize in their advertising expenses and secure the maximum results at the minimum of cost. Even where the individual retailer is not affiliated with the "voluntary chain" or co-operative organization, he enjoys many advantages in purchasing his supplies which the "chain store," because of the magnitude of its requirements, cannot enjoy. In purchasing butter, eggs, apples, potatoes and all kinds of vegetables and garden crops, the individual retailer has access to individual farmers or producers from whom he can purchase in small quantities, on a day-by-day basis, and to whom he can often make

payment for such purchases by exchanging other merchandise in which he has a substantial margin of profit. As against such opportunities, the "chain store" must necessarily purchase in large quantities which are delivered to a central warehouse from which such quantity purchases must be redistributed to the individual store. The various wholesale and retail grocery associations of America have repeatedly insisted that their respective members could purchase and distribute at retail just as cheaply as the "chain store." The truth of this statement is obvious and "chain store" companies have repeatedly had the experience of opening a new store in an apparently favorable neighborhood only to find that previously established retailers were so alert and efficient as to make it advisable to close said store. Furthermore, "chain store" operating [fol. 177] companies have often operated a new store successfully for a year or two years in competition with an indifferent retailer who has suddenly awakened to the necessities of competition and so thoroughly adjusted himself to it as to make it unprofitable for the "chain store" to continue in that neighborhood.

Almost without exception, the existing differences in price and value offered by the "chain store" and competitive merchants can be traced directly to the differences in the service rendered by these respective types of retail establishments. In the matter of service to customers, the alert, individual merchant may easily have many advantages over his "chain store" competitor. His more intimate knowledge of the tastes and peculiarities of his community, his capacity to render service of many kinds extending beyond the boundaries of those rules and regulations which are necessary to "chain store" operation, give him a distinct advantage in building customer good will. He has a great advantage over the "chain store" in directing his employees, in the general management of his store, and in the rapid adjustment of his prices to meet competition and is always immediately aware of every circumstance and requirement of his local situation.

There is a common misapprehension to the effect that "chain store" competition has resulted in driving out of business the individual or so-called "independent mer- [fol. 178] chant." The error of this conclusion is clearly indicated by a study of this question conducted by Dr. Paul C. Olsen of the University of Pennsylvania (following the

recent Louisville Grocery Survey, conducted under the auspices of the United States Department of Commerce), in order to determine the exact influence of "chain store" development upon the mortality of competitive retailers in the grocery field. Dr. Olsen studied two periods of nine years each and so widely separated in point of time that in the first period, there were practically no "chain stores" in existence and in the second period, "chain stores" had reached the very peak of their development. The first period studied was from 1891 to 1899, inclusive. Dr. Olsen's study discloses that from 1891 to 1899, inclusive, new retail grocery merchants entered the field in Louisville at the average rate of 23% per annum. The year by year figures for this period are as follows:

1891	24 per cent
1892	24 per cent
1893	22 per cent
1894	22 per cent
1895	23 per cent
1896	22 per cent
1897	21 per cent
1898	22 per cent
1899	23 per cent
Average	23 per cent

Dr. Olsen's study also discloses that during this period from 1891 to 1899, inclusive, retail grocery merchants failed in Louisville at the average rate of 23% per annum. In other words, during this early period, when there was no [fol. 179] "chain store" competition, the death rate among Louisville retail grocery businesses equaled 100% of the birth rate of such businesses. The year by year mortality figures for this period are as follows:

1891	22 per cent
1892	22 per cent
1893	22 per cent
1894	21 per cent
1895	27 per cent
1896	22 per cent
1897	23 per cent
1898	21 per cent
1899	24 per cent
Average	23%

Between the years 1921 to 1929, inclusive, chain stores reached their peak development in the City of Louisville and yet Dr. Olsen's survey discloses that during this period the birth rate for new businesses in the retail grocery field was 25% per annum. The year by year figures are as follows:

1921	25 per cent
1922	25 per cent
1923	25 per cent
1924	24 per cent
1925	26 per cent
1926	26 per cent
1927	25 per cent
1928	24 per cent
1929	22 per cent
Average	25%

Dr. Olsen's study also discloses that during the period from 1921 to 1929, the mortality rate among Louisville retail grocers fell substantially below the birth rate of said retail grocers—the mortality rate during this period averaging only 24% per annum as against a birth rate of 25% per annum. The average by year mortality figures for this [fol. 180] period are as follows:

1921	22 per cent
1922	21 per cent
1923	21 per cent
1924	25 per cent
1925	24 per cent
1926	27 per cent
1927	24 per cent
1928	24 per cent
1929	26 per cent
Average	24%

Even the most superficial examination will disclose that the so-called "chain stores" have been no more immune from failure than has any other class of commercial enterprise. While it often happens that the failure of a "chain store" organization represents such a large amount of capital and such substantial business problems that some larger

or more successful organization absorbs it rather than to allow it to liquidate in bankruptcy, just as it happens in any other class of business where the units are large, the fact nevertheless remains that there have been many substantial "chain store" failures, among which are the following:

A. A. Adams Stores.
National Drug Company.
Schulte United.
Neve Company.
National Grocery Company of Detroit.
Clarence Saunders Stores.
Almar Stores.
Page & Shaw.
Continental Chain Store Corporation.
City Stores Company.
G. & M. Stores.
Southern Stores Corporation.
Remington Hardware Stores.

[fol. 181] Kentucky has had its representation among the list of "chain store" failures. The following "chain store" firms formerly operated in Kentucky and have either gone out of business through failure or gone into receivership or some equivalent re-organization program:

Home Owned Stores.
Cohn Stores.
United Chain Stores.
Clarence Saunders Stores.
Schulte Stores.

It is reasonable to expect that if a 1% gross sales tax representing such substantial increase in operating cost, is added to the expense of doing a "chain store" business in the State of Kentucky, the resultant hardship will substantially increase the list of such failures.

Robert W. Lyons.

(Duly verified.)

AFFIDAVIT OF JOHN B. BONHAM

He is vice president of the Kroger Grocery and Baking Company, and is familiar with practically every phase of

the grocery, meat and vegetable business as well as with the general economics of retail trade.

(This witness's testimony is principally concerned with the situation in regard to chain grocery stores, and is therefore largely omitted in this narrative.)

[fol. 182] His experience is that earnings or net profits do not increase because of an increase in sales volume or in relation thereto.

There are many other factors which affect profits or earnings. Sound management, efficiency in operation, rents, taxes, wages, spoilage, competitive prices, proper personnel, market conditions, transportation costs, commodity prices, interest rates, damage suits, claims, litigation and unforeseen contingencies which always arise and cannot reasonably be anticipated or named here, are all important factors upon which profits or earnings depend. An unexpected drop in commodity prices for coffee or sugar or other staple items of which we carry a large inventory, may frequently cause inventory losses which vitally affect profits.

As a further illustration of the fact that profits have no necessary relation to sales, Kroger has a number of stores located in Kentucky and elsewhere in the United States which have gross sales of $35,000 or under which show a profit from the operation of said stores, whereas numerous other stores with gross sales from $50,000 to $90,000 are operated at a loss. A large sales volume may result from special advertising on a large scale but the advertising expense may absorb any profit from such sales increase. Special or distress sales at low or competitive prices frequently move large quantities of merchandise and increase sales volume without profit to the distributor. The lack of relationship of more sales volume to net earnings or profits, is further illustrated by the fact that a number of stores [fol. 183] which which Kroger is in competition and which have a smaller sales volume than Kroger's stores, make a larger percentage of net profit. This is frequently due to the fact that the individual store owner endeavors to build his business upon a service basis offering credit, delivery service, a wide selection of merchandise, including numerous luxury items, which are not handled by Kroger stores, and by reason of the foregoing obtains a higher price at a larger margin of profit than competitive stores which cater

more particularly to the average consumer, who does not require special service or luxury items. He has observed that the same thing is true of other businesses with which he has had contact, and that large sales or small sales are not the measure of net profits. Frequently concerns with large gross incomes have net losses and other concerns with considerably smaller gross incomes have large net profits.

John B. Bonham.

(Duly verified.)

AFFIDAVIT OF W. A. STEIDEN

He is 43 years old, and has been engaged in the grocery business ever since he started to work. He was general manager of the Piggly Wiggly Valley Company beginning in 1917, and for the past two years has been branch manager for the Louisville branch of the Kroger Grocery and Baking Company.

The witness has extensive duties in checking the sales [fol. 184] and inspecting the two hundred and twenty-two stores under his management, and as a part of his duties he endeavors to keep advised as to competing stores.

The average sales of each Kroger store is about $50,000.00. Each Kroger store competes with the grocery store located in its neighborhood and it is not affected by grocery stores in other cities. The sales of many of the competitors exceed the sales of the Kroger store with which they compete. We have a Kroger store at 529 West Oak Street. John Hardy operates a grocery store in the same block. His store has sales which are estimated at $150,000.00 a year and this estimate is about three times as much as the sales of the Kroger store.

The grocery business in the city of Louisville and in the state of Kentucky is highly competitive. There are a great number of stores, and no individual or no corporation controls either the power of purchasing or the ability to sell to the public. Almost every grocery in my district has to pay license and special privilege taxes. There is a state tax for selling soft drinks. The same is true of cigarettes and oleomargarine. These special privilege taxes run between $50.00 and $75.00 a store, and these taxes are alike for the Kroger stores and for the persons and corporations

who operate a single store. The Kroger store, situated at 2549 W. Market St., handles soft drinks, cigarettes, and oleomarganie. It pays a $6.00 license fee for the right to [fol. 185] sell soft drinks, $11.00 for the privilege of selling cigarettes and the same amount in order to enable it to sell oleomargarine. The total tax is $28.00. Under the Gross Sales Act, this amount will be deducted from the tax which would have to be paid for that particular store. Mrs. B. Shulman's store, which is located at 25th & Griffith Ave., is in direct competition with this Kroger store. I estimate its annual sales at $50,000.00 and since the owner of this store has no other store, the tax would be 1/20th of 1% or about $25.00. Mrs. Shulman's grocery sells oleomargarine, cigarettes, and soft drinks. The deduction which it would be allowed to take would completely offset the tax which it would have to pay. This would not be so in the case of the Kroger store because the sales of the Kroger store are aggregated with the sales of all other Kroger stores in the state of Kentucky; thus placing Kroger in a higher bracket and subjecting it to a 1% tax. Inasmuch as Kroger has twelve million dollars worth of sales in Kentucky, the tax on each store would be about $450.00 and when the deduction is taken off there would still remain a tax of about $425.00.

The effect of allowing deductions creates a similar result in the case of almost every other competitor who operates only a single store. A 1% tax, therefore, is placed on Kroger while no tax is placed on the competitors.

The profits which Kroger endeavors to make from store [fol. 186] op-ation in the Branch over which he has supervision do not average over 1½ to 2% on gross sales, but it is not able to make this profit at all times and a number of stores in his district have been operated at a loss for the last two years. The tax, therefore, would take about one-half Kroger's profit and would frequently turn its profit into a loss or else increase the loss sustained from store operations. A tax of $425.00 per store is oppres-ive and prohibitive. It is practically impossible to operate any store at a profit and pay a $400.00 tax per store. It would be impossible to increase business because the entire profit on the increase would be taken up by the 1% tax. It would be impossible to open any new stores because the 1% tax

has wiped out any margin of profit which it might have. However, competitors who operate a single store could increase their business or open new stores without subjecting themselves to any tax, or else they could undersell Kroger without paying any tax on the business which they take away from Kroger. Many of the stores which Kroger operates are under long term leases, and the closing of these stores would involve heavy losses.

Many of the competitive stores, although individually owned, are now members of a co-operative association.

W. A. Steiden.

(Duly verified.)

[fol. 187] AFFIDAVIT OF D. T. PETTY

He is 31 years of age, and lives in Evansville, Indiana. For the last six years has had charge of District 14 of the Louisville Branch of the Kroger Grocery and Baking Company. His district in Kentucky is comprised of the counties of Davies, Hopkins, Henderson and Christian. The witness sets out the particular competition in the chain grocery store business within his district.

The Gross Sales Tax of $400.00 on each of the Kroger stores is prohibitive and confiscatory. There are a great number of competing merchants and a 1% tax that is levied on some and not on all, would give those merchants not taxed an advantage over those who must pay. The profits which we endeavor to make are about 1½ to 2% on gross sales, but we are not able to make this profit at all times and some of our stores for the last two years have operated at a loss. The 1% tax would increase the loss as to these stores and take the major part of the profit where we are making it. As the result of the imposition of the Gross Sales Tax, our competitors who operate their business efficiently would be able to undersell us by 1%, but they would not have to pay any tax on the increased business because of the set-offs which they are allowed to take. It would be impossible for The Kroger Grocery and Baking Company to open new stores because the profits of the new stores would be wiped out by the tax. However, competitors of The Kroger Grocery and Baking Company who [fol. 188] operate or own a single store, could open new stores without subjecting themselves to the tax.

He believes that if the sales of each of the stores which are members of Independent Grocers Alliance would be aggregated the same as the sales of each Kroger store are aggregated with the sales of every other Kroger store in the state, that these merchants would fall in the highest bracket and would have to pay a 1% tax. However, the members of the co-operative associations pay nothing. In spite of this fact, they enjoy the advantages which the stores owned by Kroger have as a result of being members of the Kroger organization. The central headquarters of Independent Grocers Alliance send special supervisors to the member stores who co-operate with the retailer in assisting and developing of the business. These supervisors are experts in the grocery business and they assist the retailer much in the same manner as affiant assists the Kroger managers.

Every Kroger store is a separate unit under its own manager. Separate records are kept for each store. Each store is charged with taxes and rent and with the goods it purchases and each store is credited with the sales it makes. However, the Kentucky Gross Sales Statute does not treat the Kroger stores as separate units but aggregate the sales of all of its stores, thus subjecting each store to a 1% tax on its gross sales. In contrast to this, the Kentucky Sales Tax Statute disregards the benefits received by [fol. 189] voluntary association of independent store owners and permits these owners to operate without paying any tax.

D. T. Petty.

(Duly verified.)

STATEMENT RE AFFIDAVIT OF GILBERT J. SNYDER

The testimony of this witness is concerned with the chain grocery store business exclusively, and for that reason is omitted herefrom.

STATEMENT RE AFFIDAVIT OF ALBERT B. BERGER

The testimony of this witness is concerned entirely with the chain grocery store situation, and is therefore omitted.

Affidavit of John E. Donahue

He is 30 years old and lives in Lexington, Kentucky. He has been in the grocery business for nine years, and is superintendent for the Great Atlantic & Pacific Tea Company, has charge of 49 stores in the eastern part of Kentucky.

The average gross sales of each Atlantic & Pacific store in his territory is about Fifty Thousand ($50,000) Dollars.

There is no monopoly in the grocery business in Kentucky and the field is highly competitive. The Atlantic & Pacific stores under his supervision are subject to the same license tax that is imposed on the individual owners. Under the Gross Sales Tax these licenses are deductible, but the sales tax in the case of the Atlantic & Pacific stores is so high that they still have to pay an exorbitant sum after the deduction. The competitors of these stores, however, who do not own or operate any other store, do not have any tax to pay be- [fol. 190] cause their gross sales tax is completely offset by deductions which they are allowed. For example, Atlantic & Pacific have a store in Corbin, Kentucky, which does about Fifty Thousand ($50,000) Dollars of business a year. Pennington & Gabber operate a store in that city which sells the same class of merchandise to the same public. Both of these stores sell oleomarg-ine, cigarettes and candled eggs. The tax on the independent store would be 1/20 of 1%, or about $17.50. The cigarette tax, license fee and the oleomarg-ine license would completely offset this tax. The Great Atlantic & Pacific Tea Co. has sales approximating Thirteen Million ($13,000,000) dollars, in the State of Kentucky. Under the gross sales tax law the tax on each store amounts to Five Hundred Sixty ($560) Dollars. After the deduction is made each store in the Atlantic & Pacific System would still have a Five Hundred ($500) Dollar tax to pay. This is true in the case of the Corbin store which competes with the store operated by Pennington & Gabber.

In Cumberland they operate a store on Main Street which does about Fifty-Five Thousand ($55,000) Dollars business a year. This store would have a Five Hundred ($500) Dollar tax to pay. The Independent Grocers who are members of the Independent Grocers Alliance—an organization which gives to the retailer practically every advantage which mem-

bers of the Atlantic & Pacific organization have—no tax to pay.

[fol. 191] The same is true in the case of the store at Evart, Kentucky. The competing store owner is a member of the Independent Grocers Alliance and as a result he has advantage of common advertising, mass merchandising, quantity buying and supervision by a trained expert; however, the owner of this store sells oleomargarine and cigarettes, and consequently has deductions which relieve him from the payment of any tax. The Atlantic & Pacific, in that city, however, has to pay One (1%) Per Cent on its sales. In every case the Atlantic & Pacific store would be subject to a One (1%) Per Cent tax on all of its gross sales due to the fact that its sales are added to the sales of all other Atlantic & Pacific stores in the State of Kentucky, whereas, the competing store which was owned or operated by either an individual or a corporation which did not own any other store, has no tax to pay.

The profits from store operations in the district under his supervision are not over 1½ to 2 per cent on the gross sales. A Five Hundred ($500) Dollar tax on each store is oppressive and prohibitive. It is practically impossible to operate any store at a profit and pay a Five Hundred ($500) Dollar tax per store. Any increase in business [fol. 192] would be taxed at One (1%) Per Cent, which would take almost all of the profit received as a result of the increase in business. The tax is so much that no new stores could be opened which would be profitable. Competitors could undersell him without subjecting themselves to any tax, because their aggregate sales would not exceed Four Hundred Thousand ($400,000) Dollars and they would remain at all times in the last bracket. Some of the stores which he supervises are held under long term leases and the closing of the same would involve heavy losses.

He is informed and believes that if the gross sales of all the members of the Independent Grocers Alliance were added together that the tax on each member would be One (1%) Per Cent on sales; that is, if they were taxed in the asme manner as the Atlantic & Pacific stores the sales of all members would be added together in order to determine the rate of taxation. In effect, however, the members of the co-operative association, although enjoying all the

benefits enjoyed by the Atlantic & Pacific stores under his supervision, pay no tax at all.

Groceries which are in the immediate vicinity of the Atlantic & Pacific store which he operates have no taxes to pay, while his stores have a heavy burden to meet, although these stores are direct competitors.

Each store in the Atlantic & Pacific system is a separate [fol. 193] unit, separate books are kept and taxes and expenses are charged against each particular store. Each store is charged with goods purchased by it, and credited with the goods it sells. The Aggregation of sales of all the Atlantic & Pacific stores under the Gross Sales Tax statute, disregards this separation, but at the same time that statute disregards the common advantages of the members of the Independent Grocers Alliance.

John E. Donahue.

(Duly verified.)

STATEMENT RE AFFIDAVIT OF JOHN SCANLAN

The testimony of this witness is concerned entirely with the chain grocery store situation, and is therefore omitted herefrom.

AFFIDAVIT OF CHRIS SCHULMANN

He is 40 years old, and lives in Louisville, Kentucky, and has been in the grocery business for sixteen years. He is superintendent in charge of 62 stores in the Western section of Louisville for the Great Atlantic and Pacific Tea Company.

The fact that an organization operates a store or a group of stores in another city has no effect on the stores which he supervises in Louisville. The competition for these stores is offered by the groceries which are within one block or on the opposite corner. Every one of the stores under his supervision is in direct competition with other stores which are carrying on the same kind of business as that conducted in any one of the A & P stores. The com- [fol. 194] petitors sell the same merchandise and they have

the same method of business—the only difference is that in his case he supervises a group of stores, whereas the majority of competitors, whether they are operated by an individual or a corporation, only own a single store.

Groceries having sales of $75,000.00 a year are doing a fairly large business. There are not more than two groceries which are competing with the stores which he supervises that are doing more than $100,000.00 worth of business a year.

Almost every grocery store in his district has to pay license and special privilege taxes to the State of Kentucky, which taxes run between fifty and seventy-five dollars. Competitors of the stores under his control are selling the same goods as the A. & P. stores and, consequently, they have to pay the same special taxes. For example, in the city of Campbellsville, he supervises a store situated at 112 Main Street. This store sells soft drinks and pays a State Tax of $16.00; it pays a special privilege tax of $11.00 for the right to sell oleomargarine; a cigarette tax of $11.00 is paid and there is a $2.00 tax which must be met before the store can handle the sale of eggs. The principal competitor of the Campbellsville store is Hoskins Grocery. This store sells soft drinks, oleomargarine, cigarettes and eggs and its taxes for these special privileges would be similar to the tax imposed on the A. & P. store. The sales of Hoskins Grocery are about $52,000.00 a year. The license taxes which Hoskins would have to [fol. 195] pay are deductible from the tax he has to pay under the Sales Tax Statute; the result would be that Hoskins Grocery would not have to pay any tax under the Gross Sales Law. The A. & P. exemption would be just as large but the A. & P. store would be subjected to a much higher tax since its sales would be lumped with the sales of all other A. & P. stores. The same result would occur in the case of every A. & P. store under his supervision, i. e., each store would be subject to a heavy tax because its competitor doing the same kind of business would not have to pay, merely because its owner did not own any other store.

In Eminence, Kentucky, the A. & P. operates a store at No. 4 Kings Block; this store is under his direct supervision. Its chief competitor is Friend-Berry. Both of these stores sell soft drinks, oleomargarine, cigarettes and

eggs. The total special license tax which the store he supervises has to pay is $55.00, and the tax which the Friend-Berry store pays is about the same. The Friend-Berry is one-half block away from the store which he supervises; the business conducted is exactly the same as the business conducted in the A. & P. Store; however, the tax on its sales would not be more than $25.00 and the exemption would be greater than the tax. As a result, the tax would only fall on the store which he supervises, and not on the competitor of that store.

In Louisville, he supervises the store located at 3133 Portland Avenue. Mr. Fischer operates a store at 33rd and Portland Avenue. Mr. Fischer has no other store and the [fol. 196] store operated by him is one of the chief competitors of the one which affiant supervises. Both stores have the same license tax, but the sales tax of the A. & P. store would be much larger, and, as a result, Fischer's sales tax would be entirely wiped out, whereas the A. & P. tax would be very large.

The stores which affiant has listed above are fair examples of the situation in regard to each one of the sixty-two stores which he supervises. In each case, the special license taxes are the same as the taxes of the competing stores. In each case, the competing stores have a volume of sales which is the same as the stores which he supervises. In some cases the competing stores have a larger volume of sales than the stores under his control, but, in each case, the competing stores are owned by either a corporation or an individual that owns no other stores, and pays no tax, whereas each and every one under his supervision pays a large tax under the Gross Sales Statutes. This is caused by the fact that the sales in every one of the A. & P. stores are added together, in order to put A. & P. into a higher bracket, and the only persons in the grocery business who would have to pay under the Gross Sales Statute would be those who operate enough stores so as to make their aggregate sales over $400,000.

The tax on each A. & P. store would be about $566.00 and the deductions would amount to about $60.00. The effect [fol. 197] of the tax is to impose a $500.00 burden which is not imposed on the competitors of the stores under affiant's supervision. Such a tax would force the company to close almost all, if not all, its stores which he controls,

at least he is practically certain that it would be impossible to operate these stores at a profit, if a tax is paid, at a fair rate for the capital invested.

Profits in his territory range from 1½% to 2½% on gross sales, and the 1% tax would take almost all of this profit. If the stores which he supervises were to be closed, the competitors would secure this business without being forced to pay this exorbitant tax, because each competitor would merely get the sales of a nearby A. & P. store and it would not be thrown into a higher bracket.

It would be impossible for these stores which he supervises to increase business and thereby increase profits, because an increase in business and in profits would be totally eaten up by the tax; besides this, it would be possible for competitors to undersell him, thereby adding to their sales but not subjecting themselves to the tax.

For example, there is an A. & P. store in Elizabethtown, Kentucky. It does an annual business of about $60,000.00. The Hawkins Grocery, which competes with this store, does an annual business of about $40,000.00; it pays special privilege taxes of about $60.00, the same as the A. & P. store. By underselling A. & P. and accepting a smaller net profit of [fol. 198] 1%, which Hawkins could do because of the heavy tax imposed on the A. & P., he would be able to get the entire A. & P. business in Elizabethtown; he would then have sales of $100,000.00, but he would have no tax to pay because his license tax would still offset the entire tax imposed under the Gross Sales Tax Law.

There is no monopoly in the grocery business. Every store he operates has one or more nearby competitors who would be glad to secure the business done by his stores. The stores which he supervises attempt to meet competition by accepting a small margin of profit and by efficient methods of merchandising. Many competitors have copied A. & P.'s attempt to supply the customer on the basis of a small margin of profit although they own only one store. Many of the competitors of the stores which he supervises are members of co-operative buying associations. These organizations purchase goods for all members of the co-operative association; they have common advertising; they employ people who visit the stores and recommend changes in much the same way as he supervises the stores under his

control. These men advise them in regard to proper window displays and methods of selling, and they have uniform advertising prices. If the sales in all these stores which are members of the cooperative association would be aggregated and the tax imposed on this basis, each store would have a much higher tax to pay because the aggregate sales would place the store in the highest bracket; however, [fol. 199] under *under* the Kentucky Sales Tax Law, the members of the co-operatives, although using the same methods as many stores and selling goods in the same manner as goods are sold in his stores, do not have to pay any tax.

The method of adding together all of the sales in the case of the A. & P. stores has no connection with the manner in which the A. & P. organization operates the stores. Each store in the system is a separate unit; separate books are kept for each store; each store is charged with the goods it buys and each store is credited with the goods it sells. If the taxes which have to be paid are charged against each particular store and if the present tax is allowed, a $500.00 charge would be made against each store.

Chris Schumann.

(Duly verified.)

STATEMENT RE AFFIDAVIT OF LOUIE J. JONES

He is 31 years old, and lives in Louisville, Kentucky. As superintendent for the A. & P. stores he has charge of 65 stores situated in the east end of the city of Louisville. His testimony is substantially the same as that of Chris Schumann in its application to the particular stores under affiant's control. As it is merely cumulative it is omitted.

Louie J. Jones.

(Duly vertified.)

[fol. 200] STATEMENT RE AFFIDAVIT OF BRACK M. FERRILL

He is 36 years of age and lives in Evansville, Indiana. He is superintendent for the Great Atlantic & Pacific Tea Company, in charge of 66 stores, of which 18 are situated in Kentucky.

His testimony is substantially the same as that of Chris Schumann in its application to the particular stores under affiant's control. As it is merely cumulative, it is omitted.

Brack M. Ferrill.

(Duly verified.)

AFFIDAVIT OF M. R. ANDERSON

He is Safety Director of the city of Lexington, and in his opinion the operation of a group of stores by a retail merchant does not increase the fire or police hazard except in an arithmetic ratio.

M. R. Anderson.

(Duly verified.)

STATEMENT RE AFFIDAVIT OF HARMON NOE

He is Chief of Police of the City of Harlan, and testifies to the same effect as M. R. Anderson.

Harmon Noe.

(Duly verified.)

STATEMENT RE AFFIDAVIT OF R. W. OWENS

He is Chief of the Hazard Fire Department, and testifies to the same effect as M. R. Anderson.

R. W. Owens.

(Duly verified.)

[fol. 201] STATEMENT RE AFFIDAVIT OF CRAWFORD LEE

He is Chief of Police of the city of Frankfort, and testifies to the same effect as M. R. Anderson.

Crawford Lee.

(Duly verified.)

STATEMENT RE AFFIDAVIT OF JAMES W. STITES

This witness simply testified in regard to matters contained in the senate and house journals relative to the passage of House Bill No. 111. As this matter is set out in

a certified copy of the entries in the journals filed by the Defendants at the trial of this case, this affidavit is omitted.

James W. Stites.

Affidavit of Daniel M. Cohen

He is a director of the Dan Cohen Shoe Company, and has charge of the store operated by said company in Covington, Kentucky. He is familiar with the general retail situation in that city.

In his opinion there are only three stores in the city of Covington which have sales over four hundred thousand dollars in their Covington stores.

Daniel M. Cohen.

(Duly verified.)

Affidavit of Paul H. Nystrom

He is 53 years of age, and is professor of marketing in the School of Business of Columbia University. He qualifies himself as an expert upon retail marketing, [fol. 202] and particularly in regard to chain store operations.

The Kentucky Gross Sales Tax Law seems to assume either or both that:

1. As the volume of sales in retail concerns increases beyond $400,000 a year there is an increasing rate of net profit and therefore ability to pay increasing rates of taxes.

2. Retail concerns having a sales volume in excess of $400,000 a year are responsible for the decline in number of small independent retailers and that for this they should be regulated, checked, or punished. Both of these assumptions are incorrect.

One of the marked characteristics of the retail trade as compared with manufacturing and other industries is that with certain exceptions, costs of operation do not decline when sales increase. In stores having but very small sales the expenses of operation, when properly charged, do run higher than the average, but when a retail store has reached a certain volume of business which varies according to lines handled and services rendered, but which for purposes of illustration may be said to amount to about $25,000 in sales

per year in grocery stores and somewhat more than that in drug stores and hardwood stores, a minimum cost of doing business is reached. Beyond this point increases in sales volume are usually accompanied by increases in expenses [fol. 203] of operation so that the rates of expenses in larger stores are rarely less than in the smaller stores doing the same kind of business and that have reached a point of efficient operation. Indeed the rates of expenses in concerns with higher sales are usually higher. Accurate compilations of retail store expense figures are available in support of this statement, such as the reports of the Harvard Bureau of Business Research on operating expenses in retail grocery stores, shoe stores, department stores, specialty stores, stationery and office supplies; the reports of the Bureau of Business Research of the State University of Iowa on grocery stores and the reports of the National Association of Retail Clothiers and Furnishers on men's clothing. In the reports of hundreds of retail stores compiled and presented in the foregoing there is a well established indication that, after some minimum sales point has been reached, which represents the necessary amount for efficient retail operation, the rates of expenses tend to rise as retail sales increase. There are a few retail lines in which there seems to be an exception to this rule just mentioned, such as in the hardware and the retail building material business, in both of which it appears that the rates of expenses of operation tend to decline slightly as the sales volumes increase. In all such cases, however, there are strong possibilities that the declines in expense rates found in concerns with larger sales may be due to differences in lines handled and services rendered. Thus, a hardware [fol. 204] dealer with a large volume of sales may and does often include heating and roofing contract work, the sale of automobiles and agricultural implements, and even wholesaling to local industries. These special forms of selling require less expense per dollar of sales and naturally tend to reduce the rates of expenses for the whole business.

It is a fairly well established fact that in retail businesses of the same kind, selling the same kinds of goods and offering the same services, the rates of expenses tend to increase as sales volumes rise. The reason for this difference in expense trends in the retail business compared with the

costs of operation in manufacturing and other industries is that the typical unit operation in retailing is the making of a sale to an individual customer and this most important part of retail store operation has never been and probably can never be reduced to the routine, the time and labor saving operations, characteristic of the mass production methods of a factory. Thus, the final cost of selling and delivering the goods to the ultimate consumer tends to remain constant no matter what the size of business. There are economies in large retail institutions such as come from the distribution of general items of overhead expense over increasing sales, including rent, interest, heat, light, etc., but these savings are counterbalanced, by the increases in expense due to additional supervision and record keeping required to maintain a large retail concern in efficient operation.

[fol. 205] Since the rates of expense tend to rise with increases in sales volume in retail businesses of the same kind rendering the same types of services, the advantage in increasing sales lies in increasing purchasing power of the larger concern and thereby enabling it to buy its goods in larger quantities and at lower prices. To meet this advantage of the larger stores smaller, independent retailers are uniting in large numbers for the purposes of co-operative purchasing.

The most important factor in the earning of net profits in retailing as well as in every other business is managing ability. There are wide differences in actual net profits earned in all kinds of retail businesses and in all sizes of such businesses. There are numerous instances of retail concerns with small sales volumes who are able to earn high rates of net profit. Such energy and ability in the smaller concern leads to its growth. Many of the larger retail concerns, though not without exceptions, represent higher average efficiency in operation. The range in managing ability is greater among small independent retailers than among concerns with large sales, but there are important differences in operating efficiency and net profit earning capacity in the large concerns as well. High net profits in the retail business are almost invariably the result of good management and not of size of concern or volume of sales.

It would be inaccurate to judge the chain store movement

[fol. 206] by the published statements of a few chain store systems, even of the leaders. There are well over eight thousand chain systems in the U. S. of which the sales records and statistics of operation of less than 100 are available. Of the seventy or more well known chain store systems several have enjoyed unusually high net profits for the following reasons:

They have offered new and desirable varieties of goods and new services at new or different price lines not covered by the older retail dealers and have as a consequence grown rapidly and have earned very high profits. As an illustration, the 5 and 10 cent stores sell a hammer for ten cents, something unavailable at that price in the regular hardware stores before the chain stores came into existence. True, this ten cent hammer has very few of the qualities of a Maydole or a Plumb hammer, but it serves its purpose for many people who do not need a better quality hammer and the fact that it can be bought for ten cents, instead of seventy-five cents or a dollar makes it a highly useful service to the public. Anyone may see on passing through the 5 and 10 cent chain stores, and many others as well, that much of the merchandise handled is not precisely competitive with the merchandise formerly found in regular stores, but is of a different class and price level. The chain store systems have through their initiative in developing these [fol. 207] new lines of trade earned and are entitled to their growth and success.

High net profits characterize all new and successful business enterprises but the high profits likewise attract and develop competition. The small regular independent retailers have learned and are learning the methods of the chains. They are adapting these methods to their own use and, as a result, are able not only to hold their own against chain stores, but, as has been amply proved in a great many communities, are able to outsell their chain store neighbors. An examination of chain store trends during recent years has led many competent students of business to the conclusion that their era of pioneering and of high profits has already passed its peak and may henceforth be expected to decline. This does not mean that chain stores may not continue to grow, but it may mean that their growth will be much less spectacular in the future. Cer-

tainly the chain store systems taken as a whole have given no indication of any special ability to withstand the stress of business depressions any better than independent retailers. The chain store method of operation is not a sure road to profit-making success.

The belief that chain store organizations are in some way responsible for the high mortality rate among small independent retailers as well as for the decline in importance of many small trading centers needs but a little analysis to show its fallacy. The failure rate among small independent [fol. 208] retailers has always been high and long before chain store systems appeared in our system of distribution. As early as 1840, General Henry A. S. Dearborn, then collector of the port of Boston, in an address before the Massachusetts Legislature, stated:

"After an extensive acquaintance with business men and having long been an attentive observer of the course of events in the mercantile community, I am satisfied that among one hundred merchants and traders not more than three in this city ever acquire independence."

In 1870's, David A. Wells, a well known American economist of that period, estimated that at least ninety per cent of those who go into the retail business fail.

In his testimony before the Industrial Commission in 1900, John Wanamaker stated that only about four per cent of all who embark in mercantile business succeed. He also quoted A. T. Stewart, a great New York merchant, who died in 1876, who had claimed that only two per cent of all retail dealers succeeded. Much similar evidence might be added.

Certainly the present failure rate among retailers is no higher than, if indeed as high as, it was in these earlier years. This statement is based on studies made by the affiant and described in "Economics of Retailing," Vol. I, Chap. XIV, "Failure Rate in the Retail Business," and by Professor E. D. McGarry of the University of Buffalo in his "Retail Trade Mortality."

[fol. 209] With respect to the decline in importance as trading centers of many small towns throughout the country it is obvious that this decline has had little or nothing to do with the chain store development and would cer-

tainly have taken place had there never been any chain stores. The main reason for the decline of trade in the smaller towns is, of course, the increased facility of transportation by rail, especially by good roads and automobiles, and more recently by cheap bus fares. With the present development of good roads and the common use of automobiles in the state of Kentucky there cannot be many families who are more than two or three hours riding distance from a good sized city either within or outside of the state. It is the attractions of the larger cities that have caused the trade in smaller towns to decline. These chains have had but little to do with this major movement. In fact, the coming of chain stores to small towns has in many cases helped to re-create the trade of those towns and to hold it from going to larger cities.

It is frequently alleged that the independent retailers in the smaller towns provide a substantial leadership in political, civic, social, religious, and educational interests which is broken down by the growth of the chain store systems. There are many independent retailers who do serve their communities splendidly, but it would be an error to assume that all or even a majority of independent retailers provide such excellent service to their communities. Most of [fol. 210] them do not. How could it be otherwise? It must be borne in mind that a very large proportion of independent retailers have very insignifigant businesses and, while the volume of business done is, of course not a direct measure of the importance of the retailer in his community it may be safely taken as a rough guide. According to the trial census of distribution taken by the U. S. Bureau of the Census in 1927, covering eleven American cities, it was found that 28% of all of the independent retailers had sales volumes of less than $5,000 a year; 46% had sales of less than $10,000 a year; and 74% had a business of less than $25,000 a year. Obviously, with retail sales of less than $5,000 or even less than $10,000 a year, there can be no satisfactory economic business unit. Clearly, most of these small concerns are merely trial efforts, a fringe or margin of concerns recently established, of concerns about to give up business, or of concerns desperately trying to maintain a place in the distributive mechanism. A few of such small concerns eventually become larger and successful. Most of them eventually give up the struggle only to be followed by

a constant stream of new beginners. These conditions clearly illustrate that most retailers are not and cannot be important factors in their communities. These conditions also explain why there is such a high failure rate as that which has always prevailed in the retail field. The chain store system of distribution is not responsible for these con- [fol. 211] ditions for these conditions existed long before the chain stores were ever heard of. The chain store systems merely serve as a convenient but fallacious excuse for the present rapid turnover of such retailers. Back in the years from 1905 to 1915 the mail order houses were blamed for the decline of small towns and the high failure rate of small independent retailers. In an earlier period, from 1895 down to 1905, many small retailers tried to place the responsibility for their failures on the department stores, that were then coming into prominence. After the present agitation about chain store systems has passed away, he has no doubt but that some new reason will be advanced.

There is ample evidence that independent retailers do not need special protection against the chain store systems. There are thousands of independent retailers, small as well as large, who have amply demonstrated during recent years their ability to meet the competition of chain stores successfully. The elements of effective retailing are the same for all classes of retail institutions. They include convenient location, suitable building and equipment, carefully selected stocks of merchandise such as people want, fair competitive prices, good clean housekeeping and attractive display, courteous, intelligent sales service, suitable forms of publicity and enough capital to finance the store, its purchases of goods and, where credits are granted, to carry customer accounts. There is not a single element [fol. 212] in this list in which independents cannot by the application of intelligence and energy do as well as, or better than, chain systems excepting possibly in the purchase of goods and in the use of certain forms of advertising. Chain store systems as well as larger stores, as is well known, are able to purchase larger quantities of all goods handled and consequently to buy them for less. The independent retailer cannot on his own secure this advantage, but by combining with a sufficient number of other retailers for the purpose of the purchase of goods he can do as well as the chains. There has been a very rapid de-

velopment in this direction. Considering but one field alone, more than 60,000 retail grocers throughout the country, and a proportionate number of these in the state of Kentucky, now belong to such co-operative buying organizations and enjoy the advantages of quantity buying which was introduced by the department and chain store systems. Indeed with buying power equalized a great many independent retailers are able, through the exercise of good management in the conduct of their business, to meet the requirements of their respective communities more successfully than the chain stores. The size of the chain store system is both its strength and its weakness. It possesses buying power and operates under highly standardized methods but its very size makes it inflexible and prevents it from meeting the individual requirements of local communities. It is in this respect, particularly, that independent retailers [fol. 213] have shown themselves superior to the competition of chains.

The chain store system of distribution which has grown up as a part of our present distribution of goods has had the effect of setting the pace for the improvement of retailing, for better and cleaner stores, for more efficient operation, for lower prices, and for closer attention to the requirements of consumers. This does not mean that chain stores either invariably or regularly sell for less than independent stores, although there have been some local studies indicating this effect. It seems sounder to assume that, considering differences in qualities of goods handled and varieties of services rendered, there are probably not now any important differences in the prices charged by chain stores and independent stores wherever they are in active competition. Everyone must grant, however, that had it not been for the advent of the chain stores retail store operation would still be conducted in old-fashioned ways, the expenses of operation would have been higher, there would have been more leaks and wastes in operation and prices of practically all commodities would have been higher to the public. Independent stores, both small and large, where managed by competent business men, are everywhere meeting the challenge of chain store competition and are giving as good or better merchandise and service at as low prices as the chain stores and the net result of this competition has been and is now enormously advantageous to the consuming public.

[fol. 214] Chain store organizations are often criticized for their lack of interest in the civic and social affairs of the communities in which their stores are located. There has been some basis for this criticism. The earlier chain store operators have been so much taken up with the problems of the establishment and management of their new stores that they have often forgotten that the success of their stores is, of necessity, dependent upon the success of the communities in which they are located. A chain store organization's interest in any community in which it has a store may not be so individual and particular as that of an independent retailer located in that community, but the chain store does not have the same reasons for interest in the growth of the community as the independent. A more intelligent self-interest on the part of the chains is certain to result in a more active interest and participation in all community affairs. Some of the chain store systems have during recent years made serious approaches towards meeting this problem fairly and squarely and there is every reason to expect that others will follow their lead. The truth is that in many towns in which there are both chain stores and indepenudent stores one now finds both chain store managers and independent retailers in increasing number working together for the welfare of their community.

The Kentucky Gross Sales Tax Law provides for the assessment of a graduate tax against gross sales rather than [fol. 215] net sales. Gross sales constitute an unfair basis for the computation of such a tax for gross sales represent the total volume of business without taking into account returned goods, adjustments, and deductions which must occur to some extent in every retail business. There are, however, very wide differences in the amount of returns and allowances. They run considerably higher in clothing, furniture, floor covering, and other kinds of home furnishings than in groceries and drugs. Returns run heavier in stores having a credit business and still heavier in instalment selling concerns than in all-cash businesses. Consequently the burden of this tax will fall heavier on certain kinds of businesses than on others. Furthermore it is the common experience in retailing that as the sales volume increases the volume of returns and allowances increases

still more rapidly. In the report of operating results of department and specialty stores in 1929, Bulletin No. 83, Harvard Bureau of Business Research, page 46, it is shown that the amount of returns and allowances range from 1.7% for concerns with sales less than $150,000 and then regularly upward to 14% for concerns with sales of $10,000.00 or more per year. Under the terms of the Kentucky law the larger concerns with the heavier burdens of returns and allowances would also have to bear heavier burdens of taxes not only on their actual net sales but also on their returns and allowances as well.

The incidence of the Kentucky Gross Sales Tax may be [fol. 216] questioned. If the tax be added to the expenses of operating and the retail prices raised so as to shift the tax to the consumer then the real burden of the tax will fall on people least able to bear it. By far the largest part of the total sales of chain stores as well as of department stores, the stores which would be most affected by this tax, is made to the masses of the people who have but very moderate means. Granting many individual exceptions, wealthier classes of the people do not, as a rule, constitute an important amount of patronage of any chain or department store. These larger sales organizations are large because they serve the masses. A large part of the income of the poorer people is expended for food and other necessities of life bought in retail stores, whereas the more well-to-do spend smaller proportions of their incomes in this way. It is clear that if the tax can be shifted, then the main burden would fall on the poorer people of the state.

It is debatable, however, whether the tax can be shifted to the customer. Retail prices, on most goods, are subject to very keen competition. Most housewives who buy the necessities of consumption sold by retail stores are very keen to notice price differences. Any attempt on the part of any retail dealer or group of retail dealers to raise their prices to cover the amount of this tax would be certain to meet a loss in custom. Even a one per cent difference in price, other things being equal, would result in a gradual [fol. 217] transfer of trade. If the tax cannot be shifted then it places an inequitable burden on the concerns with the larger sales which, as we have pointed out, do not necessarily have greater ability to pay this tax.

This tax falls progressively heavier upon concerns whose gross volume exceeds $400,000 a year. It reaches its heaviest burden at a million dollars a year and more. Retail organizations with low net profits will find the tax confiscatory. Any concern with sales in excess of a million dollars a year but with a net profit of less than 1% on sales will have practically its entire profit taken by the tax. Less than 1% net profit on sales is not unusual in the retail trade. In the Harvard report, referred to above, the average profits reported by over 600 department stores and speciality stores for 1929 averaged less than 1%. This was for a year of good business conditions; for a year such as 1930 the average results for all types of mercantile institutions must be even much lower. Retail stores having net profits of less than 1% on net sales will find it profitable in net results to limit their sales to about $400,000 a year rather than to make additional efforts to increase this volume and retail concerns already enjoying sales volumes of a million dollars or more but with net profits of 1% or less will find it to their advantage to close up a part of their businesses, dismiss many of their employees and dis- [fol. 218] pose of a large part of their retail store facilities. By so doing, they will be money ahead.

The net effect of the Kentucky Gross Sales Tax Law if continued will be to penalize the larger concern for its size and, in effect, to subsidize smaller retailers regardless of their relative efficiency in operation or usefulness to society. This tax will discourage the growth of business beyond certain points and eventually defeat its own purpose. It does not seem conceivable that these effects could have been given proper consideration by the legislature at the time the law was made.

One may sympathize with the efforts of the law-makers of the commonwealth of Kentucky in their struggle to shift the heavy tax burdens now carried by the people of that state, but a tax of the nature directed by this law, which falls so inequitably on a small proportion of concerns whose sales happen to exceed the arbitrary limit of $400,000 a year cannot possibly be the final answer. The tax cannot help but be detrimental not only to those individual concerns who must immediately bear its burdens but also the *the* progressive development of the state of Kentucky.

Paul H. Nystrom.

(Duly verified.)

[fol. 219] LETTER OF JOSEPH MARTIN AND A. H. BRENDEL CERTIFYING GROSS SALES TAX REPORT ANALYSIS AND THE ANALYSIS

February 13, 1931.

Hon. J. W. Cammack, Attorney General Commonwealth of Kentucky, Frankfort, Kentucky; Hon. Frank E. Wood, 900 Traction Building, Cincinnati, Ohio.

GENTLEMEN: As per your request of February 9th, we are attaching hereto a report showing the number of Gross Sales Tax Reports filed with the Gross Sales Tax Department of the Commonwealth of Kentucky, and an analysis of same up to and including February 12, 1931.

These statements were compiled under the supervision of Mr. Joseph Martin, Supervisor of the Gross Sales Tax Department, and Mr. A. H. Brendel of the firm of J. D. Cloud & Co., Certified Public Accountants, and we hereby certify that the attached statements are true and correct to the best of our knowledge and belief.

Respectfully submitted.

Joseph Martin, Supervisor Gross-sales Tax Department. A. H. Brendel, Certified Public Accountant.

[fol. 220] Number of Blanks Sent Out (Estimated by Mr. Martin) 55,000

Number of Reports Filed by Retail Merchants

	Number filed	Number indicating tax	Number indicating no tax
Showing retail sales less than $400,000	16,353	11,025	5,328
Showing retail sales between $400,000 and $500,000	9	6	3
Showing retail sales between 500,000 and 600,000	4	2	2
Showing retail sales between 600,000 and 700,000	4	3	1
Showing retail sales between 700,000 and 800,000	2	1	1
Showing retail sales between 800,000 and 900,000	1	.....	1
Showing retail sales between 900,000 and $1,000,000	.....	.....	.....
Showing retail sales in excess of $1,000,000	1	.....	1
Totals	16,374	11,037	5,337
Number of reports returned showing retail merchants out of business or not engaged in retail trade (Estimated by Mr. Martin)	1,060		
Total reports received	17,434		

Number of Reports Showing Tax Liability

	No. of returns	Gross sales	Gross tax	Credits allowed	Net tax	Credits shown on reports in excess of tax liability
Showing sales less than $400,000	16,353	$247,923,309	$121,741.66	$59,645.00	$62,096.66	$171,795.54
Showing sales between $400,000 and $500,000	9	4,034,504	2,422.40	1,303.71	1,118.69	6,233.71
Showing sales between 500,000 and 600,000	4	2,247,599	1,817.99	1,452.93	365.06	5,283.65
Showing sales between 600,000 and 700,000	4	2,585,035	2,518.57	1,108.12	1,410.45	177.20
Showing sales between 700,000 and 800,000	2	1,485,783	1,642.86	977.52	665.34	1.49
Showing sales between 800,000 and 900,000	1	814,559	636.15	636.15	.....	1,755.24
Showing sales between 900,000 and 1,000,000	.....	.....	.....	.....	.....	.....
Showing sales in excess of $1,000,000	1	1,325,934	6,309.35	6,309.35	.....	4,593.15
Totals	16,374	$260,416,723	$137,088.98	$71,432.78	$65,656.20	$189,839.98

Number of merchants outside of First and Second Class Cities reporting over $400,000 sales..... Two

	Number of Merchants Reporting Sales of	
	Showing tax liability	Showing no tax liability
Less than $10,000	4,897	3,666
$10,000 and under $25,000	3,668	1,108
$25,000 and under 50,000	1,521	353
$50,000 and under 75,000	455	111
$75,000 and under 100,000	187	33
$100,000 and under 150,000	152	28
$150,000 and under 200,000	61	12
$200,000 and under 250,000	34	9
$250,000 and under 300,000	22	3
$300,000 and under 400,000	28	5
Over $400,000	12	9
Total	11,037	5,337

[fol. 221] **Testimony for Defendants**

[fol. 222] NARRATIVE OF TESTIMONY OF WALTER BURR, GIVEN BEFORE ALMA RHEAD, FEBRUARY 7, 1931

WALTER BURR testified as follows:

That he has been Professor of Rural Sociology in the University of Missouri since September 1, 1929. That he has been a graduate of Kansas State Agricultural College and of the University of Missouri. That prior to teaching he was connected with the Department of Agriculture in the capacity of Rural Organization Specialist and from time to time during the eight years he has acted as teacher, he conducted research projects for the Department of Agriculture, these research projects including the study of farm families receiving poor relief from County funds. That he is the author of magazine articles and three books, the books being "Rural Organization", "Small Towns and Estimate of Their Trade and Culture", and "Community Leadership". That he has made a special study of rural trade and has been frequently called in as an advisor in Kansas and Missouri and in surrounding States in regard to problems of community organizations. That he is familiar with the transition which has taken place in the methods of distribution of goods and wares, a phase of which change [fol. 223] is found in the introduction of store distributing centers in communities that are controlled from outside the community. That this change is known as the "chain store system", which system undertakes through organized efficiency methods to distribute commodities to the public as distinguished from the retail store owned and managed by a local individual. That the multiple owned store companies attempt through efficiency methods to get the goods to the consumer at the lowest possible price. That these multiple owned store companies come into competition with the individual who has performed other functions in the community in addition to engaging in the merchandise business as coincident with the fact of his permanency, his residence, and his leadership as a business man in the community. That community life developed in the past to a considerable extent on the "mutual aid system". That the merchant group have borne to a considerable extent the responsibility of the conservation and developments of com-

munity resources including civic and social resources such as relieving distress of an economic nature in the community, looking after the interests of the school beyond that which is looked after by the responsible leaders and paid out of taxation, the general cooperation and looking after problem people in the community, the support of the churches and the conducting of civic movements. That the individual merchants have borne the major part of the cost in time, money and service in order to keep the good will of the people and to be successful. That as a result of the introduction of the change in the method of distribution the burden carried by the individual merchant is falling upon the State and being met by taxation as for example, the relief of poverty in the health situation which is now coming to be considered as "health prevention". That the County health unit is being introduced, supported partially by the State in matters of vocational training where heretofore they were on an apprenticeship basis and are now [fol. 224] being introduced in high schools under support of federal funds under the "Smith-Hughes Act". That the tendency for communities under the less personal system is to be more ready to send their problem people such as insane, feeble-minded, epileptic, and criminal to State institutions rather than to look after them in the community thereby imposing an added burden upon the State, which must be met from the tax funds. That the multiple owned stores are not bearing locally the burden which heretofore was borne by the individual store owner for the reason that the manager of the multiple owned store is likely to be temporary in the community. That transient persons do not get under the civil, social burdens of the community in which they go into. That they devote their time and attention to reach the objective in distributing food at the lowest possible cost and for this reason cannot devote any time for community enterprises. That the managers of the multiple owned stores do not have the power of decision in expending funds of the company for such purposes.

That the service which was rendered and is being rendered by the individual store owner had a decided value in money to the State both from an economic standpoint in that the problems of such are handled in their origin in a local community and therefore do not become an expense to the State, and also from a social standpoint in in-

creasing the high standards of living and culture thereby creating more progressive and prosperous citizens. That the service rendered by the individual merchant can be reckoned in dollars and cents and is necessarily an expense against his business.

That individual merchants do not sell their goods at the same price as chain stores and that the service rendered by the individual merchant is a factor in this price difference. That insanity, feeble-mindedness, and epilepsy [fol. 225] are not actually increasing but that the number of reported cases is largely due to increase in registration.

Cross-examination:

That he graduated from the University of Kansas in 1920 and that prior thereto he was in settlement work in Chicago, Juvenile Court work in Kansas City, and settlement work in San Francisco. That all his work in these three cities was work done in large industrial centers. That during the years 1914 to 1920 he travelled about the State of Kansas dealing with community problems of various kinds, town-country relations and conflicts, rural High School developments, consolidation of schools and formation of co-operative associations. That he has had no business experience of any kind.

That he has never lived in or been in Kentucky except to pass through. That he has never made any study of business or retail distribution in the State of Kentucky. That he would define a chain as a system of retail distribution so organized that instead of the business being conducted through one store it is conducted through two or more stores.

That in certain places where the owners of the multiple system, lives and has some of his stores, those particular stores may be said to be home-owned even though they are a part of a chain store system and that some chain stores are home-owned and some are not.

That the change in the trend of rural life has been going on for a great number of years and was so marked that when Roosevelt was President he appointed the "Country Life Commission" to make an investigation. That chain store systems have extended their operation very rapidly in the last few years but that The Great Atlantic & Pa-

cific Tea Company had a great number of stores in 1900. That since the war there has been a development in manufacturing which is characterized by the expression "massed [fol. 226] production" which has necessitated mass distribution. That he is not opposed to the chain store system. That he is not opposed to the sending of problem cases to institutions. That we are changing from the dependence upon the individual ownership to dependence upon the State. That coincident in point of time with the growth of the multiple outlet stores there has been a slowing up in the rate of the movement of population from rural areas to urban areas. That individual owned stores are copying such efficiency methods from the multiple owned store operators as they can introduce into their system. That he would not in the long run advocate the retention in our economic system of any waste or inefficiency in the distribution of merchandise.

That he has had no practical experience in the collection of taxes or in working for any tax body. That he has made a wide study of taxes in order to give advice to rural communities.

That both the individual store owner and the chain store operator purchase their merchandise very largely outside of the community. That there is no difference which can be based upon the fact that one sends in its stock of merchandise and the other orders it in. That the local merchant does purchase certain of his product from surrounding farm areas. That generally speaking, the chain store has developed sales efficiency methods that enable it to undersell the average individual local merchant. That the economic and efficient distribution of food has a value and benefit to the community to the extent that it does not in the long run break down community, civic, educational, social and religious organizations.

That efficiency does not necessarily depend in any sense upon whether a man owns one of two stores.

[fol. 227] That he is familiar with the development of cooperative or voluntary chains in the United States especially with Independent Grocers' Alliance. That that organization has approximately ten thousand cooperative stores. That all those stores have distinctive and uniform store fronts bearing I. G. A. labels. That the interior arrangements of these stores are substantially similar and

that they use the same color in all ten thousand stores. That they have some peculiar I. G. A. brands. That the ten thousand stores purchase, advertise and distribute cooperatively. That they are advised by men from the central headquarters and that membership in these cooperative stores is open to every individual grocery store. That members of the cooperative or voluntary chain are considered individual home-owned stores. That the difference between the multiple outlet stores and individual stores in regard to buying power does not depend upon the ownership of two or more stores but upon the volume of business. That his chief point in regard to the change from individual home-owned stores to chain store operations is that the individual store owner performs certain civic functions and that the individual store owner is being supplanted by another system which other system must bear the burdens of individual store owners. That all differences with relation to distribution price and purchasing power have been met by the cooperative or voluntary chain except the difference in regard to civic interest. That there is a variation among individual store owners in regard to whether they are charitable or not. That there is a variation among individual store owners as to their liberality and that there is a variation among men as to their ability to lead the public. That some individual merchants in small towns support churches and some do not. That some [fol. 228] individual merchants support the public schools and some do not. That he is familiar with instances where managers of J. C. Penny stores have contributed to charitable civic, philanthropic, church, and educational movements as liberally as the corresponding competitive merchant. That he would not make any statement that the chain store managers as a whole are uncharitable and lack leadership or interest and do not live in or care about the community. That he knows of no study undertaken to determine how many chain store managers own their own homes in the towns in which they live. That he has no statistics in regard to contributions made by store managers regardless of the ownership of the stores in the State of Kentucky to charitable, philanthropic or civic enterprises. That he has made no study of the part taken in civil affairs by store managers in the State of Kentucky regardless of the ownership of the stores. That he has made no study

and has no facts within his personal knowledge as to whether or not managers of stores regardless of ownership, frequently move from the community where the store is located. That he has no knowledge as to whether managers of stores operated by J. C. Penny in the State of Kentucky have power to spend company funds for philanthropic purposes. That there has been an increase in the rate of commitments to asylums from big cities as well as from small towns and rural communities. That he does not advocate the taking care in the private home of those who require custodial care. That he does not accuse the chain stores or multiple outlet stores of causing insanity or epilepsy.

That lower prices resulting from economic efficiency and sales increases the purchasing power of the consumer's dollar, and that practically every item that a member of rural community purchases, including all necessities of life, is distributed through multiple outlet stores.

[fol. 229] That in a town of approximately 2500 there would be about 600 families and about 20 to 40 retail stores serving such a community. That the average family would purchase from these stores approximately $900.00 worth of goods per year. That he has no idea what the average contribution of the individual home-owned store proprietor would be in a town of approximately 2500 inhabitants. That in such a town of 2500 inhabitants and 600 families with an average purchase of $900.00 per family, the total purchase would amount to $540.00 per year and assuming that efficiency results in a ten percent saving, there would be a total saving to the community of $54,000.00. That if the saving was only five percent the total sum saved the community would be $27,000.00.

That in a town of 5000 inhabitants there would be about 1000 families and that upon the same assumption as to purchases and savings due to efficient distribution of merchandise there would be a saving of $90,000.00 or a saving of $45,000.00 if the efficient distribution of merchandise resulted in a five per cent savings.

Redirect examination:

That taking the individual store owner as a class and those who operate multiple outlet stores in various communities, the burden of social service has fallen on the

individual merchant owning and managing a store in the small town. That the burden is in the process of shifting and that part of it is still being borne by the individual store operator. That even if one assumed that chain store operation resulted in a saving to the community of some $54,000.00, it does not necessarily follow that the community would be that much better off at the end of the year than if it had made those purchases from the individual store owner. That he has never heard of either The Great [fols. 230-232] Atlantic & Pacific Tea Company or The Kroger Grocery & Baking Company ever donating any hospitals or old homes to the community in which they do business. That the time and energy expended by the individual local merchant is the greatest contribution to the community. That he found it more profitable in his experience in advising communities in regard to their social problems to call on the individual merchants rather than the chain store managers. That he had received material response from chain store merchants in money but not in time. That he does not favor penalizing the multiple outlet store for subsidizing the home-owned store.

Recross-examination:

That he has discussed the general situation in regard to the matter in question with the Attorney General of Kentucky before he testified but that no discussion was entered into as to the testimony. That he has studied the briefs in the case and that he was invited to come to testify by the Attorney General. That he was promised a reasonable fee for appearing as an expert witness.

[fol. 233] AFFIDAVIT OF HENRY F. WALRADT

Affidavit of Henry F. Walradt in Opposition to Plaintiff's Motion for Interlocutory Decree

HENRY F. WALRADT, first being duly sworn, says:

I am, and have for the past twenty years been, a resident of Columbus, Ohio. I am now serving in the Ohio State University as Professor of Economics, and have been connected with that institution for the past twenty years.

Immediately preceding that, I had been engaged as a student for eight years in Yale University, first as an undergraduate and then as a graduate student, taking there three degrees: B. A., M. A., and Ph. D. During the last half of 1916 and part of 1917, I was engaged in a taxation study for the Connecticut Chamber of Commerce. From September, 1918, to September, 1919, I was a member of the Research Bureau of the Federal War Trade Board and served as historian. For the last seven or eight years, I have taken an active part in shaping the tax legislation in the State of Ohio, setting in practically all of the taxation committees of the Sessions of the General Assembly. I have also served as an advisor for the Ohio Council of Retail Merchants. I am a member of the American Economic Association, American Society of University Professors, and of the National Tax Association. As a mem- [fol. 234] ber of the National Tax Association, I served last year on the Committee of Motor Vehicle Taxation under the chairmanship of Professor Martin, and I am again serving with this committee for the current year.

While a graduate student in the general field of economics, I specialized in the field of public finance and my thesis was written in that field, and as professor in Ohio State University, I am teaching subjects in the field of public finance.

I have been engaged for several weeks in collecting material to be used in Court in connection with the above-styled case. I have prepared certain charts and tables filed herein. These charts and tables are marked, for identification, Walradt, Exhibit A; Walradt, Exhibit B; Walradt, Exhibit C; Walradt, Exhibit D; Walradt, Exhibit E; Walradt, Exhibit F; Walradt, Exhibit G; Walradt, Exhibit H; Walradt, Exhibit I; and Walradt, Exhibit J. These were prepared by me and are referred to hereinafter by their respective identifying numbers.

It has been my purpose to study the Kentucky Gross Sales Tax with the view of finding whether or not it is unduly discriminatory and confiscatory. Are the rates too sharply progressive, and have there been other taxes which have been as heavy and as sharply progressive?

It is my contention that the Kentucky Gross Sales Tax (Chapter 149, Acts of 1930, pages 475-482) is a tax measure which will provide some much-needed revenue for the State

[fol. 235] of Kentucky, and that the classification provided in the Act is not unreasonable, but is based on the ability to pay.

The tax is levied upon the gross sales or gross receipts of retail merchants. Gross earnings or gross receipts have long been used by various taxing units in this country as a measure for levying taxes, and taxes upon gross earnings or gross receipts have been upheld by the courts. At the present time the neighboring State of Ohio imposes the following taxes based upon gross earnings:

Steam railroads	4%
Pipe line companies	4%
Express companies	2%
Telegraph	2%
Electric lights and power	1.35%
Gas	1.35%
Heating and cooling companies	1.35%
Messenger and signal companies	1.35%
Union depot companies	1.35%
Water transportation	1.35%
Waterworks	1.35%
Sleeping and freight line, or equipment companies	1.35%
Electric railroads	1.2 %

California imposes a 7½% tax on the gross earnings of gas and electric companies and a 7% tax on the gross earnings of railroads. Note that the rates in all these cases exceed the highest rate imposed by the Kentucky Act. In this connection it might be noted that the French have a 2% sales tax which applies to the sales of retail merchants as well as to other sales. This is in support of the [fol. 236] contention that the highest rate of the Kentucky Gross Sales Tax is not unduly high.

The State of Maine has taxed railroads on their gross receipts since 1881. It is interesting to note that from that date on Maine has used progressive rates. The Act of 1881 imposed a tax of ¼ of 1% of the gross receipts of such railroads whose average gross receipts per mile did not exceed $2,250 and this rate was increased by ¼ of 1% for each additional $750 or fraction thereof on the average gross receipts per mile until the maximum rate of 3¼% of the entire gross receipts was reached in the case of rail-

roads where average gross receipts per mile exceeded $11,250. In this case the maximum rate was thirteen times the lowest rate.

In 1907, Maine increased their progressive rates so that the lowest rate was ½ of 1% of the gross receipts of those railroads whose average gross receipts per mile did not exceed $1,500 and increased this rate by ¼ of 1% for each additional $400 or fraction thereof in the average gross receipts per mile until the maximum rate of 5½% of the total gross receipts was reached for those railroads whose average gross receipts per mile exceeded $9,500.

The present method of taxing the gross receipts of railroads used by Maine was adopted in 1927, and is as follows:

[fol. 237]

	Tax.
When net receipts do not exceed 10% of gross receipts	3½% of gross receipts
When net receipts constitute from 10% to 15% of gross receipts	4 % " " "
When net receipts constitute from 15% to 20% of gross receipts	4½% " " "
When net receipts constitute from 20% to 25% of gross receipts	5 % " " "
When net receipts constitute over 25% of gross receipts	5½% " " "

From this table it appears that any railroad whose net earnings were less than 3½% of its gross earnings would be taxed for more than 100% of its net earnings. The fact that a railroad is operating at an actual loss does not excuse it from paying a tax measured by its gross earnings.

Maine also uses progressive rates in taxing the gross receipts of telegraph and telephone companies (the rates ranging from 1¼ to 6 per cent) and of street railways (the rates ranging from 1¼ to 4 per cent).

The use of progressive rates in connection with a gross sales tax is reasonable since in general the larger the gross sales, the greater will be the net income of the concern making the sales. Ability to pay is measured by the *absolute* amount of net income received. It matters not from what source the income is received or how large a return is received on the capital invested. An individual or concern

receiving a certain amount of net income has by that fact a certain ability to pay taxes and it is now generally agreed [fol. 238] that as one's net income increases, his ability to pay taxes increases progressively. It is in accordance with this theory that Wisconsin, since 1911, has levied progressive net income taxes upon both individuals and corporations. If it is true that as the amount of gross sales increases the *amount* of net income resulting increases, then the use of progressive rates in a gross sales tax is justifiable and reasonable.

The tendency for net income to increase as gross sales increase is sufficient by itself to support the constitutionality of a graduated tax on gross sales, but, if in addition, it can be shown—as some of the other witnesses will endeavor to prove—that there is also a tendency for the actual return on the investment to increase as well as the amount of net income to increase with increased volume of sales, the case for progressive taxes is made still stronger.

There is still another strong argument in favor of progressive rates in connection with a gross sales tax. In those states which depend largely for their local revenues upon the general property tax, it is a well known fact that those concerns which have a large volume of sales with a rapid turnover escape bearing their fair share of the tax burden as compared with those concerns having a much smaller volume of sales and a slow turnover. The average amount of merchandise on hand at any time as compared with the total business done is relatively much smaller for the former than the latter. It is only fair, therefore, that [fol. 239] in addition to the general property tax some other form of tax be devised which will tend to equalize the tax burden between these two groups. In so far as a gross sales tax tends to be larger for concerns having a relatively rapid turnover, such a tax served that purpose.

A comparison of the Kentucky Gross Sales Tax with the Federal Income Tax on the incomes of 1918 throws considerable light upon the question of whether or not the rates of the Kentucky tax are excessive.

Two graphs (Exhibits A and B) are presented showing the rate of increase in the effective rates of the Kentucky Gross Sales Tax as compared with the effective rates of the Federal Income Tax based on incomes of 1918. Let us make clear what is meant by the term "effective rates." In the

case of both taxes the rates increase as the amount of the base—i. e., gross sales or net income—increases; but note that the increased rates do not in either case apply to the total base, but only to a certain portion in excess of a given sum up to some larger sum. It is, therefore, necessary to compute the taxes on each of these several portions and then add them in order to ascertain the total tax due. To find the "effective rate" of tax on a given amount of gross sales or net income, it is necessary to divide the total tax due by said amount. This gives the rate of tax which if applied to the total gross sales or net income would give the tax due. This is known as the "effective rate." A table [fol. 240] has been prepared (Exhibit C) which shows how the Kentucky Gross Sales Tax is computed and the effective rates of the tax from $400,000 of gross sales up to $12,000,000 of gross sales.

It is important that the effective rate be constantly kept in mind whenever progressive rates are used, the increased rates applying only to portions of the total sum taxed. It is a natural tendency to think only in the terms of the highest rate applicable, whereas the actual effective rate may be considerably lower. For example, retail merchants who have gross sales in Kentucky of over $1,000,000 are likely to think of the tax on gross sales as a 1% tax. By examining Exhibit C, it is clear that the tax does not reach even ½ of 1% until gross sales amount to $1,390,000, and the tax does not reach ¾ of 1% until the gross sales amount to nearly $2,800,000. In fact, after allowing for the credits permitted by the Act in question, it is improbable that any retail merchant in Kentucky will pay a tax of more than 82/100 of 1% of his gross sales. In no case will it be possible for the tax to reach a full 1%. Notice that the changes in the effective rate of the tax as the gross sales increase by $100,000 are small, the largest increase being only 632/10,000 of 1% in the case of the increase in gross sales from $1,000,000 to $1,100,000. Notice also the flattening out of the increases after $2,500,000 gross sales. This is shown not only in Exhibit C, but in the graph (Exhibit D) which shows the changes in the effective rates of the Kentucky [fol. 241] Gross Sales Tax. The same fact is brought out in Exhibits E, F, and G under the column entitled "Ratio between successive effective rates—Gross Sales."

Exhibit A plots the effective rates of the Kentucky Sales Tax as computed in Exhibit C, in such a way as to show the degree of progression. The steeper the curve the larger the degree of progression. In Exhibit B the rapidity of the progression in the effective rates of the Federal Income Tax levied on 1918 incomes is plotted. By comparing the two graphs which are drawn on the same scale, it will be readily seen that the degree of progression is greater for the Federal Income Tax for the first $500,000. The real comparison between these two taxes should not be made for the same amount of gross sales and net income, but rather for that amount of net income which might be expected to result from a given amount of gross sales. Such a comparison of resulting taxes and effective rates is made in Exhibits E, F, and G, in which the assumption is made that the net receipts amount to 4, 3, and 2% respectively of the gross sales. These tables show also the degree of progression in the effective rates and the degree of progression in the amount of taxes due for stated amounts of gross sales and the equivalent net incomes.

It will be noted that the increase in the effective rates and in the tax as computed is greater for the Federal Income Tax at first, but that in Exhibits E and F the effective [fol. 242] rates and the tax as computed increase at a faster rate in the case of the Gross Sales Tax from $500,000 gross sales until $1,800,000 gross sales in Exhibit E and $1,900,000 in Exhibit F. In Exhibit G the effective rates and the tax as computed increase at a faster rate from $600,000 gross sales until $2,000,000 gross sales. Note, however, that in all three cases from this point on the effective rates and the increase in the tax as computed progress at a higher rate in the case of the Federal Income Tax than in the case of the Kentucky Gross Sales Tax.

In Exhibit E the actual increase in the tax as computed for each bracket is always larger for the Federal Income Tax; in Exhibit F it is always larger from $1,600,000 gross sales, and in Exhibit E it is always larger for the Federal Income Tax from $4,000,000 gross sales on.

Finally, it should be noted that if the net income amounts to 4% or only 3% of the gross sales, the actual amount of taxes payable under the Federal Income Tax levied on 1918 incomes was always larger than the taxes payable under the Kentucky Gross Sales Tax for the equivalent amount of

gross sales. Even if we assume that the average net income made by retail merchants is only 2% of their gross sales, the taxes payable under the aforesaid Federal Income Tax were larger than the taxes payable on the equivalent amount of gross sales under the Kentucky Gross Sales Tax until the gross sales exceed $900,000 and the amount of taxes due [fol. 243] under the Federal Income Tax again exceed those due under the Kentucky Gross Sales Tax when the gross sales approach $8,000,000. Thus, even assuming net income amounts to only 2% of gross sales, any individual merchant or partnership doing $8,000,000 or more of business would have been more heavily taxed under this Federal Income Tax than under the Kentucky Gross Sales Tax. If the percentage of net income to gross sales is 3% or more, as shown above, the taxes payable under this Federal Income Tax would always be higher. Exhibits H, I, and J show graphically the relation between the amounts of taxes due under the two types of taxes being compared in Exhibits E, F, and G.

Summary: The fact that not only have proportional taxes on gross receipts or earnings been levied for years by various taxing divisions in this country, but also graduated taxes on such gross receipts or earnings and that these taxes have been upheld by the courts; the fact that as gross sales increase the tendency is for net income to increase giving to the recipient greater ability to pay taxes and the fact that the Federal Income Tax levied upon the incomes of 1918, although in general increasing at a more rapid rate and resulting in heavier taxes than is true for the Kentucky Gross Sales Tax, was not thrown out by the courts as unduly discriminatory or confiscatory, lead to the conclusion that the Kentucky Sales Tax is not unduly discriminatory or confiscatory.

Henry F. Walradt.

(Duly verified.)

[fol. 244] (Here follow Exhibits A and B to affidavit of Henry F. Walradt, side folios 245 and 246.)

EXHIBIT "A" - TO AFFIDAVIT OF HENRY F. WALRADT

EFFECTIVE RATE ON TOTAL GROSS SALES OF THE KENTUCKY GROSS SALES TAX

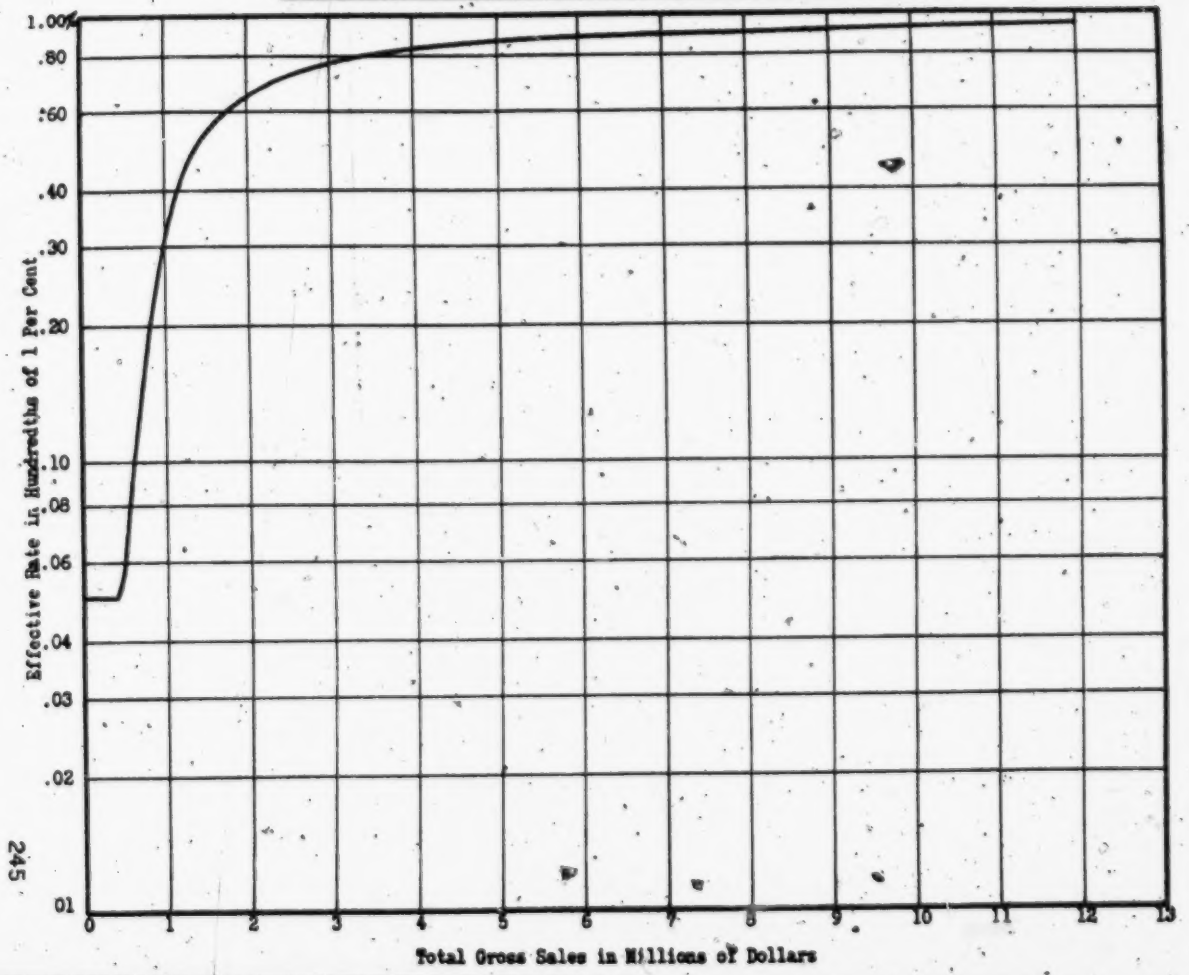
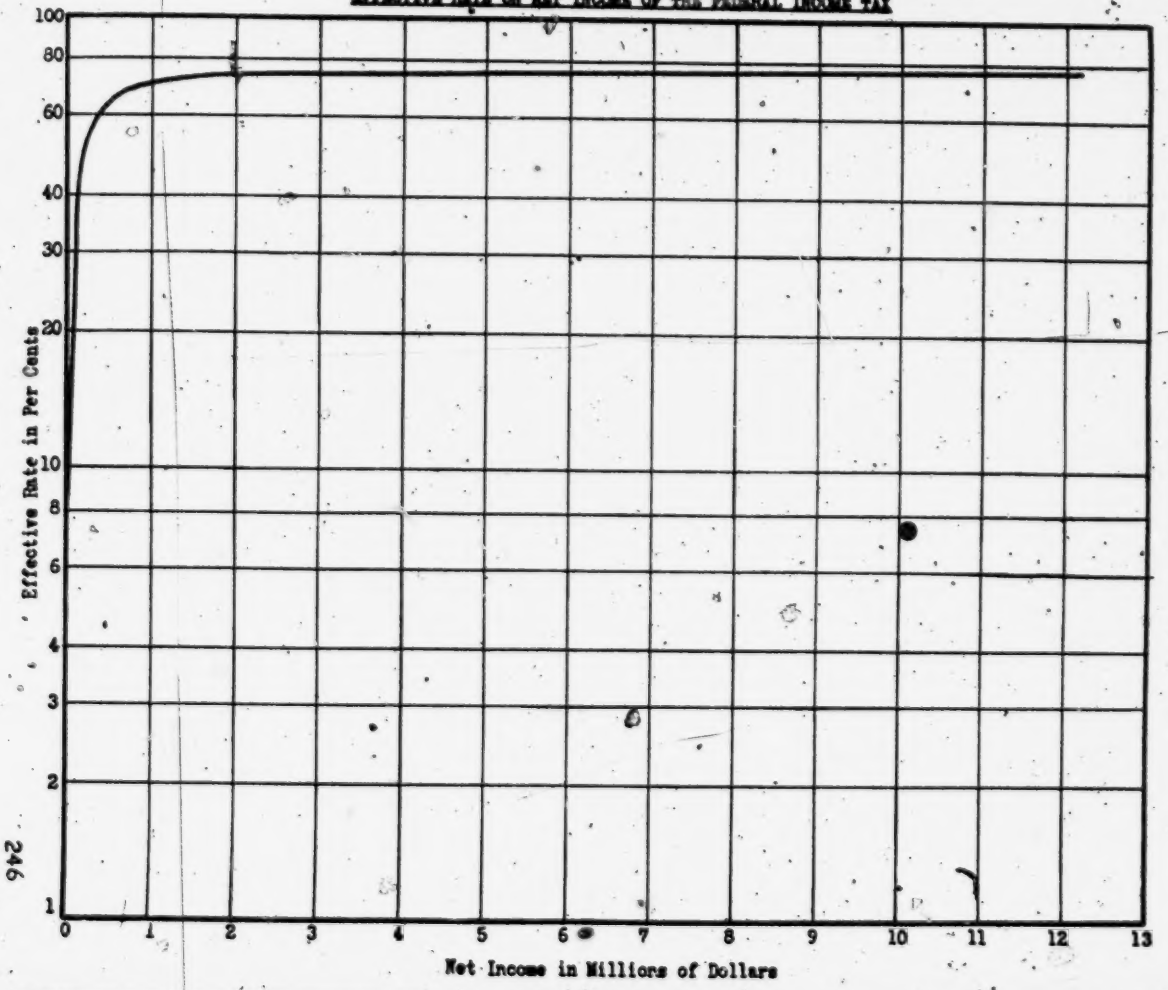


EXHIBIT "B" - TO AFFIDAVIT OF HENRY F. WALRADT

EFFECTIVE RATE ON NET INCOME OF THE FEDERAL INCOME TAX



246

164B

[fol. 247]

Appendix

[fol. 248]

Exhibit C to Affidavit of Henry F. Walradt

Application of the Kentucky Sales Tax Rates

Fractional parts of gross sales		Rate levied on the fractional part	Total gross sales	Tax on fractional part	Cumulative tax	Effective rate on total gross sales (fraction of 1 per cent)	Increase in effective rate over preceding class. (fraction of 1 per cent)
$1—	$400,000.....	1/20 of 1%	$400,000	$200	$200	.05	.....
400,000—	500,000.....	2/20 of 1%	500,000	100	300	.06	100/10,000
500,000—	600,000.....	5/20 of 1%	600,000	250	550	.0917	317/10,000
600,000—	700,000.....	8/20 of 1%	700,000	400	950	.1357	440/10,000
700,000—	800,000.....	11/20 of 1%	800,000	550	1,500	.1875	518/10,000
800,000—	900,000.....	14/20 of 1%	900,000	700	2,200	.2444	569/10,000
900,000—	1,000,000.....	17/20 of 1%	1,000,000	850	3,050	.305	611/10,000
1,000,000—	1,100,000.....	1%	1,100,000	1,000	4,050	.3682	632/10,000*
1,100,000—	1,200,000.....	Do.	1,200,000	Do.	5,050	.4208	526/10,000
1,200,000—	1,300,000.....	"	1,300,000	"	6,050	.4654	446/10,000
1,300,000—	1,400,000.....	"	1,400,000	"	7,050	.5036	382/10,000
1,400,000—	1,500,000.....	"	1,500,000	"	8,050	.5367	331/10,000
1,500,000—	1,600,000.....	"	1,600,000	"	9,050	.5656	289/10,000
1,600,000—	1,700,000.....	"	1,700,000	"	10,050	.5912	256/10,000
1,700,000—	1,800,000.....	"	1,800,000	"	11,050	.6139	227/10,000
1,800,000—	1,900,000.....	"	1,900,000	"	12,050	.6342	203/10,000
1,900,000—	2,000,000.....	"	2,000,000	"	13,050	.6525	183/10,000
2,000,000—	2,100,000.....	"	2,100,000	"	14,050	.6690	165/10,000
2,100,000—	2,200,000.....	"	2,200,000	"	15,050	.6841	151/10,000
2,200,000—	2,300,000.....	"	2,300,000	"	16,050	.6978	137/10,000

* Largest increase in the effective rate of any one class over the effective rate of the preceding class.

[fol. 249]

Exhibit C—Continued.

Fractional parts of gross sales	Rate levied on the fractional part	Total gross sales	Tax on fractional part	Cumulative tax	Effective rate on total gross sales (fraction of 1 per cent)	Increase in effective rate over preceding class (fraction of 1 per cent)
2,300,000— 2,400,000	1%	2,400,000	1,000	17,050	.7104	126/10,000
2,400,000— 2,500,000	Do.	2,500,000	Do.	18,050	.722	116/10,000
2,500,000— 2,600,000	"	2,600,000	"	19,050	.7327	107/10,000
2,600,000— 2,700,000	"	2,700,000	"	20,050	.7426	99/10,000
2,700,000— 2,800,000	"	2,800,000	"	21,050	.7518	92/10,000
2,800,000— 2,900,000	"	2,900,000	"	22,050	.7603	85/10,000
2,900,000— 3,000,000	"	3,000,000	"	23,050	.7683	80/10,000
3,000,000— 3,100,000	"	3,100,000	"	24,050	.7758	75/10,000
3,100,000— 3,200,000	"	3,200,000	"	25,050	.7828	70/10,000
3,200,000— 3,300,000	"	3,300,000	"	26,050	.7894	66/10,000
3,300,000— 3,400,000	"	3,400,000	"	27,050	.7956	62/10,000
3,400,000— 3,500,000	"	3,500,000	"	28,050	.8014	58/10,000
3,500,000— 3,600,000	"	3,600,000	"	29,050	.8069	55/10,000
3,600,000— 3,700,000	"	3,700,000	"	30,050	.8122	53/10,000
3,700,000— 3,800,000	"	3,800,000	"	31,050	.8171	49/10,000
3,800,000— 3,900,000	"	3,900,000	"	32,050	.8218	47/10,000
3,900,000— 4,000,000	"	4,000,000	"	33,050	.8263	45/10,000
4,000,000— 4,100,000	"	4,100,000	"	34,050	.8305	42/10,000
4,100,000— 4,200,000	"	4,200,000	"	35,050	.8345	40/10,000
4,200,000— 4,300,000	"	4,300,000	"	36,050	.8384	39/10,000
4,300,000— 4,400,000	"	4,400,000	"	37,050	.8420	36/10,000
4,400,000— 4,500,000	"	4,500,000	"	38,050	.8456	36/10,000
4,500,000— 4,600,000	"	4,600,000	"	39,050	.8489	33/10,000
4,600,000— 4,700,000	"	4,700,000	"	40,050	.8521	32/10,000
4,700,000— 4,800,000	"	4,800,000	"	41,050	.8552	31/10,000

4,800,000—	4,900,000.....	"	4,900,000	"	42,050	.8582	30/10,000
4,900,000—	5,000,000.....	"	5,000,000	"	43,050	.861	28/10,000
5,000,000—	5,100,000.....	"	5,100,000	"	44,050	.8637	27/10,000
5,100,000—	5,200,000.....	"	5,200,000	"	45,050	.8663	26/10,000
5,200,000—	5,300,000.....	"	5,300,000	"	46,050	.8689	26/10,000
[fol. 250]							
5,300,000—	5,400,000.....	"	5,400,000	"	47,050	.8713	24/10,000
5,400,000—	5,500,000.....	"	5,500,000	"	48,050	.8736	23/10,000
5,500,000—	5,600,000.....	"	5,600,000	"	49,050	.8759	23/10,000
5,600,000—	5,700,000.....	"	5,700,000	"	50,050	.8781	22/10,000
5,700,000—	5,800,000.....	"	5,800,000	"	51,050	.8802	21/10,000
5,800,000—	5,900,000.....	"	5,900,000	"	52,050	.8822	20/10,000
5,900,000—	6,000,000.....	"	6,000,000	"	53,050	.8842	20/10,000
6,000,000—	6,100,000.....	"	6,100,000	"	54,050	.8861	19/10,000
6,100,000—	6,200,000.....	"	6,200,000	"	55,050	.8879	18/10,000
6,200,000—	6,300,000.....	"	6,300,000	"	56,060	.8897	18/10,000
6,300,000—	6,400,000.....	"	6,400,000	"	57,050	.8914	17/10,000
6,400,000—	6,500,000.....	"	6,500,000	"	58,050	.8931	17/10,000
6,500,000—	6,600,000.....	"	6,600,000	"	59,050	.8947	16/10,000
6,600,000—	6,700,000.....	"	6,700,000	"	60,050	.8963	16/10,000
6,700,000—	6,800,000.....	"	6,800,000	"	61,050	.8978	15/10,000
6,800,000—	6,900,000.....	"	6,900,000	"	62,050	.8993	15/10,000
6,900,000—	7,000,000.....	"	7,000,000	"	63,050	.9007	14/10,000
7,000,000—	7,100,000.....	"	7,100,000	"	64,050	.9021	14/10,000
7,100,000—	7,200,000.....	"	7,200,000	"	65,050	.9035	14/10,000
7,200,000—	7,300,000.....	"	7,300,000	"	66,050	.9048	13/10,000
7,300,000—	7,400,000.....	"	7,400,000	"	67,050	.90608	13/10,000
7,400,000—	7,500,000.....	"	7,500,000	"	68,050	.90733	13/10,000
7,500,000—	7,600,000.....	"	7,600,000	"	69,050	.90855	12/10,000
7,600,000—	7,700,000.....	"	7,700,000	"	70,050	.9097	12/10,000
7,700,000—	7,800,000.....	"	7,800,000	"	71,050	.9109	12/10,000

[fol. 251]

Exhibit C—Continued.

Fractional parts of gross sales	Rate levied on the fractional part	Total gross sales	Tax on fractional part	Cumulative tax	Effective rate on total gross sales (fraction of 1 per cent)	Increase in effective rate over preceding class (fraction of 1 per cent)
7,800,000— 7,900,000.....	1%	7,900,000	1,000	72,050	.9120	11/10,000
7,900,000— 8,000,000.....	Do.	8,000,000	Do.	73,050	.9131	11/10,000
8,000,000— 8,100,000.....	"	8,100,000	"	74,050	.9144	11/10,000
8,100,000— 8,200,000.....	"	8,200,000	"	75,050	.91524	10/10,000
8,200,000— 8,300,000.....	"	8,300,000	"	76,050	.91627	10/10,000
8,300,000— 8,400,000.....	"	8,400,000	"	77,050	.91726	10/10,000
8,400,000— 8,500,000.....	"	8,500,000	"	78,050	.91823	10/10,000
8,500,000— 8,600,000.....	"	8,600,000	"	79,050	.9192	10/10,000
8,600,000— 8,700,000.....	"	8,700,000	"	80,050	.9201	9/10,000
8,700,000— 8,800,000.....	"	8,800,000	"	81,050	.9210	9/10,000
8,800,000— 8,900,000.....	"	8,900,000	"	82,050	.9219	9/10,000
8,900,000— 9,000,000.....	"	9,000,000	"	83,050	.92278	9/10,000
9,000,000— 9,100,000.....	"	9,100,000	"	84,050	.92363	9/10,000
9,100,000— 9,200,000.....	"	9,200,000	"	85,050	.92446	8/10,000
9,200,000— 9,300,000.....	"	9,300,000	"	86,050	.92527	8/10,000
9,300,000— 9,400,000.....	"	9,400,000	"	87,050	.92606	8/10,000
9,400,000— 9,500,000.....	"	9,500,000	"	88,050	.92684	8/10,000
9,500,000— 9,600,000.....	"	9,600,000	"	89,050	.92760	8/10,000
9,600,000— 9,700,000.....	"	9,700,000	"	90,050	.92835	8/10,000
9,700,000— 9,800,000.....	"	9,800,000	"	91,050	.92908	7/10,000
9,800,000— 9,900,000.....	"	9,900,000	"	92,050	.92980	7/10,000
9,900,000— 10,000,000.....	"	10,000,000	"	93,050	.9305	7/10,000
10,000,000— 10,100,000.....	"	10,100,000	"	94,050	.93119	7/10,000
10,100,000— 10,200,000	"	10,200,000	"	95,050	.93186	7/10,000
10,200,000— 10,300,000.....	"	10,300,000	"	96,050	.93252	7/10,000

10,300,000—	10,400,000.....	"	10,400,000	"	97,050	.93317	7/10,000
10,400,000—	10,500,000.....	"	10,500,000	"	98,050	.93381	6/10,000
10,500,000 -	10,600,000.....	"	10,600,000	"	99,050	.93443	6/10,000
10,600,000—	10,700,000.....	"	10,700,000	"	100,050	.93505	6/10,000
10,700,000—	10,800,000.....	"	10,800,000	"	101,050	.93565	6/10,000

[fol. 252]

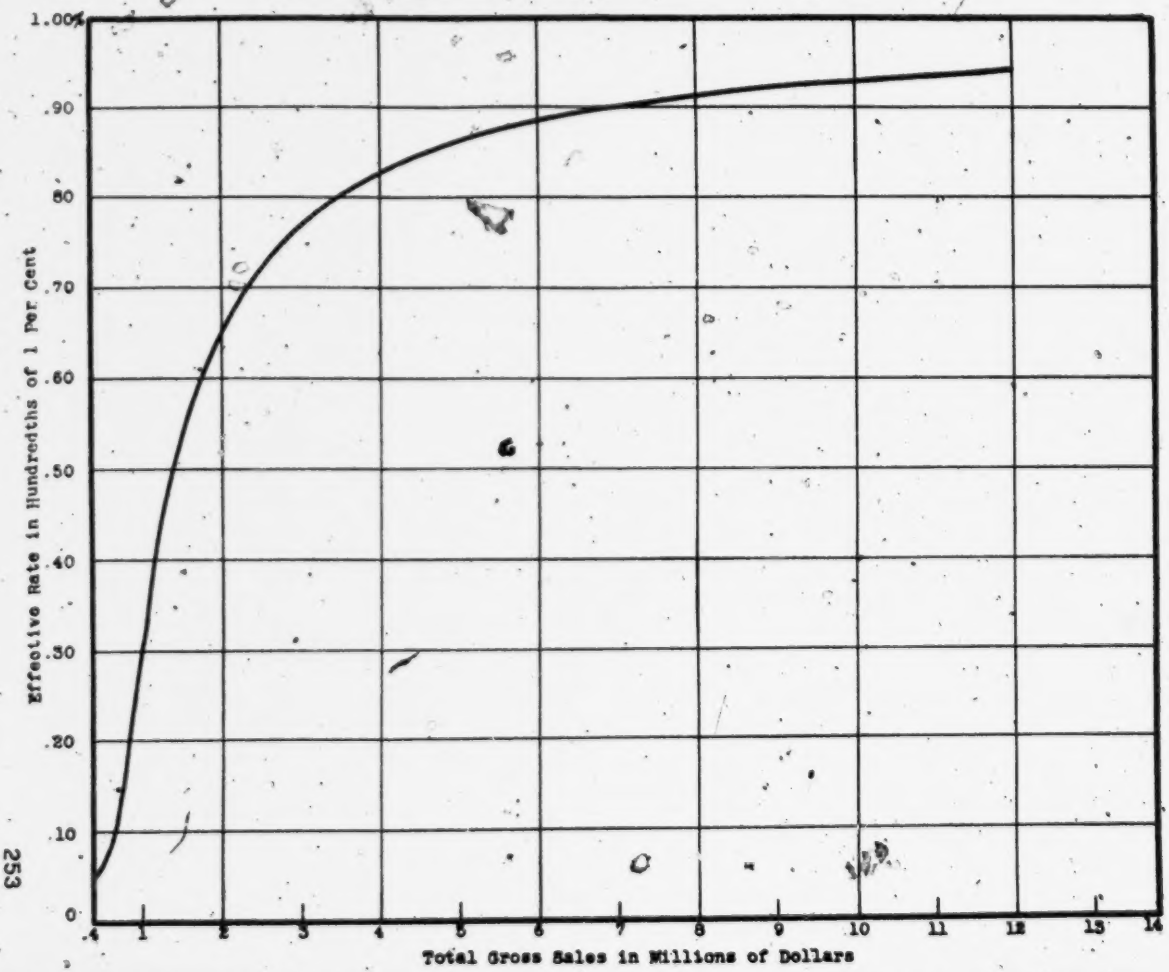
10,800,000—	10,900,000.....	"	10,900,000	"	102,050	.93624	6/10,000
10,900,000—	11,000,000.....	"	11,000,000	"	103,050	.93682	6/10,000
11,000,000—	11,100,000.....	"	11,100,000	"	104,050	.93739	6/10,000
11,100,000—	11,200,000.....	"	11,200,000	"	105,050	.93795	6/10,000
11,200,000—	11,300,000.....	"	11,300,000	"	106,050	.93850	6/10,000
11,300,000—	11,400,000.....	"	11,400,000	"	107,050	.93904	5/10,000
11,400,000—	11,500,000.....	"	11,500,000	"	108,050	.93957	5/10,000
11,500,000—	11,600,000.....	"	11,600,000	"	109,050	.94009	5/10,000
11,600,000—	11,700,000.....	"	11,700,000	"	110,050	.94060	5/10,000
11,700,000—	11,800,000.....	"	11,800,000	"	111,050	.94110	5/10,000
11,800,000—	11,900,000.....	"	11,900,000	"	112,050	.94160	5/10,000
11,900,000—	12,000,000.....	"	12,000,000	"	113,050	.94208	5/10,000

(Here follows Exhibit D to Affidavit of Henry F. Walradt, side folio 253.)

EXHIBIT "D" - TO AFFIDAVIT OF HENRY F. WALRADT

EXHIBIT "D" - TO AFFIDAVIT OF HENRY F. WALRADT

EFFECTIVE RATE ON TOTAL GROSS SALES OF THE KENTUCKY GROSS SALES TAX



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170A

[fol. 254]

EXHIBIT E to Affidavit of Henry F. Walradt

Gross-sales Tax Compared with Federal Income Tax (1913), Assuming Net Income to be 4% of Gross Sales

Gross sales	Net income (4% of gross)	Gross sales tax (total)	Net income tax (total)	Effective rate of gross sales tax (per cent)	Effective rate of net income tax (per cent)	Ratio between successive effective rates		Ratio between successive taxes as computed	
						Gross sales	Net income	Gross sales	Net income
$100,000	$4,000	$50	$120	.05	3.00	.....	.....	.....	.....
200,000	8,000	100	530	.05	6.63−	100.00	221.00	200.00	441.67−
300,000	12,000	150	1,150	.05	9.58+	100.00	144.49+	150.00	216.98+
400,000	16,000	200	1,850	.05	11.56+	100.00	120.67−	133.33+	160.87−
500,000	20,000	300	2,630	.06	13.15	120.00	113.75+	150.00	142.16+
600,000	24,000	550	3,490	.0917	14.54+	152.83+	110.57+	183.33+	132.70−
700,000	28,000	950	4,430	.1357	15.82+	147.98+	108.80+	172.73−	126.93+
800,000	32,000	1,500	5,450	.1875	17.03+	138.17+	107.65+	157.89+	123.02+
900,000	36,000	2,200	6,550	.2444	18.19+	130.35−	106.81+	146.67−	120.18+
1,000,000	40,000	3,050	7,730	.305	19.33−	124.80−	106.27−	138.64−	118.02−
1,100,000	44,000	4,050	8,990	.3682	20.43+	120.71+	105.69+	132.79−	116.30+
1,200,000	48,000	5,050	10,330	.4208	21.52+	114.29−	105.34−	124.69+	114.91−
1,300,000	52,000	6,050	11,750	.4654	22.60−	110.60−	105.02−	119.80+	113.75−
1,400,000	56,000	7,050	13,250	.5036	23.66+	108.23−	104.69+	116.53−	112.77−
1,500,000	60,000	8,050	14,830	.5367	24.72−	106.57+	104.48+	114.18+	111.92+
1,600,000	64,000	9,050	16,490	.5656	25.77−	105.38+	104.25−	112.42+	111.19+
1,700,000	68,000	10,050	18,230	.5912	26.81−	104.53−	104.04−	111.05−	110.55+
1,800,000	72,000	11,050	20,050	.6139	27.85−	103.84−	103.88−	109.95+	109.98+
1,900,000	76,000	12,050	21,950	.6342	28.88+	103.31−	103.70−	109.05−	109.48−
2,000,000	80,000	13,050	23,930	.6525	29.91+	102.89−	103.57−	108.30−	109.02+
[fol. 255]									
2,100,000	84,000	14,050	25,990	.6690	30.94+	102.53−	103.44+	107.66+	108.61−
2,200,000	88,000	15,050	28,130	.6841	31.97−	102.26−	103.33−	107.12−	108.23+

EXHIBIT E to Affidavit of Henry F. Walradt—Continued

Gross-sales Tax Compared with Federal Income Tax (1918), Assuming Net Income to be 4% of Gross Sales

Gross sales	Net income (4% of gross)	Gross sales tax (total)	Net income tax (total)	Effective rate of gross sales tax (per cent)	Effective rate of net income tax (per cent)	Ratio between successive effective rates		Ratio between successive taxes as computed	
						Gross sales	Net income	Gross sales	Net income
2,300,000	92,000	16,050	30,350	.6978	32.99−	102.03−	103.19+	106.64+	107.89+
2,400,000	96,000	17,050	32,650	.7104	34.01+	101.81−	103.09	106.23+	107.58−
2,500,000	100,000	18,050	35,030	.7220	35.03	101.63+	103.00−	105.87−	107.29−
3,750,000	150,000	31,000	67,030	.8267	44.69−	114.50+	127.58−	171.75−	191.35+
5,000,000	200,000	43,050	101,030	.8610	50.52−	104.15−	113.05−	138.87+	150.72+
7,500,000	300,000	68,050	173,030	.9073	57.68−	105,38−	114.17+	158.07+	171.27−
10,000,000	400,000	93,050	248,030	.9305	62.01−	102.56−	107.51−	136.74−	143.35−
12,000,000	480,000	113,050	308,030	.94208	64.17+	101.24+	103.48+	121.49+	124.19+
12,500,000	500,000	118,050	323,030	.9444	64.61	100.25−	100.69−	104.42+	104.87−

[fol. 256]

EXHIBIT F to Affidavit of Henry F. Walradt

Gross-sales Tax Compared with Federal Income Tax (1918), Assuming Net Income to be 3% of Gross Sales

Gross sales	Net income (2% of gross)	Gross sales tax (total)	Net income tax (total)	Effective rate of gross sales tax (per cent)	Effective rate of net income tax (per cent)	Ratio between successive effective rates		Ratio between successive taxes as computed	
						Gross sales	Net income	Gross sales	Net income
100,000	$3,000	$50	$60	.05	2.00	.....	.....	.....	.....
200,000	6,000	100	250	.05	4.17−	100.00	208.5	200.00	416.67−
300,000	9,000	150	680	.05	7.56−	100.00	181.29+	150.00	272.00
400,000	12,000	200	1,150	.05	9.58+	100.00	126.72−	133.33+	169.12−
500,000	15,000	300	1,670	.06	11.13+	120.00	116.18−	150.00	145.22−
600,000	18,000	550	2,230	.0917	12.39−	152.83+	111.32+	183.33+	133.53+
700,000	21,000	950	2,840	.1357	13.52+	147.98+	109.12+	172.73−	127.35+
800,000	24,000	1,500	3,490	.1875	14.54+	138.17+	107.54+	157.89+	122.89−
900,000	27,000	2,200	4,190	.2444	15.52−	130.35−	106.74+	146.67−	120.06−
1,000,000	30,000	3,050	4,930	.305	16.43+	124.80−	105.86+	138.64−	117.66+

1,100,000	33,000	4,050	5,720	.3682	17.33+	120.72+	105.48−	132.79−	116.02+
1,200,000	36,000	5,050	6,5[illegible]	.4208	18.19+	114.29−	104.96+	124.69+	114.51+
1,300,000	39,000	6,050	7,430	.4654	19.05+	110.60−	104.73−	119.80+	113.44−
1,400,000	42,000	7,050	8,350	.5036	19.88+	108.23−	104.36−	116.53−	112.38+
1,500,000	45,000	8,050	9,320	.5367	20.71+	106.57+	104.18−	114.18+	111.62−
1,600,000	48,000	9,050	10,330	.5656	21.52+	105.38+	103.91+	112.42+	110.84−
1,700,000	51,000	10,050	11,390	.5912	23.33+	104.53−	103.76+	111.05−	110.26+
1,800,000	54,000	11,050	12,490	.6139	23.13−	103.84−	103.58+	109.95+	109.66−
1,900,000	57,000	12,050	13,640	.6342	23.93−	103.31−	103.46−	109.05	109.21−
2,000,000	60,000	13,050	14,830	.6525	24.72−	102.89−	103.30+	108.30−	108.72+

[fol. 257]

2,100,000	63,000	14,050	16,070	.6690	25.51−	102.53−	103.20−	107.66+	108.36+
2,200,000	66,000	15,050	17,350	.6841	26.29−	102.26−	103.06−	107.12−	107.96−
2,300,000	69,000	16,050	18,680	.6978	27.07+	102.03−	102.97−	106.64+	107.67−
2,400,000	72,000	17,050	20,050	.7104	27.85−	101.81−	102.88+	106.23+	107.33+
2,500,000	75,000	18,050	21,470	.7220	28.63−	101.63+	102.80+	105.87−	107.08+
2,600,000	78,000	19,050	22,930	.7327	29.40−	101.48+	102.69−	105.54	106.80+
2,700,000	81,000	20,050	24,440	.7426	30.17+	101.35+	102.62−	105.25−	106.59−
2,800,000	84,000	21,050	25,990	.7518	30.94+	101.24−	102.55+	104.99−	106.34+
2,900,000	87,000	22,050	27,590	.7603	31.71+	101.13	102.49−	104.75	106.16−
3,000,000	90,000	23,050	29,230	.7683	32.48−	101.05+	102.43−	104.54−	105.94+
3,100,000	93,000	24.050	30,920	.7758	33.25−	100.98−	102.37+	104.34−	105.78+
3,200,000	96,000	25,050	32,650	.7828	34.01+	100.90+	102.29−	104.16−	105.60−
3,300,000	99,000	26,050	34,430	.7894	34.78−	100.84+	102.26+	103.99+	105.45+
3,400,000	102,000	27,050	36,310	.7956	35.60−	100.79−	102.36−	103.84−	05.46+
3,500,000	105,000	28,050	38,230	.8014	36.41−	100.73−	102.28−	103.70−	105.29−
5,000,000	150,000	43,050	67,030	.861	44.69−	107.44−	122.74+	153.48−	175.33+
8,000,000	240,000	73,050	129,830	.9131	54.10	106.05+	121.06−	169.69−	193.69−
10,000,000	300,000	93,050	173,030	.9305	57.68−	101.91−	106.62−	127.38−	133.27+
12,000,000	360,000	113,050	218,030	.94208	60.56+	101.24+	104.99+	121.49+	126.01−
12,500,000	375,000	118,050	229,280	.9444	61.14+	100.25−	100.96−	104.42+	105.16−

[fol. 258]

EXHIBIT G to Affidavit of Henry F. Walradt

Gross-sales Tax Compared with Federal Income Tax (1918), Assuming Net Income to be 2% of Gross Sales

Gross sales	Net income (2% of gross)	Gross sales tax (total)	Net income tax (total)	Effective rate of gross sales tax (per cent)	Effective rate of net income tax (per cent)	Ratio between successive effective rates		Ratio between successive taxes as computed	
						Gross sales	Net income	Gross sales	Net income
$100,000	$2,000	$50	$0	.05	0.	.....	.....	.....	.....
200,000	4,000	100	120	.05	3.00	100.	.....	200.00	.....
300,000	6,000	150	250	.05	4.17	100.	139.00	150.00	283.33+
400,000	8,000	200	530	.05	6.83	100.	161.39+	133.33+	212.00
500,000	10,000	300	830	.06	8.3	120.	121.52+	150.00	156.60+
600,000	12,000	550	1,150	.0917	9.58	152.83+	115.42+	183.33+	138.55+
700,000	14,000	950	1,490	.1357	10.64	147.98+	111.06+	172.73−	129.57−
800,000	16,000	1,500	1,850	.1875	11.56	138.17+	108.65−	157.89+	124.16+
900,000	18,000	2,200	2,230	.2444	12.39	130.35−	107.18−	146.67−	120.54+
1,000,000	20,000	3,050	2,630	.305	13.15	124.80−	106,13+	138.64+	117.94−
1,100,000	22,000	4,050	3,050	.3682	13.86	120.72+	105.40	132.79−	115.97−
1,200,000	24,000	5,050	3,490	.4208	14.54	114.29−	104.91−	124.69+	114.43−
1,300,000	26,000	6,050	3,950	.4654	15.19	110.60−	104.47+	119.80+	113.18+
1,400,000	28,000	7,050	4,430	.5036	15.82	108.23−	104.15−	116.53−	112.15+
1,500,000	30,000	8,050	4,930	.5367	16.43	106.57+	103.86−	114.18+	111.29−
1,600,000	32,000	9,050	5,450	.5656	17.03	105.38+	103.65+	112.42+	110.55−
1,700,000	34,000	10,050	5,990	.5912	17.62	104.53−	103.46+	111.05−	109.91−
1,800,000	36,000	11,050	6,550	.6139	18.19	103.84−	103.23+	109.95+	109.35−
1,900,000	38,000	12,050	7,130	.6342	18.76	103.31−	103.13+	109.05−	108.85+
2,000,000	40,000	13,050	7,730	.6525	19.33	102.89−	103.04−	108.30−	108.42−

[fol. 259]

2,100,000	42,000	14,050	8,350	.6690	19.88	102.53−	102.84+	107.66+	108.02+
2,200,000	44,000	15,050	8,990	.6841	20.43	102.26−	102.77−	107.12−	107.66+
2,300,000	46,000	16,050	9,650	.6978	20.98	102.03−	102.69+	106.64+	107.34−
2,400,000	48,000	17,050	10,330	.7104	21.52	101.81−	102.57+	106.23+	107.05−

2,500,000	50,000	18,050	11,030	.722	22.06	101.63+	102.51−	105.87−	106.78−
2,600,000	52,000	19,050	11,750	.7327	22.60	101.48+	102.45−	105.54	106.53−
2,700,000	54,000	20,050	12,490	.7426	23.13	101.35+	102.35−	105.25−	106.30−
2,800,000	56,000	21,050	13,250	.7518	23.66	101.24−	102.29+	104.99−	106.08+
2,900,000	58,000	22,050	14,030	.7603	24.19	101.13	102.24	104.75	105.89−
3,000,000	60,000	23,050	14,830	.7683	24.72	101,05+	102.19	104.54−	105.70+
3,100,000	62,000	24,050	15,650	.7758	25.242	100.98−	102.11+	104.34−	105.53−
3,200,000	64,000	25,050	16,490	.7828	25.766	100.90+	102.08−	104.16−	105.37−
3,300,000	66,000	26,050	17,350	.7894	26.288	100.84+	102.03−	103.39+	105.22−
3,400,000	68,000	27,050	18,230	.7956	26.809	100.79−	101.98+	103.84−	105.07+
3,500,000	70,000	28,050	19,130	.8014	27.329	100.73−	101.94−	103.70−	104.94−
3,600,000	72,000	29,050	20,050	.8069	27.847	100.69−	101.90−	103.57−	104.81−
3,700,000	74,000	30,050	20,990	.8122	28.365	100.66−	101.86	103.44+	104.69−
3,800,000	76,000	31,050	21,950	.8171	28.882	100.60+	101.82+	103.33−	104.57+
3,900,000	78,000	32,050	22,930	.8218	29.397	100.58−	101.78+	103.22	104.46+
4,000,000	80,000	33,050	23,930	.8263	29.913	100.55−	101.76−	103.12	104.36+
4,100,000	82,000	34,050	24,950	.8305	30.427	100.51−	101.72−	103.03−	104.26+
4,200,000	84,000	35,050	25,990	.8345	30.940	100.48+	101.69−	102.94−	104.17−
4,300,000	86,000	36,050	27,050	.8384	31.453	100.47−	101.66−	102.85+	104.08−
4,400,000	88,000	37,050	28,130	.8420	31.966	100.43−	101.63+	102.77+	103.99+
4,500,000	90,000	38,050	29,230	.8456	32.478	100.43−	101.60+	102.70−	103.91+
4,600,000	92,000	39,050	30,350	.8489	32.989	100.39+	101.57+	102.63−	103.83+
4,700,000	94,000	40,050	31,490	.8521	33.5	100.38−	101.55−	102.56+	103.76−
4,800,000	96,000	41,050	32,650	.8552	34.01	100.36+	101.52+	102.50−	103.68+
4,900,000	98,000	42,050	33,830	.8582	34.52	100.35+	101.50−	102.44−	103.61+
5,000,000	100,000	43,050	35,030	.861	35.03	100.33−	101.48−	102.38−	103.55−

[fol. 260]

7,500,000	150,000	68,050	67,030	.90733	44.69	105.38+	127.58−	158.07+	191.35+
8,000,000	160,000	73,050	73,830	.9131	46.14	100.64−	103.24+	107.35−	110.14+
10,000,000	200,000	93,050	101,030	.9305	50.52	101.91−	109.49+	127.38−	136.84+
12,000,000	240,000	113,050	129,830	.94208	54.10	101.24+	107.09−	121.49+	128.06−
12,500,000	250,000	118,050	137,030	.9444	54.81	100.25−	101.31+	104.42+	105.55−

(Here follow Exhibits H, I, and J, side folios 261, 262, 263, 264, and 265.)

EXHIBIT "H" - TO AFFIDAVIT OF HENRY F. WALRADT

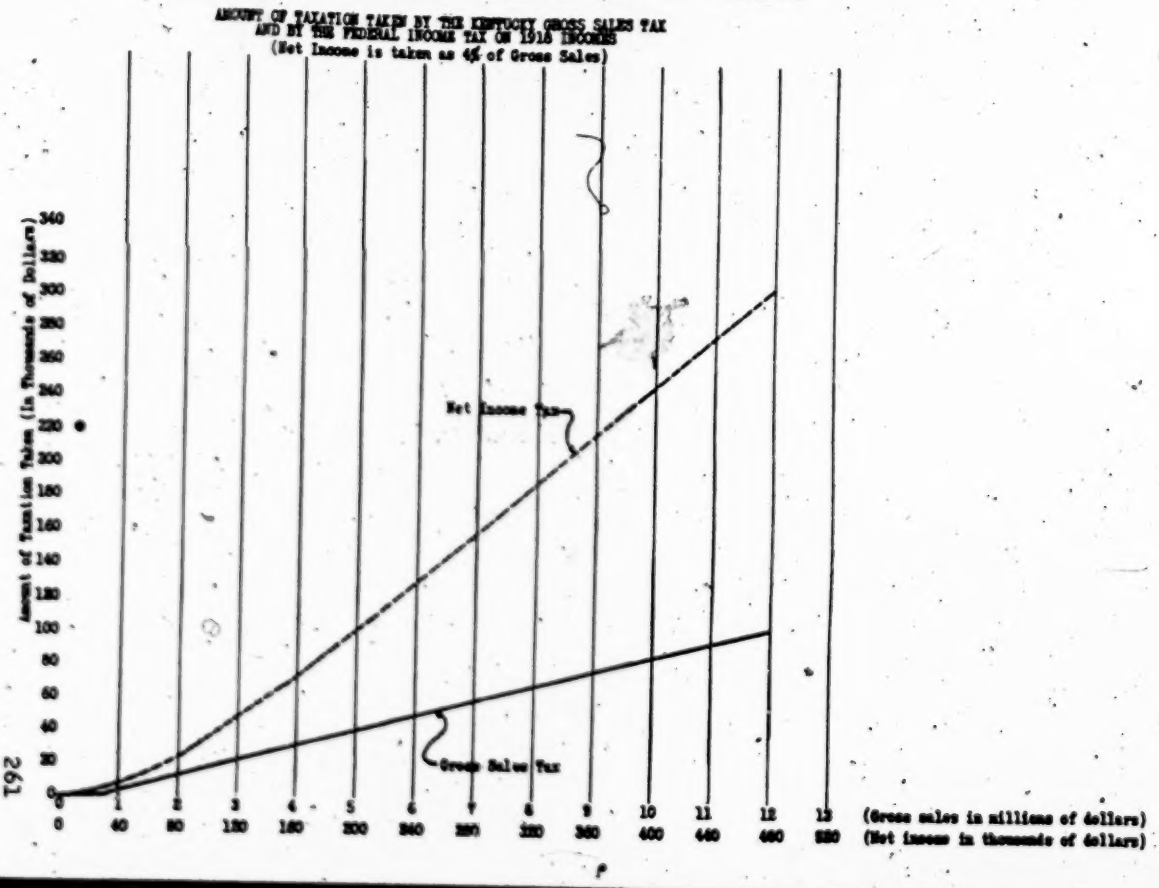
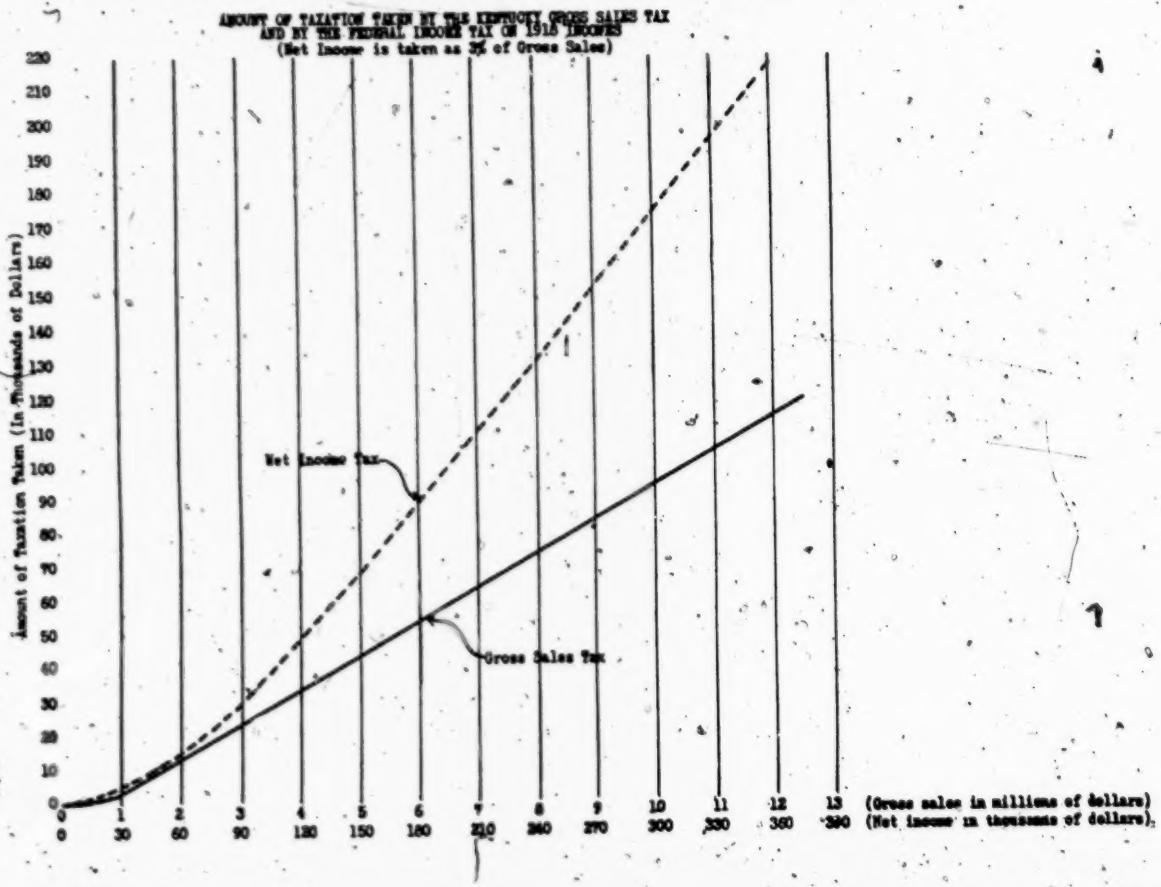


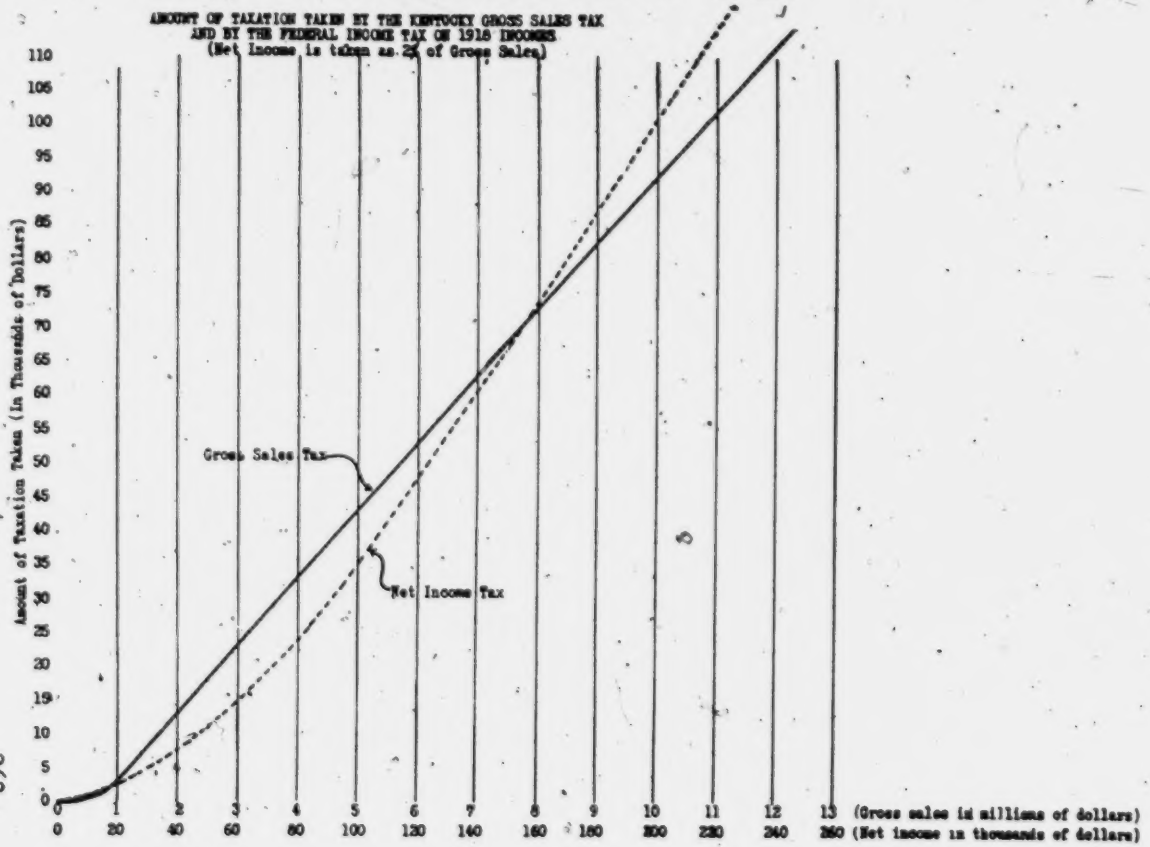
EXHIBIT "I" - TO AFFIDAVIT OF HENRY F. WALRADT



262

176B

EXHIBIT "J" - TO AFFIDAVIT OF HENRY F. WALRADT

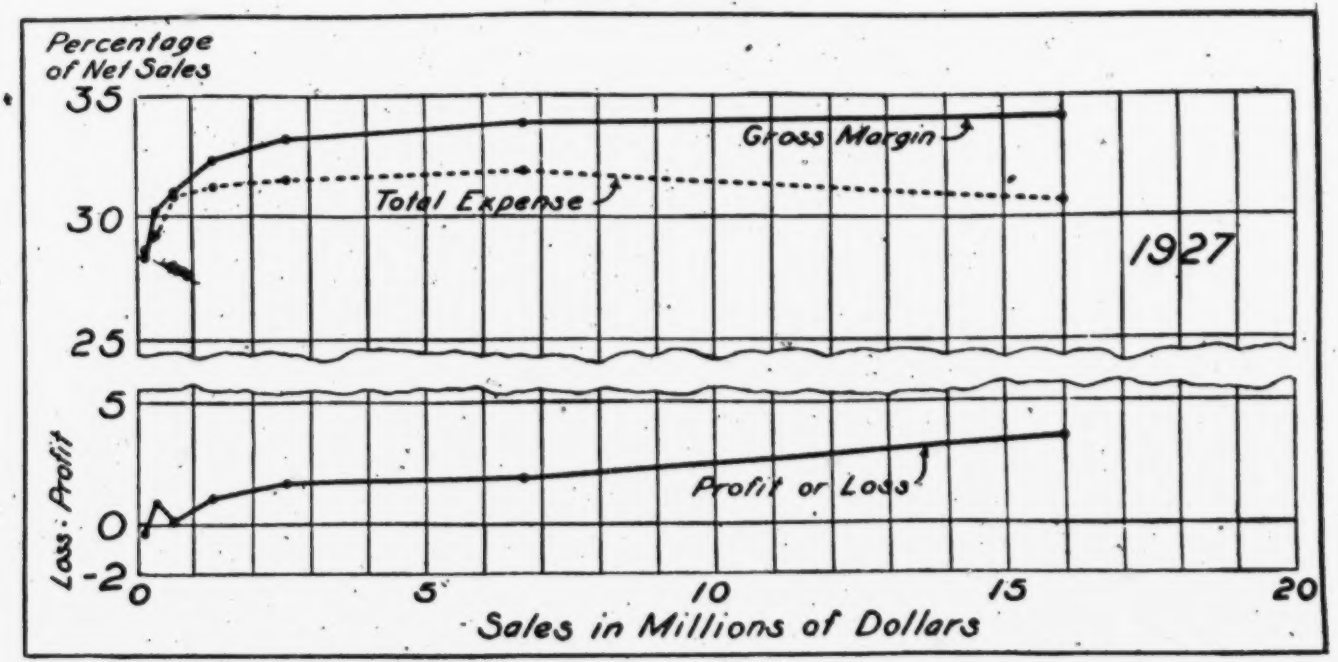


263

1760

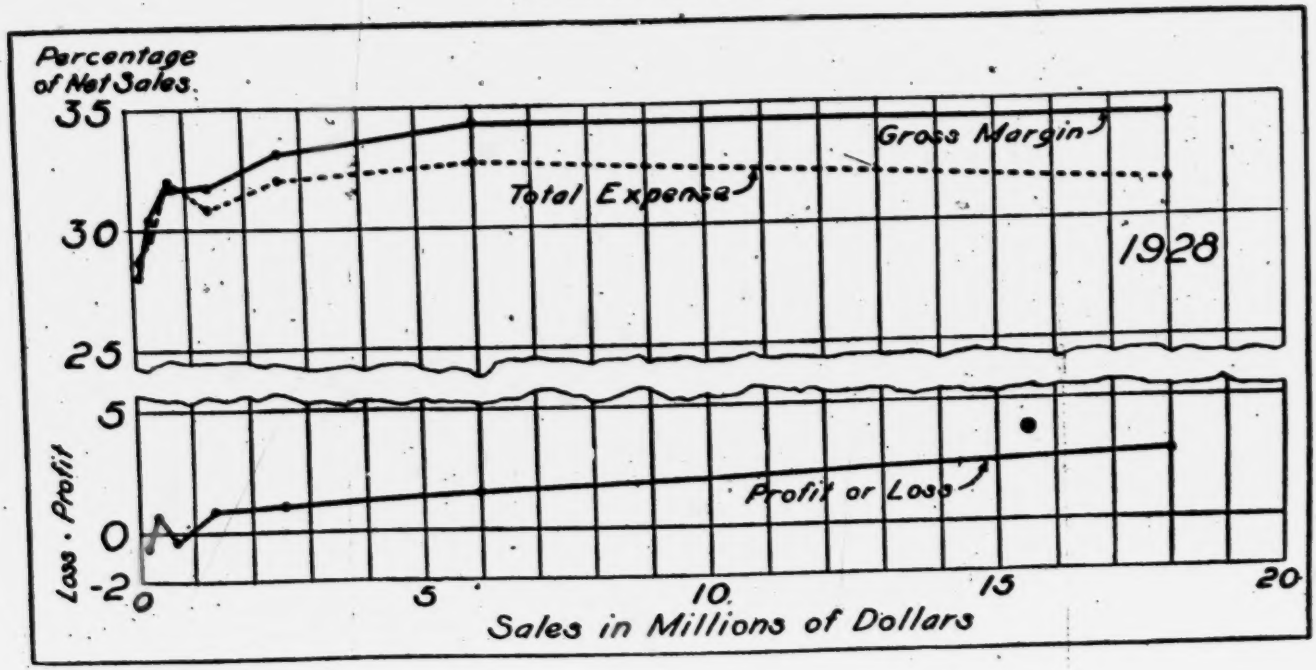
Chart 1. Typical Operating Results as Related to Sales Volume for Seven Groups of Department Stores: 1927

(Based on 508 Reports)



264
149
176D

Department Stores: 1928
(Based on 413 Reports)



[fol. 266] AFFIDAVIT OF JAMES W. MARTIN

Affidavit of James W. Martin in Opposition to Plaintiff's Motion for Interlocutory Decree

JAMES W. MARTIN, first being duly sworn, says:

I am, and have for about two and one-half years been, a resident of Lexington, Kentucky. I am now employed by the University of Kentucky as Professor of Economics and Director of the Bureau of Business Research in the College of Commerce and have served in that capacity since I came to Lexington.

Immediately preceding, for four years I was employed as Professor of Economics in Emory University, Atlanta, Georgia; and while employed by Emory, was a member of the Georgia Manufacturers Association Committee to investigate the tax system of the State of Georgia and its local subdivisions.

Prior to that time, I was for two years an instructor in economics at the University of Chicago, and, while there, served as Assistant to the Chairman of the Highway Finance Committee of the National Tax Assocaition.

My graduate training in Economics comprised one and one-fourth years at George Peabody College and Vanderbilt University, Nashville, Tennessee, and three years, some of which were part-time, at the University of Chicago. This included the summer of 1927, when as a research fellow of [fol. 267] the University of Chicago, I was detailed to Washington for investigation in the Library of Congress, Library of the Department of Agriculture, and other Washington libraries. I am a bachelor of arts and a master of arts.

I am a member of the American Economic Association; American Academy of Political Science; (English) Royal Economic Society; the National Municipal League; the National Tax Association; and the Tax Research Foundation. As a member of the National Tax Association, I have served for the current and last preceding year as Chairman of the Committee on Motor Vehicle Taxation; and I am President of the Tax Research Foundation, a non-profit corporation engaged in investigating State, local, Federal, and foreign tax systems.

Since 1923, I have been engaged in tax investigations among the most important of the results of which are a number of papers published largely by the National Municipal League, the National Tax Association, and the Social Science Research Council on Highway Finance, and the methods of research in Highway Finance. Other articles include an investigation of the possibilities of income taxation in Kentucky, two or three investigations of recent trends in taxation in the Southern States, certain papers on the recent economic development of Kentucky, several papers on tax administration, and an analysis of the State Tax System of Kentucky, now being published by the Tax Research Foundation.

[fol. 268] I have been engaged for several weeks in the collection of certain statistical data to be used in Court in the above styled case. I have prepared certain charts and exhibits filed herewith. These charts and exhibits are marked for identification, Martin Exhibit No. 1, Martin Exhibit No. 2, Martin Exhibit No. 3, Martin Exhibit No. 4, Martin Exhibit No. 5, Martin Exhibit No. 6, Martin Exhibit No. 7, Martin Exhibit No. 8, Martin Exhibit No. 9, Martin Exhibit No. 10, Martin Exhibit No. 11, Martin Exhibit No. 12, Martin Exhibit No. 13, and No. 13a, Martin Exhibit No. 14, Martin Exhibit No. 15, and Martin Exhibit No. 16, respectively. They were either prepared by me or under my personal supervision and direction, and are referred to hereinafter by their respective identifying numbers.

It has been my purpose to examine the operation of the Kentucky gross sales tax to determine the answer to five questions.

1. What are the actual rates? Are they, or are they not, the same as the plaintiffs imply in their petition?

2. What do operating statistics indicate with respect to the relative efficiency of cooperation as compared with actual consolidation in the retail field? To state this question differently, is it actually possible for retailers by voluntary cooperation to secure the advantages of large-scale operation to the same extent that they may be secured by retailers actually operating on a large scale?

[fol. 269] 3. Do large retailers actually have more or less taxable capacity than small ones? The answer to this question should throw some light on the economic justification

for the graduated scale of rates prescribed in Chapter 149, Acts of the General Assembly of 1930.

4. Is the graduation prescribed in the statute, or indeed any graduation at all, justifiable on the ground that the dealer operating on a large scale pays relatively less tax for State and local purposes, or for all purposes, than does the smaller one? If it is shown that this is the case, it may be possible to justify graduation of rates even in the absence of evidence that the larger retailer has more tax paying ability than the small one.

5. Assuming that the taxes imposed in the gross sales tax statute are not shifted to consumers by raising prices, are the rates so high as to be in effect confiscatory?

Before attacking these problems specifically, certain remarks concerning the basis and method of analysis should be made. Some of our analysis is based on secondary sources of information; that is, dependence has been placed on reports by the Harvard Bureau of Business Research and Moody's Reports which are in turn based on original data, namely, reports of merchants and corporate reports to stockholders respectively.

Due to pressure of time the original data necessary for our analysis could not be assembled in all cases. The statis- [fol. 270] tics submitted have two claims to consideration to which attention should be directed.

(1) In every instance, the statistics not collected from original sources are the work of agencies recognized throughout the worlds of economic scholarship and of business as being entirely reliable. Policies of well-managed department stores all over the country, for example, are determined in the light of results reported by the Harvard Bureau and unmeasured sums are invested or withdrawn from investment on the basis of Moody's reports.

(2) While the data offered are reliable, even where derived from secondary sources, they are not presented as data, but as a basis for statistical analysis. It is the analysis, not the raw figures, which is submitted as evidence in this matter. Even if the figures presented contained errors, which we do not believe, the substantial accuracy of our results would not, in the absence of mistakes so numerous and extensive as to be unthinkable, be impugned. In other words,

the exhibits below are to be regarded as units and not as statements of detailed data. Moreover, these data have been checked in a general way by a careful investigation of the problems involved and sometimes by direct comparison of different sources of information.

[fol. 271] I

From petitions which have been submitted by the Kroger Grocery and Baking Company, the J. C. Penney Company, the Stewart Dry Goods Company, and Levy Brothers, in the Eastern and Western Districts of Kentucky, it would appear that the rate on dealers who have sales of $1,000,000 or more is 1 per cent flat, whereas the rate on those who have only $400,000 to $1,000,000 of sales are graduated so that on the smaller the rate is 0.05 per cent and reaches 1 per cent on sales in excess of $1,000,000. The actual fact is that the rates are very much less severe than the petitions imply. For example, the rate which Levy Brothers would pay under the statute for the year 1930, assuming they have correctly stated taxable sales at $1,253,389.07, and computed the tax to be $5,449.28, would be 0.43 per cent. The tax on the J. C. Penney Company, again assuming accuracy of statement and competition, would be 0.54 per cent; that on the Stewart Dry Goods Company, 0.74 per cent; and that on the Kroger Company, assuming taxable sales to be $10,000,000 and accepting the company's statement with respect to offsets, would be 0.77 per cent. In other words, the tax rate is made considerably less than the apparent 1 per cent by (a) the very low rates on sales of less than $400,000 and (b) in some instances the offsets of license taxes which are permitted by the statute.

[fol. 272] A second point that should be noted in this connection is that graduation is not nearly so steep as the bare statement of the facts set forth in the several petitions tend to imply. This has already been illustrated in the cases cited. It will be further illustrated in the exhibits submitted herewith.

II

The facts with respect to the relative efficiency of unit stores operating on a small scale and large retailers, whether operating in chains or not, are set forth in the

exhibits discussed below. In a preliminary way, attention should be directed to the fact that some of the small-scale stores, the operating expenses of which have been analyzed below, do actually cooperate with other unit stores, while some do not. It appears from careful investigation of the subject-matter that in general there is distinct advantage in completely unified management, which makes itself manifest in lower operating expense, greater efficiency in purchasing, and higher rate of return on capital invested. Careful statistical analysis discloses that the prices at which small-scale retail grocers, for instance, actually sell, either in cooperative groups or not, are in general decidedly above the prices at which very large-scale competitors sell. One such investigation made in Lexington indicates that the most efficient of the small retailers, including those in the cooperative organizations, in the spring of 1930, sold [fol. 273] at price levels 3 or 4 per cent below the prices charged by the least efficient large-scale retailers. (The term "efficient" is here used to mean simply ability to sell at lower prices.)

III

Economic theorists have long urged, and in some instances have demonstrated, that large-scale enterprises are able to obtain certain economies of operation which small-scale operators cannot enjoy. Most investigations of this sort have been directed to manufacturing enterprises, but in recent years some attention has been given to the study of the relative efficiency of large-and-small-scale merchants. For present purposes at least, two aspects of this problem require analysis.

In Exhibit I the ratios of net gain of a large number of specialty stores to the sales of those retailers are shown. These data are available and are shown in the exhibit for the years 1927, 1928 and 1929. In 1929 they were so reported as to indicate the typical ratios for specialty stores having sales of $500,000 or less, for those having sales of between $500,000 and $2,000,000 and for those having sales of $2,000,000 and over. These data are based on reports of operating expense gathered from all parts of the United States. In 1927 and 1928 as shown in the exhibit, only two classes, those having sales of $1,000,000 or less and those having sales of over $1,000,000 are reported.

[fol. 274] The significance of this exhibit for present purposes lies in the fact that, in all these instances, the several retailers have a very much higher ratio of net gain to net sales if they are large-scale than if small-scale merchants. This is equally true for each of the three years, the only years for which comparable information is available.

Exhibit II sets forth similar data for a large number of department stores scattered over the United States, including several in Kentucky. In each year the experience of department stores confirms that of the specialty already discussed in that earnings on sales were very much higher for large-scale enterprises than for the smaller-scale operators. In 1929, for instance, the retailers having sales of between $150,000 and $299,000 made an average of 2 per cent on sales, whereas those selling $10,000,000 or more during the year made an average of 5.3 per cent. The showing for the years 1928 and 1927 is even more conclusive (for department stores) than for the abnormal year 1929.

Another and more significant analysis of the reliability of the theory that large-scale operation makes possible certain economies unattainable for those who operate on a small scale is offered in a series of exhibits now being presented, showing the ratios of profits or net gain (by which we mean return on invested, borrowed as well as owed capital) to invested capital as shown by net worth, in certain types of retailing by size groups.

[fol. 275] Exhibit III shows the ratio of net profits to net worth of retail jewelry stores for the year 1927, the only year for which information is available. The exhibit indicates that the least efficient jewelers, speaking in terms of size-groups, are those having sales of between $20,000 and $49,000 each. On the average these incurred a loss of 0.7 per cent. The return ranges from this negative quantity on small stores to a positive 3.2 per cent on stores having $500,000 or over of sales. This exhibit may be accepted as a typical example of one of the less efficient retailing groups. It indicates that in no instance is the net return based on the investment of owners particularly generous. It approaches adequacy only in the case of those having net sales of $500,000 or over.

Exhibit IV shows the relation between net gain and the capital investment, as measured by net worth, of retail

specialty stores scattered over the United States. (This is the same group of stores used in Exhibit I.) Analysis of this exhibit shows that large retailers in the specialty field appear to derive very much greater gains if they are large-scale operators than if they do business on a small scale or relatively small scale.

Exhibit V shows the ratio of net gain to net worth of department stores, both chain and independent, for the three years ending 1929. In 1927 and 1928 it will be observed that, as the size of the business increases, there [fol. 276] is an almost perfectly continuous tendency toward an increase of the rate of net gain to net worth. Even in the abnormal year 1929 this tendency, while not absolutely continuous, is certainly unmistakable.

Summarizing these evidences, it may be said that the effectiveness of the merchant, as measured either in terms of ratio of net income or net gain to sales or of the ratio of net income or net gain to capital invested by owners, is greater in large than in small enterprises. The evidence all points to the conclusion that large-scale are more profitable than small-scale enterprises. This conclusion would imply, on the basis of generally accepted principles of justice in taxation, that it is justifiable to tax the large-scale operator at a higher rate than the dealer engaged in retailing on a small scale.

These conclusions are still further confirmed by analysis of data on retailing for 1930 published by the Census Bureau on or before January 28, 1931. All cases so published, in which the distribution in detail is shown, are included in the analysis presented in Exhibit VI. The significant part of this exhibit is column four, headed "Turn-over" and to a certain extent column five, headed "Sales per Store." The term "turnover" as used in this and the next exhibit is not to be taken as the equivalent of the term as used by accountants because the Census Bureau values inventory (shown in column two) at cost and sales, of course, at selling price. To secure a ratio which could [fol. 277] be technically defined as "turn-over" it would be necessary to show both of these items according to the same method of valuation. This cannot be done on the basis of reports by the Census Bureau. It follows, therefore, that if the mark-up employed in practice by a given class of retailers is large the figures shown in column four will

be correspondingly large. Certain allowances for this error must be made as will be indicated below.

Careful examination of the table at the top of the page, from which data for Chicago are excluded on the ground that Chicago is so large as to be a city somewhat different from any to be found in the State of Kentucky, indicates that the larger the retail enterprise, generally speaking the greater the turnover with the modification that single store independents have a higher turn-over, as measured here, than do two-store multiples or three-store multiples. Undoubtedly this showing is contrary to the actual fact and appears as it does because of the large mark-up of single store independents. The data at the bottom of the page, where figures for Chicago are included, show the tendency even more clearly than do those with Chicago omitted. The apparent reason for this is that Chicago seems to be an exceptionally favorable area for chain store operation.

It must be observed that this exhibit, throwing together as it does, slow turn-over businesses like jewelry and rapid turn-over lines like cigars, is not wholly satisfactory.

[fol. 278] Examination of Exhibit VII showing information similar to that just discussed for grocery and variety store owners tends to confirm the conclusion tentatively suggested already. These figures all clearly indicate that in a general business field the rate of turn-over is very definitely larger where the size of the retail enterprise is large. Grocery and variety stores have been chosen for this illustration because they are reported for a comparatively large number of cities, whereas department stores and specialty stores, for example, are reported for a relatively small number of places.

Here again the statistics are shown both with and without the Chicago data. If it is considered that Chicago is not typical of large cities in this State to the extent that it should be excluded, the data at the top of the page should be observed. If, on the other hand, it is believed that all data available to date should be considered, statistics at the bottom of the page will be more convincing.

As plaintiffs have urged in their petitions, rate of turnover is a significant fact in retailing efficiency. That merchant who secures the highest rate of turn-over, other things remaining the same, will enjoy the most profitable business.

Consequently, it may be concluded on the basis of data already published from the Census of Distribution that, generally speaking, large-scale merchants enjoy a more profitable business than do small-scale operators.

[fol. 279] That the data shown above are actual comparisons of large with small-scale retailers is borne out by examinations of column five in the tables presented in Exhibits VI and VII. Examination of this column makes it entirely clear that in general two-store multiples have larger sales per store than single store independents; three-store multiples still larger sales, et cetera. From an examination of this column also, it may be concluded that the large-scale retailer must pay less in the way of managerial expense per unit of sales than must the small-scale dealer, since the former has so much greater average sales per store.

IV

If it is true that the large-scale grocer or variety store merchant or the retailer of any other class enjoys greater sales per store and, at the same time, higher rate of turnover, it must follow that, if ad valorem taxes are assessed against different retailers, the small-scale operator will have to pay considerably more per dollar of sales than will the dealer operating on a large scale.

In Kentucky heretofore, and at the present time, the State and its local subdivisions secure general revenue primarily through the imposition of property taxes; consequently, when the inventory of the large-scale merchant is assessed it will constitute a decidedly less proportion of [fol. 280] the total goods sold during the year than will that property assessed against the small store owner.

It should also be observed that since turnover is higher and since in many cases the same warehouse may be used by the large-scale merchant, it is practicable to reduce the amount of goods on hand on July 1st, the day as of which ad valorem tax assessments are made, to a minimum figure. Some such reduction undoubtedly takes place in the stores of small merchants, but it is inconceivable that the small independent store is able to do this as effectively as the larger store and particularly the large multiple-unit retailer.

Another strong indication that the property tax burden on large retailers is less than that on those doing a smaller business is provided by Exhibit VIII. A careful comparison of the last two columns make it clear that with rare exceptions, the large-scale dealer doing business both within and without the State of Kentucky have decidedly a larger percentage of business in Kentucky than of property. Indeed, the cases in which the contrary is true are so rare as to suggest that there is some extraordinary reason; and a careful investigation of the situation indicates that this is certainly true, at least in the case of Montgomery Ward and Company, which constitutes the most unexpected variation of this sort.

An examination of the annual report of this corporation to stockholders indicates that the total net sales of the corporation for the year 1929 were over $267,000,000 and [fol. 281] that the total gross sales of chain and department stores operated by the company were at practically $125,000,000; consequently there must be some error in the report to the State Tax Commission indicating aggregate sales of only $60,000,000. If this is the case it is not at all unlikely that the ratio of sales in Kentucky to total sales is higher than that shown in the exhibit. No details concerning the National Bellas Hess Company, the other extraordinary variant, are known, but there is doubtless some peculiar explanation of that company's higher ratio of property in Kentucky than of sales.

Exhibit IX shows that the taxes on different classes of retail stores operating in Louisville, Kentucky, in 1928 tend to decline as the sales of the store get larger. In the case of drug stores, for example, it will be observed that the very small merchant pays three times as much tax per dollar of sales as the merchant having sales of $100,000 or more. The merchant doing a general grocery business pays about six times as much tax in proportion to sales if he is one of the very small dealers, as he pays if his sales amount to $100,000 or more. The table indicates clearly that, if information available (that is, concerning merchants doing some kind of food business) is typical, the large merchant generally must pay less taxes, relatively speaking, than the small one.

[fol. 282] Exhibit X shows for the years 1927 to 1929 that the same conclusion applies to department stores in

general. (Several of these are Kentucky retailers.) Examination of the table in any of the three years for which data are available, indicates that the very large merchant, that is, the merchant having $10,000,000 or more of sales, pays less than one-half as much tax per unit of business as the department store having less than $150,000 of sales. Generally speaking, the gradation is fairly even throughout the several groups.

On the basis, then, of the information available, it is fair to say that, not only does the large retailer enjoy greater tax-paying ability than the small one, but in actual practice at the present time he appears to pay less tax in proportion to amount of business than does his already handicapped competitor. Therefore, it may be suggested that the graduation of rates in the gross sales tax is justified, not only by greater taxable capacity on the part of the large retailer, but also by the fact that the payment of larger taxes will tend to equalize the tax burdens already imposed on large and small merchandising enterprises.

One other point in this connection should be made. Exhibit XI indicates that, taking the country as a whole, the tax burden resting on the department stores tends to decline with increase in the scale of operations at about the same rate whether the merchant is an independent, a co-[fol. 283] operative, or a chain dealer. The tax on the enterprise having $2,000,000 or more of sales is in either instance approximately one-half that imposed on those merchants having less than $500,000 of sales.

V

The allegation that the rates imposed in this statute are confiscatory, so far as the business of large-scale dealers is concerned, has been examined in several exhibits now to be submitted.

Exhibit XII constitutes a tabulation of the important corporations doing a retail business for which information concerning sales, net worth, and earnings could be had. The corporations include merchants doing chain store businesses, some doing both chain and mail order business, and perhaps some of still other types. An attempt was made to include as many as possible of the principal retailers whose operating results could be determined, whether

directly by examination of annual reports, or, if that were impossible, by the use of Moody's Manual of Industrials.

For the purpose of this analysis, it has been assumed that 5 per cent of the total sales, property, and net worth of the corporation is in Kentucky. This percentage was chosen because in round numbers it is the figure which shows the allocation of the business of the Kroger Grocery and Baking Company.

Some of the corporations included do not do business in this State at all, but they were included in the analysis [fol. 284] in order to give some indication of how their business would be affected if they chose to operate in this commonwealth, assuming that the sales tax is sustained.

The last two columns of the body of the table show for each individual corporation the ratio of net earnings to net worth before and after the application of the tax rates prescribed in the statute. In view of the fact that the assignment of business to Kentucky has been very generous, as indicated in exhibit VIII, the twelfth column in comparison with the eleventh, shows in general the application of the tax to businesses of the sort examined would not prevent these corporations from earning a substantial rate of return. Examination of column 6 in comparison with column 12 indicates that, if the tax were imposed at a flat rate of 1 per cent this conclusion would not be so valid.

The typical net result of the imposition of the tax rates prescribed in the Kentucky statute is even more clearly shown in the summary at the end of this table. The most significant part of the summary is found in columns ten, eleven and twelve. Column ten shows that the average concern having extremely large sales, the average of those having moderately large sales, the average of those having smaller sales, and the average of those having the smallest sales would be before any tax on sales. Column eleven makes it clear that if a 1 per cent sales tax were applied in Kentucky the larger retailer, typified by those who have [fol. 285] presented petitions before the United States District Court, would still have average returns on net worth of 10 to 12.31 per cent, while those having average sales in Kentucky of less than $1,000,000 would be reduced to a decidedly lower rate on owned investment, and the smallest

group, on the average, would find itself unable or almost unable to continue in business.

Examination of column twelve shows that the application of the Kentucky sales tax with the graduated rates prescribed in the statute leaves the largest scale enterprises still earning, on the average, 12.49 per cent, the second largest scale, 11.61 per cent, and the third, 9.74 per cent, while the group of smallest merchants have their earnings on proprietorship reduced only to 7.79 per cent.

Summarizing, it may be said that, of these merchants are typical, the conclusion is perfectly obvious that the sales tax prescribed by the 1930 legislatiure, not only does not result in confiscation but tends to equalize the burdens on the merchants of various sizes who do business in Kentucky.

Exhibit XIII, in the main, is based on the figures presented in Exhibit VIII, namely, sworn statements by merchants reporting their sales within and without Kentucky. Only the fifth column, per cent earning on sales, is derived from other sources. As shown in the appendix to the table, this information is taken directly from the annual reports of corporations to stockholders or indirectly from the same [fol. 286] source through Moody's Investment Manual: Industrials, 1930, or Moody's special report.

Analysis of the results shown by this exhibit drives one to the same conclusion which was reached in the study of the Exhibit VII, that is, the comparison of the columns headed "Per cent Earned on Property Before Sales Tax," and "Per Cent Earned on Property After Sales Tax," indicates clearly that the imposition of the sales tax is not confiscatory even ignoring the license offsets which the law allows these various retailers.

Exhibit XIV is based on the same logic as Exhibit XIII but instead of using property invested in Kentucky and total property invested in the business, Exhibit XIV employs invested capital as measured by net worth, as shown in the annual report of the corporations to stockholders. It is assigned to Kentucky on the assumption (a decidedly generous one as shown above) that net worth in Kentucky to total net worth is in the same relation as sales in Kentucky to total sales. The conclusions reached above in connection with the analysis of Exhibit XIII are almost

equally obvious from a comparison of the two columns in the exhibit.

Exhibit XV is taken from a study of the leading chain stores of two different classes. It shows in the first table average ratio of net earnings to sales for four stores of each class over a period of ten years, 1920 to 1929 inclusive. The merit of this table does not lie in the large [fol. 287] number of cases included, but in the fact that they were selected as leading representative cases for an entirely different purpose, namely, investment analysis, and that the showing is highly favorable to these stores from the point of view of earnings on net sales.

The second table in Exhibit XV shows clearly that the earnings of large scale variety and grocery stores of the chain type are sufficiently large in proportion to net worth that the application of the rates prescribed in the Kentucky statute do not cut them down sufficiently to constitute confiscation. This is particularly obvious in the light of the first table which shows that the typical earnings on sales of variety stores in 1929 were 9 per cent, and on grocery stores, 2.6 per cent or 3.1 per cent, depending on what one regards as typical. Application of the rates in the statute would, of course, reduce the variety store earnings in 1929 of 16.8 per cent by one-ninth of that figure and computation may be made similarly for the grocery store earnings.

Exhibit XVI, a tabulation of all the cases (shown completely) selected by Moody to indicate the trend, shows in the second column unsolicited verification of the above conclusions. To reduce any of these figures by a fraction of one point would in no normal case result in cutting the ratio, shown in the last column but one, to a figure which would picture confiscation.

The conclusion from these analyses, then, is that application of the rates prescribed in the gross sales tax statute [fol. 288] would have the effect, if actually borne by the merchants, of taxing most heavily these, relatively speaking, with large tax paying ability, those who pay at the present time, least taxes to the commonwealth and its subdivisions, and in any event application of the rates do not, except in rare instances, constitute so severe a burden on merchants as to make it impossible for them to continue

in business. Indeed, the scale of rates provided will tend to bring about, but will not completely effect, an equalization of the tax burdens imposed on retail merchants of different sizes.

James W. Martin.

(Duly verified.)

[fol. 289] EXHIBIT NO. I TO AFFIDAVIT OF JAMES W. MARTIN

Ratio of Net Gain to Net Sales from Operation of Specialty Stores, 1927-1929*

Net sales	1929 Number of stores	1929 Ratio	1928 Number of stores	1928 Ratio	1927 Number of stores	1927 Ratio
$500,000 or less	35	2.8%	Reported as shown below			
500,000–2,000,000	29	3.0				
2,000,000 or over	21	5.2				
1,000,000 or less	Reported as		36	2.8%	36	2.1%
Over $1,000,000	shown above		28	5.8	31	6.1

* As reported in Bulletins 74, 78, and 83, Bureau of Business Research, Harvard University.

[fol. 290] EXHIBIT NO. II TO AFFIDAVIT OF JAMES W. MARTIN

Ratio of Net Gain to Sales, Department Stores, 1927-1929*

Net sales	1929 Number stores	1929 Ratio	1928 Number stores	1928 Ratio	1927 Number stores	1927 Ratio
Less than $150,000	59	3.0%	Reported as shown below			
150,000– 299,000	83	2.0				
300,000– 499,000	84	2.2				
Less than 250,000	Reported as		121	2.3%	140	3.0%
250,000– 499,000	shown above		69	3.4	98	3.6
500,000– 749,000	59	3.2	61	2.8	90	3.3
750,000– 999,000	36	3.0				
1,000,000– 1,999,000	73	3.1	55	3.8	82	3.8
2,000,000– 3,999,000	58	3.7	42	4.5	41	4.3
4,000,000–10,000,000	46	3.9	40	4.8	36	4.8
10,000,000 and over	29	5.3	25	5.8	21	6.1

* As reported in Bulletins 74, 78, and 83, Bureau of Business Research, Harvard University.

[fol. 291] EXHIBIT NO. III TO AFFIDAVIT OF JAMES W. MARTIN

Ratio of Net Profits to Net Worth Retail Jewelry Stores, 1927*

Net sales	Number stores	Ratio net profits, sales
Less than $20,000	49	2.7%
20,000– 49,000	69	Loss 0.7
50,000– 99,000	40	1.1
100,000–499,000	53	1.9
500,000 or over	19	3.2

* As reported in Bulletin 76, Bureau of Business Research, Harvard University.

[fol. 292] EXHIBIT No. IV TO AFFIDAVIT OF JAMES W. MARTIN

Ratio of Net Gain to Net Worth from Operation of Specialty Stores, 1927-1929*

Net sales	1929 Number of stores	1929 Ratio	1928 Number of stores	1928 Ratio	1927 Number of stores	1927 Ratio
Less than $500,000	35	6.5%	Reported as indicated below			
500,000 to 2,000,000	29	11.5				
2,000,000 and over	21	14.0				
1,000,000 or less	Reported as		36	8.9%	36	7.0%
Over $1,000,000	indicated above		28	15.5	31	16.0

* As reported in Bulletins 74, 78, and 83, Bureau of Business Research, Harvard University.

[fol. 293] EXHIBIT No. V TO AFFIDAVIT OF JAMES W. MARTIN

Ratio of Net Gain to Net Worth in Department Stores—Chain and Independent*

Net sales	Number of stores, 1929	Ratio, 1929
Less than $150,000	59	6.3%
150,000 to 299,000	83	5.0
300,000 to 499,000	84	6.0
500,000 to 749,000	59	6.8
750,000 to 999,000	36	6.6
1,000,000 to 1,999,000	73	8.4
2,000,000 to 3,999,000	58	7.6
4,000,000 to 9,999,000	46	8.1
10,000,000 and over	29	11.3

	1928	1927	1928	1927
Less than $250,000	121	140	5.0%	6.2%
250,000 to $499,000	69	98	7.8	8.8
500,000 to 999,000	61	90	7.8	7.1
1,000,000 to 1,999,000	55	82	9.7	9.5
2,000,000 to 3,999,000	42	41	9.2	10.0
4,000,000 to 9,999,000	40	36	9.8	11.5
10,000,000 and over	25	21	12.1	13.5

* As reported in Bulletins 74, 78, and 83, Bureau of Business Research, Harvard University.

[fol. 294] EXHIBIT NO. VI TO AFFIDAVIT OF JAMES W. MARTIN

Aggregate Sales, Inventory, and Number of Stores by Type of Organization, All Stores Combined of All Cities so Far as Census Data (1930) Were Announced on or Before January 28

Type of organization	Number cities included	I Net sale (1929) (-000 omitted)	II Inventory, Dec. 31 cost (-000 omitted)	III Number of stores	IV Turnover, I/II	V Sales per store, I/III
Excluding Chicago						
Single-store independents	57	$1,429,340	$205,611	40,719	6.95	$35,103
Two-store multiples	46	161,417	27,360	2,237	5.90	72,158
Three-store multiples	55	84,043	13,350	987	6.30	85,150
Local chains (four stores and over)	55	171,816	21,975	2,105	7.82	81,623
Sectional chains	55	107,892	12,577	1,523	8.58	70,842
National chains	58	186,630	23,373	1,702	7.98	109,653
Including Chicago						
Single-store independents	..	2,517,300	352,761	75,666	7.14	33,269
Two-store multiples	..	299,102	48,135	4,255	6.21	70,294
Three-store multiples	..	173,215	25,124	1,731	6.89	100,066
Local chains (four stores and over)	..	421,350	45,671	4,416	9.23	95,414
Sectional chains	..	208,320	20,887	2,923	9.97	71,269
National chains	..	480,779	52,847	3,702	9.10	129,870

[fol. 295] EXHIBIT No. VII TO AFFIDAVIT OF JAMES W. MARTIN

Aggregate Sales, Inventory, and Number of Stores by Type of Organization and Kind of Business for All Cities so Far as Census Data (1930) Were Announced on or Before January 28

Type of organization	Number cities included	I Net sales, 1929	II Inventory, Dec. 31 cost	III Number of stores	IV Turnover, I/II	V Sales per store, I/II
Excluding Chicago						
Grocery Stores:						
Single-store independents	27	$155,695,800	$10,414,042	6,566	14.95	$23,712
Local multi-units	26	38,719,068	2,828,727	632	13.69	61,168
Sectional and national chains	23	68,581,915	3,532,101	995	19.42	68,927
Variety, 5c to $1, Including General Stores:						
Single-store independents	18	6,758,462	1,514,968	258	4.46	26,196
Local multi-units	5	1,940,913	466,421	29	4.16	66,928
Sectional and national chains	18	24,220,827	3,392,027	85	7.14	284,951
Including Chicago						
Grocery Stores:						
Single-store independents	..	245,878,346	16,534,060	11,949	14.87	20,577
Local multi-units	..	52,174,190	3,799,835	895	13.73	58,295
Sectional and national chains	..	167,462,243	7,152,763	2,624	23.41	63,819
Variety, 5c to $1, Including General Stores:						
Single-store independents	..	13,538,755	3,720,110	597	3.64	22,678
Local multi-units	..	3,651,795	806,177	61	4.53	59,865
Sectional and national chains	..	52,402,610	6,637,912	232	7.89	225,873

[fol. 296] EXHIBIT NO. VIII TO AFFIDAVIT OF JAMES W. MARTIN

Comparison of Investment with Sales in Kentucky by Retailers Doing Business Both Within and Without the State*

Name	Sales		Property invested		Per cent of sales in Ky.	Per cent of property in Ky.
	Total	In Kentucky	Total	In Kentucky		
Great A. & P. Tea Co.	896,719,959	14,134,788	121,247,407	1,211,462	1.58	1.00
Kroger Grocery & Baking Co.	286,611,215	12,635,115	63,940,978	1,500,620	4.41	2.35
S. S. Kresge Co	155,166,527	3,108,312	98,496,309	692,547	2.00	.70
F. W. Woolworth Co.	303,047,172	2,422,358	136,397,650	505,615	.80	.37
J. C. Penny Co	209,690,417	2,164,974	76,955,489	657,360	1.03	.85
Sears Roebuck & Co.	455,360,619	761,734	274,437,218	148,220	.17	.05
Montgomery Ward & Co	60,628,672	675,623	224,159,596	495,410	1.11	2.05
W. T. Grant Co	65,448,298	617,436	12,987,769	86,304	.94	.66
J. J. Newberry Co	27,789,369	451,279	19,020,685	245,620	1.62	1.29
Walgreen Co	4,680,305	448,953	2,133,774	95,580	9.59	4.48
NcCrory Stores Corporation	44,706,253	437,011	37,935,356	213,447	.98	.56
Mangels, Inc	10,600,006	408,084	2,366,843	28,008	3.85	1.18
Melville Shoe Corp	25,520,675	377,824	7,029,269	64,357	1.48	.92
S. H. Kress Co	18,427,479	370,770	9,467,722	88,771	2.01	.94
Schulte United	10,363,432	362,040	16,771,348	205,836	3.49	1.23
G. C. Murphy Co	15,726,651	297,544	4,457,129	66,358	1.89	1.49
American News Co	37,021,107	264,160	4,584,269	14,631	.71	.32
Reliable Stores Corp	14,055,480	248,714	346,911	.....	1.77	.....
Jewel Tea Co., Inc	16,844,110	207,498	7,559,542	8,604	1.23	.11
Edison Brothers Stores, Inc.	3,778,460	204,806	1,536,146	59,941	5.42	3.90

* Source: Records of Kentucky State Tax Commission.

Western Auto Supply Co	15,959,440	204,658	6,563,989	26,300	1.28	.40
Sterchi Brothers Stores, Inc	7,870,435	200,617	7,584,514	84,729	2.55	1.12
Childs Co	24,127,725	165,050	9,433,572	3,009	.68	.03
Lerner Stores Corp	19,077,143	125,160	4,973,000	7,000	.66	.14
G. R. Kenney Co	20,861,960	106,230	11,033,337	46,690	.51	.42
D. A. Schulte, Inc	18,027,784	104,105	25,502,290	16,000	.58	.06
United Cigar Stores Co. of America	69,461,594	89,055	23,465,685	22,385	.13	.10
Feltman & Curme Shoe Store Co	7,671,195	72,309	2,066,232	10,183	.94	.49
Schiff Co	5,364,922	71,474	1,436,827	12,706	1.33	.88
B. & G. Sandwich Shops, Inc	3,404,523	65,476	1,360,932	10,231	1.92	.75
C. F. Adams Co	3,180,260	51,626	471,062	5,882	1.62	1.25
National Bellas Hess Co	42,448,047	45,573	8,853,131	80,582	.11	.91
Federal Bake Shops of Missouri, Inc	481,260	41,678	53,491	5,519	8.66	10.32
Ground Gripper Shoes, Inc	1,148,864	23,935	726,350	9,093	2.08	1.25
Nunn Bush Shoe Co., Inc	2,785,483	21,792	1,124,325	6,050	.78	.54
Metropolitan Chain Stores	18,095,858	13,200	14,506,000	27,600	.07	.19

[fol. 297]

EXHIBIT No. IX TO AFFIDAVIT OF JAMES W. MARTIN

Ratio of Taxes to Sales by Volume of Business, Louisville, 1928*

Kind of business	Less than $5,000	$5,000 to $9,999	$10,000 to $24,999	$25,000 to $49,999	$50,000 to $99,999	$100,000 and over	All
Bakeries	.8	.9	.7	.2a	...	...	.5
Confectioneries	1.2	.6	.3	.4	.8b	...	.8
Dairy and poultry product	.8	.3	.3	.1	.2	.5	.4
Delicatessen	1.0	.7	.4c	...	...	...	.5
Drug	.9	.6	.5	.3	.3	.3	.6
Fish and other sea food	.6	...	.1c	...	...	...	.1
Fruit and vegetable	.1	.5	.1c	...	...	...	.2
General department and variety	...	.1a	...	...	...	...	.1
Grocery	1.3	.6	.4	.2	.2	.2	.3
Hay, grain and feed	.2	.5	.5	.5	.1	.1	.1
Hotels	.5	.3	.3	.3	.2b	...	.2
Hucksters	.8	.3d	...	...	...	...	.6
Ice cream parlors	1.7	.6	.3c	...	...	...	.7
Meat market	.9	.3	.1	.1	.1b	...	.1
Pool rooms	1.7	.5e	...	...	...	...	1.0
Restaurants and lunch room	1.3	.6	.5	.4	.3f .2g	.3	.5

* U. S. Department of Commerce, Distribution of Cost Studies No. 6, "Louisville Grocery Survey."

a—$25,000 and over.
b— 50,000 and over.
c— 10,000 and over.
d— 5,000–12,000.
e— $5,000–$15,000.
f— 50,000– 74,999.
g— 75,000– 99,999.

[fol. 298] EXHIBIT NO. X TO AFFIDAVIT OF JAMES W. MARTIN

Ratio of Taxes to Net Sales of Department Stores—Chain and Independent*

Net sales	Number of stores, 1929	Ratio of taxes to net sales 1929
Less than $150,000	59	.65%
150,000 to 299,000	83	.6
300,000 to 499,000	84	.6
500,000 to 749,000	59	.6
750,000 to 999,000	36	.45
1,000,000 to 1,999,000	73	.4
2,000,000 to 3,999,000	58	.35
4,000,000 to 9,999,000	46	.35
10,000,000 and over	29	.3

	1928	1927	1928	1927
Less than $200,000	21	140	.7%	.7%
250,000 to 499,000	69	98	.7	.65
500,000 to 999,000	61	90	.65	.6
1,000,000 to 1,999,000	55	82	.5	.5
2,000,000 to 3,999,000	42	41	.5	.45
4,000,000 to 9,999,000	40	36	.45	.45
10,000,000 and over	25	21	.3	.3

* As reported in Bulletins 74, 78, and 83, Bureau of Business Research, Harvard University.

[fol. 299] EXHIBIT NO. XI TO AFFIDAVIT OF JAMES W. MARTIN

Ratio of Taxes to Net Sales—Department Stores Independently and Centrally Owned, 1929*

	Doing no group buying		Doing some group buying		In ownership group	
Net sales	Number of stores	Per cent	Number of stores	Per cent	Number of stores	Per cent
Less than $500,000	100	.6	55	.6	34	.6
$500,000 to $2,000,000	58	.45	43	.45	31	.5
$2,000,000 or more	45	.35	34	.3	44	.35

* Bulletin No. 83, Bureau of Business Research, Harvard University, pp. 34-35.

(Here follows Exhibit No. XII to Affidavit of James Martin, side folios 300 and 301.)

[fol. 300]

EXHIBIT No. XII to Affidavit of James W. Martin

Statistics of Large Retail Stores Showing the Effect of Sales Tax

(-000 omitted)

	Total business						Kentucky data assuming 5% of total in State					
	I	II	III	IV	V	VI	VII	VIII	IX	X	XI	XII
	Net sales	Net profit after taxes	Net profit after 1% sales deducted	Net worth	Ratio, II/IV	Ratio, III/IV	Net sales	Profit before gross-sales tax	Profit after gross-sales tax	Net worth	Ratio, VIII/X	Ratio, IX/X
Atlantic and Pacific Tea Co	1053693	26220	15683	118771	22.08%	13.20%	52685	1311	791	5939	22.08%	13.32%
√Sears Roebuck & Co	403072	30058	26013	103441	29.05	25.15	20174	1503	1308	5172	29.05	25.29
√Woolworth, F. W. & Co	303047	35664	32634	158804	22.45	20.55	15152	1783	1639	7940	22.45	20.64
√Kroger Grocery & B. Co	286611	5919	3053	50549	11.74	6.04	14331	296	160	2527	11.74	6.33
√Montgomery Ward	267353	13435	10762	174457	7.70	6.17	13366	672	545	8723	7.70	6.25
√Safeway Stores	213496	6147	4012	37844	16.24	10.60	10675	307	208	1892	16.24	10.99
Penny, J. C. Co	209690	12413	10316	66612	18.63	15.49	10485	621	523	3331	18.63	15.70
√Kresge, S. S. Co. (5 & 10)	156457	14952	13388	83436	17.92	16.05	7823	748	676	4172	17.92	16.21
√American Stores	143346	6595	5161	43144	15.28	11.96	7167	330	265*	2157	15.28	12.29
Gimbel Brothers	124636	804	442*	48316	1.66	.91*	6232	40	95	2416	1.66	3.93*
Federated Department Stores	117003	4856	3686	27227	17.84	13.54	5850	243	191	1361	17.84	14.03
May Department Stores	112724	6175	5048	56161	11.00	8.99	5636	309	259	2808	11.00	9.22
√Hahn Department Stores	112323	4090	2967	43690	9.36	6.79	5616	205	155	2185	9.36	7.09
Drug, Inc	105000	17014	15964	59836	28.43	26.67	5250	851	805	2992	28.43	26.91
√National Tea Co	90201	2731	1829	17633	15.48	10.38	4511	137	98	882	15.48	11.60
McMarr	87238	2174	1301	11860	18.32	10.96	4362	109	72	593	18.32	12.41
√United Cigar Co	84679	2847	2000	72656	3.92	2.75	4234	142	107	3633	3.92	2.95
√First National Stores	75885	2905	2146	10974	26.46	19.55	3794	145	114	549	26.46	20.82
√Kress (S. H.) Co	68474	5521	4836	34785	15.87	13.90	3423	276	249	1739	15.87	14.32
√Grant (W. T.) Co	65902	3058	3299	20497	14.91	11.69	3295	153	127	1025	14.91	12.38
American News	56863	1625	1057	16049	10.13	6.59	2843	81	60	802	10.13	7.48
√City Stores	51695	2051	1534	30219	6.79	5.08	2585	103	84	1511	6.79	5.56
Mercantile Stores	48522	1069	538	16308	6.55	3.57	2426	53	36	815	6.55	4.43
National Bellas Hess	48312	214*	697*	14877	1.44*	4.69*	2416	11*	28*	744	1.44*	3.76*
Walgreen	46623	3130	2664	16034	19.52	16.61	2331	157	140	802	19.52	17.48
McCrory 5c to $1 Stores	44704	2223	1754	23137	9.51	7.58	2235	110	94	1157	9.51	8.18
Schulte Retail Stores	37420	4360	3986	29593	14.70	13.46	1871	218	206	1480	14.70	13.94
Mercantile Securities	42030	243	177*	23435	1.04	.76*	2102	12	2*	1172	1.04	.17*
√Grand Union	36943	1021	6519	6488	15.74	10.05	1847	51	40	324	15.74	12.35
Daniel Reeves	33767	1128	791	4149	27.19	19.06	1688	56	46	207	27.19	22.22
√Fashion Park	32817	948	620	14302	6.63	4.34	1641	47	38	715	6.63	5.31
F. & W. Grand	30417	1813	1509	12320	14.71	12.24	1521	91	82	616	14.71	13.37
Childs	29952	1277	978	14625	8.73	6.69	1498	64	56	731	8.73	7.66
Bohack	28866	900	612	8914	10.09	6.85	1443	45	38	446	10.09	8.52
√United States Stores	28754	475	187	5756	8.25	3.25	1438	24	17	288	8.25	5.90
Spalding, A. G., Co	27866	2050	1772	20960	9.78	8.44	1393	103	96	1048	9.78	9.12
Newberry, J. J., Co	27789	1594	1316	15056	10.59	8.74	1389	80	73	753	10.59	9.69
√Shattuck	25656	3356	3091	25309	13.26	12.21	1283	168	162	1265	13.26	12.81
√Interstate Department Stores	25545	1102	846	6939	15.86	12.19	1277	55	49	347	15.86	14.20
√Melville Shoe	25521	1594	1339	7643	20.86	17.52	1276	80	74	382	20.86	19.37
√Dominion Stores	24641	591	344	4113	14.27	8.36	1232	30	24	206	14.27	11.75
Spiegel May Stern	23922	1718	1479	14768	11.63	10.01	1196	86	80	738	11.63	10.84
McLellan	23782	1001	764	9392	10.65	8.12	1188	50	45	479	10.65	9.57
√Kinney Shoe Co	20862	948	739	7693	12.32	9.61	1043	47	44	385	12.32	11.43
√Hartman Corp	20847	1103	900	16676	6.61	5.40	1042	55	52	834	6.61	6.24
Consolidated Retail Stores	19835	579	381	5362	10.79	7.10	992	29	26	268	10.79	9.70
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

√Shattuck	25650	3350	3091	20669	16.20	12.21	1280	165	162	1266	16.20	14.91
√Interstate Department Stores	25545	1102	846	6939	15.86	12.19	1277	55	49	347	15.86	14.20
√Melville Shoe	25521	1594	1339	7643	20.86	17.52	1276	80	74	382	20.86	19.37
√Dominion Stores	24641	591	344	4113	14.27	8.36	1232	30	24	206	14.27	11.75
Spiegel May Stern	23922	1718	1479	14768	11.63	10.01	1196	86	80	738	11.63	10.84
McLellan	23782	1001	764	9392	10.65	8.12	1189	50	45	479	10.65	9.57
√Kinney Shoe Co	20862	948	739	7693	12.32	9.61	1043	47	44	385	12.32	11.43
√Hartman Corp	20847	1103	900	16676	6.61	5.40	1042	55	52	834	6.61	6.24
Consolidated Retail Stores	19835	579	381	5362	10.79	7.10	992	29	26	268	10.79	9.70
√Lerner	19077	1385	1195	5422	25.54	22.03	954	69	67	271	25.54	24.57†
Hale Bros	18449	310	126	5538	5.59	2.27	922	16	13	277	5.59	4.69
Oppenheim Collins	19854	1561	1363	9793	15.93	13.91	993	78	75	490	15.93	15.31
Kresge Department Store	17070	1391	1221	12064	11.53	10.12	854	69	67	603	11.53	11.11
√Jewel Tea Co	16844	1691	1524	6321	27.14	24.45	842	85	83	312	27.14	26.57
√Waldorf System	16362	1206	1042	6305	19.13	16.52	818	60	59	315	19.13	18.73
Diamond Shoe	16247	1187	1024	5604	21.18	18.27	812	59	58	280	21.18	20.71
Southern Grocery	16092	57*	218*	1471	3.87*	14.81*	805	3*	4*	74	3.87*	5.97*
Western Auto Supply Co	15960	533	373	5358	9.94	6.96	798	27	25	268	9.94	9.32
D. Pender Grocery	15921	288	129	2314	12.44	5.57	796	14	13	116	12.44	11.20
Thompson, John R., Co	15743	1585	1427	10348	15.30	13.79	787	79	78	617	15.30	15.04
Murphy	15726	897	740	6717	13.35	11.01	786	45	43	336	13.35	12.93
√Lane Bryant	17147	633	583	4415	14.33	13.20	780	31	30	221	14.33	13.57
√Peoples Drug	15543	894	738	5222	17.11	14.13	777	45	43	276	17.11	15.57
√Atlas Stores	15176	1154	1002	5614	20.55	17.84	759	58	56	281	20.55	20.10
√Neisner	15092	1025	874	5552	18.46	15.74	755	51	50	278	18.46	18.02
Best & Co	14614	1279	1133	6756	18.93	16.77	731	64	63	338	18.93	18.63
Reliable Stores	14218	1212	1069	7803	15.51	13.69	711	61	60	390	15.51	15.27
[fol. 301]												
National Grocery Co	13791	19	118*	2916	.65	4.04*	689	1	0.5	146	.65	.32
Miller, I. & Sons	13522	830	694	6553	12.66	10.59	678	41	41	328	12.66	12.50
Metropolitan Chain	13513	798	663	7534	10.59	8.78	676	40	39	377	10.59	10.37
Schulte United	12979	23	107*	10935	.21	.98*	649	1	0.3	533	.21	.06
Loblaw Groceteria	12834	1094	966	4775	22.91	20.23	642	55	53	239	22.91	22.18
√Bauman, Ludwig & Co	11238	623	502	8061	7.73	6.21	562	31	30	403	7.73	7.62
Magnim, I. & Co	10984	706	596	5022	14.05	11.86	549	35	35	251	14.05	13.94
American Department Stores	10823	225	116	3478	6.46	3.33	541	11	11	174	6.47	6.32†
Mangel Stores	10600	229	123	2760	8.26	4.42	530	11	11	138	8.26†	8.02†
Economy Grocery	10561	272	166	1135	23.96	14.59	528	14	13	57	23.96	22.80
Daley's Incorporated	10037	121	28	1302	9.29	2.15	502	6	6	65	9.29	9.23
Happiness Candy	9757	239*	336*	4522	5.28*	7.43*	488	12*	12*	226	5.28*†	5.42*†
Park & Tilford	9348	1001	908	3298	30.36	27.50	467	50	50	165	30.36†	30.20†
Schiff & Co	9919	499	358	2577	19.37	13.85	460	25	25	129	19.37†	19.19†
Sterchi Stores	7888	379	300	6477	5.80	4.63	394	19	19	323	5.80	5.80
√Feltman & Curme	7671	33	43*	2126	1.55	2.02*	384	2	1	106	1.55	.94
√National Family	7003	852	782	5443	15.65	14.36	350	43	42	272	15.65	15.44
Loft, Incorporated	7001	151*	221*	9742	1.54*	2.26*	350	8*	8*	487	1.54*†	1.59*†
Exchange Buffet	6634	550	484	2450	22.44	19.75	332	28	28	123	22.44	22.44
Sherman Clay	6155	295*	357*	6258	4.71*	5.68*	308	15*	15*	313	4.71*†	4.77*†
√Winn & Lovett	6092	139	78	806	17.25	9.67	305	7	7	40	17.25	17.25
Crook, J. W	5990	36*	96*	848	4.24*	11.32*	299	2*	2*	42	4.24*	4.76*
√Katz Drug	5523	420	365	1565	26.83	23.32	276	21	21	78	26.83	26.83
Bickfords	5312	510	456	3226	15.78	14.14	266	25	25	161	15.78†	15.71†
Leath & Co	5201	492	440	2763	17.80	15.92	260	25	24	138	17.80	17.39
Neve Drug	5030	456*	506*	1382	32.99*	36.61*	251	23*	23*	69	32.99*	32.99
Nunn Bush Shoe Co	5019	329	278	2397	13.73	11.60	251	16	16	120	13.73	13.73
Trunz Pork	4976	316	266	1082	29.13	24.51	249	16	16	54	29.13†	28.94†
Southern Stores	4944	26*	75*	683	3.81*	10.98*	247	1*	1*	34	.81*	3.81*
Ross Stores	4758	106	58	2307	4.59	2.51	238	5	5	115	3.59	4.59
√Federal Bake Shops	4490	241	196	1126	21.40	17.41	224	12	12	56	24.40	21.40
	4469	211	166	1209	17.45	13.73	223	11	11	60	11.45	13.98

Schiff & Co	9919	499	358	2577	19.37	13.85	460	25	25	129	19.37†	19.19†
Sterchi Stores	7888	379	300	6477	5.80	4.63	394	19	19	323	5.80	5.80
√Feltman & Curme	7671	33	43*	2126	1.55	2.02*	384	2	1	106	1.55	.94
√National Family	7003	852	782	5443	15.65	14.36	350	43	42	272	15.65	15.44
Loft, Incorporated	7001	151*	221*	9742	1.54*	2.26*	350	8*	8*	487	1.54*†	1.59*†
Exchange Buffet	6634	550	484	2450	22.44	19.75	332	28	28	123	22.44	22.44
Sherman Clay	6155	295*	357*	6258	4.71*	5.68*	308	15*	15*	313	4.71*†	4.77*†
√Winn & Lovett	6092	139	78	806	17.25	9.67	305	7	7	40	17.25	17.25
Crook, J. W.	5990	36*	96*	848	4.24*	11.32*	299	2*	2*	42	4.24*	4.76*
√Katz Drug	5523	420	365	1565	26.83	23.32	276	21	21	78	26.83	26.83
Bickfords	5312	510	456	3226	15.78	14.14	266	25	25	161	15.78†	15.71†
Leath & Co	5201	492	440	2763	17.80	15.92	260	25	24	138	17.80	17.39
Neve Drug	5030	456*	506*	1382	32.99*	36.61*	251	23*	23*	69	32.99*	32.99
Nunn Bush Shoe Co	5019	329	278	2397	13.73	11.60	251	16	16	120	13.73	13.73
Trunz Pork	4976	316	266	1082	29.13	24.51	249	16	16	54	29.13†	28.94†
Southern Stores	4944	26*	75*	683	3.81*	10.98*	247	1*	1*	34	.81*	3.81*
Ross Stores	4758	106	58	2307	4.59	2.51	238	5	5	115	3.59	4.59
√Federal Bake Shops	4490	241	196	1126	21.40	17.41	224	12	12	56	24.40	21.40
National Shirt	4469	211	166	1209	17.45	13.73	223	11	11	60	11.45 7	17.45
Shaffer Stores	3424	33	1*	1072	3.08	.93*	218	2	2	54	3.08	3.08
Sally Frocks	4154	310	269	682	45.52	39.35	208	16	15	34	45.52	45.19
Fanny Farmer Candy	4068	444	403	1446	30.71	27.87	203	22	22	72	30.71	30.71
Pig'n Whistle	3671	154	117	1708	9.02	6.85	184	8	8	85	9.02	9.02
Edison Brothers	3778	230	192	1441	15.96	13.32	189	12	11	72	15.96	15.96
Nedicks	3567	352	316	2022	17.41	15.63	178	18	17	101	17.41	17.41
Thompson Spa	3552	432	396	4007	10.77	9.85	178	22	21	200	10.77	10.72
B. & G. Sandwich	3405	133	99	897	14.83	11.04	170	7	7	45	14.83	14.83
Consolidated Automatic Merchandise	3116	555*	585*	5339	10.40*	10.96*	156	28*	28*	267	10.40*	10.40*
C. F. Adams	3163	81*	112*	1806	4.49*	6.20*	158	4*	4*	90	4.49*	4.49*
General Vending Corporation	2707	395*	422*	2062	19.16*	20.47*	135	20*	20*	103	19.16*	19.16*
Van de Kamp	2643	158	132	1148	13.76	11.50	132	8	8	57	13.76	13.76
Georgian	2607	120	94	1461	8.21	6.43	130	6	6	73	8.21	8.21
Fair Stores	2547	139	113	1051	13.13	10.75	127	7	7	53	13.13	13.06†
Crown Drug	2358	207	183	1100	18.79	16.63	118	10	10	55	18.79	18.68†
Ground Gripper	2017	129	109	1633	7.90	6.67	101	6	6	82	7.90	7.90
Nunally Co	1775	41	23	1649	2.49	1.39	89	2	2	82	2.49	2.49
Morrison Electric Co	1745	142	125	606	23.43	20.63	87	7	7	30	23.43	20.63†
Kaybee Stores	1582	216	200	890	24.27	22.47	79	11	11	45	24.27	24.27
Kane Stores	1530	159	144	1808	8.79	7.91	76	8	8	90	8.79	8.75†
Marylee Candies	1372	33*	46*	341	9.68*	13.49*	69	2*	2*	17	9.68*	9.68*
Chaffee	1220	39*	52*	486	8.02	10.70*	61	2*	2*	24	8.02*	8.02*
Allison Drug	1140	142	3	688	2.16	.50	57	1	1	34	2.16	2.08†

* Deficit.

† Ratio computed from actual figure instead of round numbers.

√ Taken from reports of corporations to stockholders where possible (marked √); otherwise from Moody's *Investment Manual: Industrials*, 1930. Data are for the year 1929 or for the fiscal year falling most largely in 1929.

Summary Showing Data in Aggregate

(-000 omitted)

	Total business						Kentucky data assuming 5% of total in State					
Sales group	I Number of merchants included	II Net worth	III Net profit before gross sales tax	IV Net profit after gross sales tax at 1% flat rate	V Ratio II/I	VI Ratio III/I	VII Kentucky net worth	VIII Net profit before gross sales tax	IX Net profit after Ky. gross sales tax at rates provided in statute	X Ratio VII/VI	XI Ratio net profit after 1% sales tax to net worth in Kentucky	XII Ratio VIII/VI
1,053,693–33,767	30	1,420,982	220,214	174,937	15.50%	12.31%	71,049	11,011	8,873	15.50%	12.31%	12.49%
32,817–15,543	30	276,720	34,553	28,144	12.49	10.17	13,836	1,728	1,606	12.49	10.17	11.61
15,176– 5,030	30	133,679	13,308	10,319	9.96	7.72	6,684	665	651	9.95	7.72	9.74
5,019– 1,140	29	44,147	3,615	1,589	8.19	3.60	2,207	181	172	8.20	3.60	7.79

[fol. 302] EXHIBIT NO. XIII TO AFFIDAVIT OF JAMES W. MARTIN

Effect of Sales Tax on Rate of Return on Property Investment of Retailers in Kentucky, 1929*

Name	Sales		Property invested		Per cent earned on sales	Amount earned in Ky. before sales tax	Income in Ky. after sales tax	Per cent earned on property	
	Total	In Kentucky	Total	In Kentucky				Before sales tax	After sales tax
Great A. & P. Tea Co	896,719,959	14,134,788	121,247,407	1,211,462	2.8	395,774	261,376	32.67	21.58
Kroger Grocery & Baking Co	286,611,215	12,635,115	63,940,978	1,500,620	2.07	261,546	142,146	17.42	9.47
S. S. Kresge	155,166,527	8,108,312	98,496,309	692,547	10.86	337,563	313,430	48.74	45.26
F. W. Woolworth	303,047,172	2,422,358	136,397,650	505,615	8.4	203,478	186,204	40.24	35.64
J. C. Penny	209,690,417	2,164,974	76,955,489	657,360	5.8	125,568	110,868	19.10	16.87
Sears Roebuck Co	455,360,619	761,734	274,437,218	148,220	8.2	62,462	61,172	42.14	41.27
Montgomery Ward Co	60,628,672	675,623	24,159,596	495,410	5.4	36,484	35,632	7.36	7.19
W. T. Grant	65,448,298	617,436	12,987,769	86,304	5.8	35,811	35,191	41.49	40.78
J. J. Newberry	27,789,369	451,279	19,020,685	245,620	6.8	30,687	30,436	12.49	12.39
Walgreen	4,680,305	448,953	2,133,774	95,580	7.0	31,427	31,178	32.88	32.62
McCrory Stores	44,706,253	437,011	37,935,356	213,447	7.1	31,028	30,791	14.54	14.43
Mangels, Inc	10,600,006	408,084	2,366,843	28,008	2.95	12,038	11,830	42.98	42.24
Melville Shoes	25,520,675	377,824	7,029,269	64,357	5.9	22,292	22,103	34.50	34.34
S. H. Kress Co	18,427,479	370,770	9,467,729	88,771	9.1	33,740	33,555	38.01	37.80
Schulte-United	10,363,432	362,040	16,771,348	205,836	6.57d	23,786d	23,967d	11.56d	11.64d
G. C. Murphy	15,726,651	297,544	4,457,129	66,358	6.01	17,882	17,733	26.95	26.72
American News Co	37,021,107	264,160	4,584,269	14,631	2.67	7,053	6,921	48.21	47.30
Reliable Stores Corp	14,055,480	248,714	346,911	.....	10.89	27,085	26,961	.....	.....
Jewel Tea Co	16,844,110	207,498	7,559,542	8,604	9.4	19,505	19,401	226.70	225.49
Edison Brothers, Inc	3,778,460	204,806	1,536,146	59,941	4.7	9,626	9,524	16.06	15.89

* Data in columns 1 to 4, inclusive, are based on tabulations by the State Tax Commission of statements given by the management of the corporations concerned. Source of column 5 is shown on appended table. Remaining columns were computed.

EXHIBIT No. XIII TO AFFIDAVIT OF JAMES W. MARTIN—Continued

Name	Sales		Property invested		Per cent earned on sales	Amount earned in Ky. before sales tax	Income in Ky. after sales tax	Per cent earned on property	
	Total	In Kentucky	Total	In Kentucky				Before sales tax	After sales tax
Western Auto Supply	15,959,440	204,658	6,563,989	26,300	2.32	4,748	4,646	18.05	17.67
Sterchi Brothers Stores	7,870,435	200,617	7,584,514	84,729	10.40	20,864	20,764	24.62	24.51
Childs Co	24,127,725	165,050	9,433,572	3,009	6.1	10,068	9,985	334.60	331.84
Lerner, Inc	19,077,143	125,160	4,973,000	7,000	6.8	8,511	8,448	121.59	120.69
G. R. Kenney Co	20,861,960	106,230	11,033,337	46,690	6.3	6,692	6,639	14.33	14.22
United Cigar Stores	69,461,594	89,055	23,465,685	22,385	6.57d	5,851d	5,896d	26.14d	26.34d
Feltman & Curme Store	7,671,195	72,309	2,066,232	10,183	.50	362	326	3.55	3.20
Schiff Co	5,364,922	71,474	1,436,827	12,706	5.4	3,860	3,824	30.38	30.10
B. & G. Sandwich	3,404,523	65,476	1,360,932	10,231	8.38	5,487	5,454	53.63	53.31
C. F. Adams	3,180,260	51,626	471,062	5,882	2.34d	1,208d	1,234d	20.54d	20.98d
National Bellas Hess	42,448,047	45,573	8,853,131	80,582	.17d	77d	100d	.10d	.12d
Federal Bake Shop of Missouri	481,260	41,678	53,491	5,519	8.0	3,334	3,313	60.41	60.03
Ground Gripper Shoes	1,148,864	23,935	726,350	9,093	9.74	2,331	2,319	25.64	25.50
Nunn-Bush Shoe	2,785,483	21,792	1,124,325	6,050	9.06	1,974	1,963	32.63	32.45

[fol. 303] APPENDIX TO EXHIBIT No. XLII

Appendix to Table on Effect of Sales Tax on Rate of Return on Investment of Retailers in Kentucky, 1929

Name	Total sales	Net operating income	Ratio net to sales
Great A. & P. Tea Co	.....	.....	2.8%c
Kroger	.....	.....	2.07a
S. S. Kresge Co	$156,458,000	$16,847,210	10.86*
F. W. Woolworth	303,047,000	25,420,000	8.4*
J. C. Penny	.....	.....	5.8c
Sears & Roebuck Co	443,453,000	36,479,000	8.2*
Montgomery Ward & Co	267,326,000	14,505,000	5.4*
W. T. Grant	65,902,000	3,829,000	5.8*
J. J. Newberry Co	.....	.....	6.8c
Walgreen Co	.....	.....	7.0c
McCrory	.....	.....	7.1c
Mangels, Inc	10,600,008b	312,631b	2.95b
Melville Shoe	25,521,000	1,518,000	5.9*
S. H. Kress	68,474,000	6,222,000	9.1*
Schulte United	12,979,422b	853,186d b	6.57b
G. C. Murphy Co	15,726,652b	944,559b	6.01b
American News	56,863,194b	1,519,246b	2.67b
Reliable Stores	14,217,783	1,547,652b	10.89b
Jewel Tea Co	16,844,000	1,582,000	9.4*
Edison Brothers Stores	3,778,460b	179,313b	4.07b
Western Auto Supply	15,959,521b	370,348b	2.32b
Sterchi Bros. Stores	7,887,681b	820,359b	10.40b
Child's	.....	.....	6.1c
Lerner Stores Corp	19,077,123b	1,297,542b	6.8b
G. R. Kinney	20,862,000	1,305,000	6.3*
United Cigar Stores Co	84,679,557	5,561,372d	6.57*d
Feltman & Curme	7,671,196	38,678b	.50b
Schiff & Co	.....	.....	5.4c
B. & G. Sandwich	3,404,523	285,167b	8.38b
C. F. Adams	3,163,328b	73,781d b	2.34d b
National Bellas Hess	48,311,813b	80,064d b	.17d b
Federal Bake Shop of Missouri	4,490,000	360,000	8.0*
Ground Grippers Stores	2,017,188b	196,468b	9.74b
Nunn Bush Shoe	5,018,912b	454,747b	9.06b

* Information shown is taken from corporation annual reports to stockholders.

a—From Bill of Complaint, Kroger Grocery & Baking Co. *v.* Ky. Tax Commission *et al.*

b—Computed from Moody's Investment Manual: Industrials, 1930.

c—Ratio taken from Moody's Investors Service (Business and Industries Guide), Sept. 26, Oct. 16, and Dec. 11, 1930.

d—Deficit.

Effect of Sales Tax on Rate of Return on Owned Capital (as Indicated by Book Value of Stock) of Retailers in Kentucky, Assuming Property and Income in and out of State Proportional to Sales, 1929a

Name	Sales		Invested owned capital		Per cent earned on sales	Amount earned in Ky. before sales tax	Income in Ky. after sales tax	Per cent earned on invested capital in Ky.	
	Total	In Kentucky	Total	In Kentucky				Before sales tax	After sales tax
Great A. & P. Tea Co	896,719,959	14,134,788	118,770,855	1,876,580	2.8	395,774	261,376	21.09	13.93
Kroger Grocery & Baking Co	286,611,215	12,635,115	50,549,295	2,229,224	2.07	261,547	142,146	11.73	6.38
S. S. Kresge Co	155,166,527	3,108,312	83,436,207*	1,668,724	10.86	337,563	313,430	20.23	18.78
F. W. Woolworth Co	303,047,172	2,422,358	158,804,130*	1,270,433	8.4	203,478	186,204	16.02	14.66
J. C. Penny Co	209,690,417	2,164,974	66,613,930*	686,123	5.8	125,568	110,868	18.30	16.16
Sears Roebuck & Co	455,360,619	761,734	241,841,326*	411,130	8.2	62,462	61,172	15.19	14.88
Montgomery Ward & Co	60,628,672	675,623	174,456,810*	1,936,471	5.4	36,484	35,632	1.88	1.84
W. J. Grant Co	65,448,298	617,436	20,496,966*	192,671	5.8	35,811	35,191	18.59	18.26
J. J. Newberry Co	27,789,369	451,279	15,055,500	243,899	6.8	30,687	30,436	12.58	12.48
Walgreen Co	4,680,305	448,953	16,034,002	1,537,661	7.0	31,427	31,178	2.04	2.03
McCrory Stores Corporation	44,706,253	437,011	23,136,615	226,739	7.1	31,028	30,791	13.68	13.58
Mangels, Inc	10,600,006	408,084	2,759,723	106,249	2.95	12,038	11,830	11.33	11.13
Melville Shoe Corp	25,520,675	377,824	7,643,446*	113,123	5.9	22,292	22,103	19.71	19.54
S. H. Kress Co	18,427,479	370,770	34,785,237	699,183	9.1	33,740	33,555	4.83	4.80
Schulte-United	10,363,432	362,040	10,935,271	381,641	6.57d	23,786d	23,967d	6.23d	6.28d
G. C. Murphy Co	15,726,651	297,544	6,716,749	126,947	6.01	17,882	17,733	14.09	13.97
American News Co	37,021,107	264,160	16,048,861	113,917	2.67	7,053	6,921	6.19	6.07
Reliable Stores Corp	14,055,480	248,714	7,803,438	138,121	10.89	27,085	26,961	20.33	19.52
Jewel Tea Co	16,844,110	207,498	6,231,109*	76,643	9.4	19,505	19,401	25.45	25.31
Edison Brothers Stores, Inc	3,778,460	204,806	1,440,986	78,101	4.7	9,626	9,524	12.33	12.19

Western Auto Supply Co.....	15,959,440	204,658	4,647,657*	59,490	2.32	4,748	4,646	7.98	7.81
Sterchi Brothers Stores, Inc...	7,870,435	200,617	6,476,503	114,151	10.40	20,864	20,764	18.28	18.19
Childs Co.....	24,127,725	165,050	14,625,486	99,453	6.1	10,068	19,985	10.12	10.04
Lerner Stores Corp.....	19,077,143	125,160	6,191,136*	40,861	6.8	8,511	8,448	20.83	20.67
G. R. Kinney Co.....	20,861,960	106,230	7,762,547*	39,589	6.3	6,692	6,639	16.90	16.77
United Cigar Stores Co. of Amer.	69,461,524	89,055	38,215,365*	49,680	6.75d	5,851d	5,896d	11.78d	11.87d
Feltman & Curme Shoe Stores Co.....	7,671,195	72,309	1,876,183*	17,636	.50	362	326	2.05	1.85
Schiff Co.....	5,364,922	71,474	2,576,889	34,273	5.4	3,860	3,824	11.26	11.16
B. & G. Sandwich Shops, Inc..	3,404,523	65,476	897,427	17,231	8.38	5,487	5,454	31.84	31.65
C. F. Adams Co.....	3,180,260	51,626	1,805,826	29,254	2.34d	1,208d	1,234d	4.13d	4.22d
National Bellas Hess Co.....	42,448,047	45,573	14,877,102	16,365	.17d	77d	100d	.47d	.61d
Federal Bake Shop of Mo., Inc.	481,260	41,678	973,523*	84,307	8.0	3,334	3,313	3.95	3.93
Ground Gripper Shoes, Inc....	1,148,864	23,935	1,633,603	33,979	9.74	2,331	2,319	6.86	6.82
Nunn Bush Shoe Co., Inc.....	2,785,483	21,792	2,396,853	18,695	9.06	1,974	1,963	10.56	10.50

a—Data taken directly from Corporation Report to Stockholders where possible (indicated by *); otherwise from Moody's *Investment Manual: Industrials*, 1930.

[fol. 305] EXHIBIT No. XV TO AFFIDAVIT OF JAMES W. MARTIN

Average Ratios of Net Earnings to Sales for Variety and Grocery Chain Stores, 1920—1929a

Type of Store	1920	1921	1922	1923	1924	1925	1926	1927	1928	1929
Four variety b	5.0%	6.1%	9.5%	10.1%	9.1%	10.2%	9.8%	10.1%	10.2%	9.0%
Four grocery c	1.4	3.0	4.2	3.9	4.3	3.7	3.7	3.5	3.1	3.1
Three grocery d	1.1	3.1	3.7	3.5	3.0	3.0	2.7	2.8	2.8	2.6

a. Data from H. G. Guthmann and K. E. Miller, "Some Financial Tendencies among Leading Variety and Grocery Chains during the Past Decade, *Harvard Business Review*, January 1931, p. 251.
b. Including Woolworth, Kresge, Kress, and McCrory.
c. Including A. & P., Kroger, National Tea and American Stores.
d. Excluding American Stores.

Average Percentages Earned on Net Tangible Investment by Variety and Grocery Chain Stores, 1920–1929a

Type of Store	1920	1921	1922	1923	1924	1925	1926	1927	1928	1929
Four variety b	17.8	19.4	26.5	26.2	22.0	22.6	19.2	20.2	19.1	16.8
Four grocery c	11.4	18.3	25.0	23.7	24.9	20.4	21.3	20.4	17.5	17.4

a. Data from H. G. Guthmann and K. E. Miller, *op. cit.*, p. 249.
b. Including Woolworth, Kresge, Kress. and McCrory.
c. Including A. & P., Kroger, National Tea, and American Stores.

[fol. 306]

EXHIBIT No. XVI TO AFFIDAVIT OF JAMES W. MARTIN

Operating Results of Certain Stores, 1929*

Name of stores	Net sales (1929)	Ratio of operating net to sales	Net earnings	Ratio of earnings to book value stock	Ratio of earnings to book after 1% sales tax (estimated)
1. Bohack	$29,000,000	3.3%	$900,337	10.1%	6.9%
2. American Stores	143,000,000	4.8%	6,594,822	15.2%	11.9%
3. First National Stores	107,000,000	4.9%	4,773,445	24.1%	20.1%
4. Great A. & P	1,053,000,000	2.8%	26,219,631	20.6%	13.2%
5. Kroger Groc. & Bkg. Co	287,000,000	2.1%	5,919,096	11.2%	5.4%
6. National Tea Co	90,210,000	3.4%	2,731,267	12.9%	9.1%
7. Daniel Reeves	33,767,000	3.6%	1,128,349	24.4%	17.6%
8. Safeway Stores	213,413,000	3.2%	6,147,313	14.5%	10.1%
9. Jewel Tea Co	16,844,000	9.3%	1,691,302	26.6%	23.7%
10. Grand Union	37,000,000	2.4%	1,021,385	8.9%	5.2%
11. Pender	15,921,000	1.6%	287,715	12.4%	4.7%
Restaurant Chains:					
1. John R. Thompson	15,742,600	7.9%	1,584,836	10.8%	9.4%
2. Frank G. Shattuck Co	26,442,000	13.2%	3,355,720	13.3%	12.4%
3. Waldorf System	16,362,000	8.5%	1,205,547	19.1%	16.4%
4. Bickford's	5,312,000	9.3%	509,572	15.8%	14.1%
5. Childs Co	30,000,000	6.1%	1,277,138	3.7%	3.07%
Variety Chains:					
1. F. & W. Grand Silver	30,400,000	3.8%	1,812,693	14.7%	10.8%
2. W. T. Grant Co	66,000,000	4.9%	3,057,750	14.9%	11.8%
3. S. S. Kresge	156,500,000	10.5%	14,952,210	17.9%	16.1%
4. S. H. Kress & Co	68,500,000	8.1%	5,834,400	16.6%	14.4%
5. McCrory Corporation	44,700,000	7.1%	2,223,234	8.2%	7.05%
6. McLellan Co	23,800,000	4.6%	1,001,457	10.7%	8.3%
7. Neisner Bros., Inc	15,000,000	7.5%	1,025,363	18.4%	15.8%
8. J. J. Newberry Co	28,000,000	6.8%	1,594,247	10.6%	9.01%
9. F. W. Woolworth Co	303,000,000	9.1%	35,664,253	22.4%	19.9%
10. J. C. Penny Co	210,000,000	5.8%	12,413,378	24.8%	20.5%

[fol. 307] EXHIBIT No. XVI TO AFFIDAVIT OF JAMES W. MARTIN (Continued)

Operating Results of Certain Stores, 1929*

Name of stores	Net sales (1929)	Ratio of operating net to sales	Net earnings	Ratio of earnings to book value stock	Ratio of earnings to book after 1% sales tax (estimated)
Shoe Chains:					
1. Melville Shoe Corp	$25,500,000	5.9%	$1,594,216	20.6%	17.09%
2. Schiff Co	9,200,000	5.4%	493,623	19.4%	15.7%
3. G. R. Kinney Co	20,900,000	6.3%	859,548	8.4%	7.1%
Drug Chains:					
1. Peoples Drug, Inc	15,500,000	6.0%	893,920	17.1%	14.7%
2. Walgreen Co	47,000,000	7.0%	3,130,466	19.5%	16.6%

* Figures except estimate taken from Moody's Investment Letters (Business and Industries Guide).
#58, September 26, 1930.
#61, October 16, 1930.
#73, December 11, 1930.

[fol. 308]

Affidavit of Clyde William Phelps.

Affidavit of Clyde William Phelps in Opposition to Plaintiff's Motion for Interlocutory Decree

Clyde William Phelps, being first duly sworn, says:

I, Clyde William Phelps, a citizen and resident of Chattanooga, Tennessee, state that I am thirty-four years of age and am at present occupying the position of Head of the Department of Economics in the University of Chattanooga, Tennessee, and have held that position since 1925; that my duties in that capacity are to teach public finance, money and banking, economics of corporations and other economic subjects; that I am a graduate of the following institutions of learning: Harvard University with the degree of Bachelor of Arts; the University of Toulouse, France, with the degree of Doctor of Law; studied public finance while at the University of Toulouse, paying some attention to the French Sales Tax; also did some graduate work at Heidelberg University, Germany, and the University of Vienna, Austria.

I was employed by the State of Kentucky in January, 1931, to investigate the cases involving the Kentucky Gross Sales Tax with the view of testifying in said cases for the Commonwealth of Kentucky.

[fol. 309] I have been giving some time to the study of Chapter 149, Acts of the General Assembly of 1930, as it relates to those fields of economics that are commonly designated as Public Finance and Marketing. The following three questions have interested me:

1st. Is that tax based upon ability to pay?
2nd. Is the tax confiscatory?
3rd. Does it fill out the tax system of Kentucky to some desirable degree?

I would like to discuss these questions in order.

First of all, let us turn our attention to the first question, namely: Is the tax based upon ability to pay? There is a reason for being interested in this question for the real justification of a tax as a revenue measure rests funda-

mentally on whether or not it taxes according to ability to pay. This means, on the one hand, not taxing beyond ability to pay and, on the other hand, it means that the state must not restrict itself to proportional taxation in all tax measures. Taxing according to ability to pay means taking a larger and larger percentage from the more and more able to pay,—as in the case of progressive or graduated taxes. Examples of progressive or graduated taxes are to be found in the tax systems of foreign countries, in the Federal Income Tax, and in the Wisconsin Corporation and Personal Income Taxes.

Now, ability to pay taxes increases progressively as the size of an establishment (as measured by the volume of sales) increases. It is a well-known principle in the field [fol. 310] of economics that there are important economies in large scale production and large scale operation which bring it about that, in general, the larger the business the more efficient it is (and consequently the greater tax-paying power it has).

This principle is confirmed by the surveys of actual facts in the fields of production and distribution which have been published from time to time. Thus we find in the retail field that in general, as the size of the establishment (as measured by sales) increases, the greater is the percentage of net profit or net gain to sales and the greater is the percentage of net profit or net gain on investment. Exhibits 1, 2, 3, 4 and 5 filed with and made a part of the affidavit of James W. Martin are referred to and made a part of this affidavit as fully as if copied at length herein.

The progressive increase in the ability to pay taxes, as indicated by the aforementioned five exhibits, constitutes a reasonable basis, in my opinion, for a graduated or progressive gross sales tax.

One of the indications of the greater efficiency possessed by large enterprises as compared to small ones is to be found in the comparative rates of turn-over. The facts which have come to my attention show that in general the large retail operators have a higher rate of turn-over than the small operators. Exhibits 6 and 7 filed and made a part of the affidavit of James W. Martin are hereby referred to and made a part hereof as fully as if copied at length herein.

[fol. 311] An example of the efficiency of the large enterprises over the small in quicker transfer of merchandise from the factory to the consumer is given in the following paragraph from an address delivered before the Sixth Annual Conference of Major Industries at Mandel Hall, University of Chicago, October 23, 1929 (published in Chain Store Progress, Volume 1, No. 9), by E. C. Sams, President of the J. C. Penney Company:

"To illustrate, the Harvard Bureau of Research has found that the individual dry goods store requires 281 days on the average to bring merchandise from the factory via the wholesalers and the store to the customer. All that time either borrowed money or the consumer's money is used. Interest to cover all this time is tremendous in amount. Contrast this with the experience of the chain store system that takes only 85 days on the average to bring the same character of merchandise from the factory direct to the consumer. Our chain store system, for example, had an average inventory through the year of 1928 of $44,127,941.00. Interest at six per cent on that amount for 85 days was $623,333.00. That is the amount our chain must charge the consumer. Based upon the same inventory in the average individual stores, examined by the Harvard Bureau of Research, interest must be charged their consumers for 281 days, or a total interest charge of $925,796.00 for the same inventory."

A student of public finance and of the general field of economics is necessarily led to conclude from his studies that if retailers are to be taxed according to their ability [fol. 312] to pay (which is a sound canon of public finance), the larger enterprises, which are generally the more efficient, must be taxed at higher rates than the smaller are taxed. This is what the Kentucky Law does.

Since the facts which have been collected upon efficiency (and thus tax paying ability) show that efficiency or ability increases stage by stage as size of business increases, it appears that a progressive or graduate tax, with numerous brackets (such as the Kentucky Retail Gross Sales Tax), reasonably endeavors to adjust the rate of taxation to increasing ability to pay.

The petitions submitted by the Kroger Grocery & Baking Company, the J. C. Penney Company and others make it appear that the Kentucky tax progresses in a jumpy, arbitrary and very sharp manner. This is not so. A study of the progression of the tax as it would work in actual practice (as shown in Prof. Walradt's affidavit) demonstrates that the effective rate progresses in an even and reasonable manner.

Before leaving this first question, it is interesting to ask whether or not independents who are uniting in voluntary associations are able to attain the economies of large scale operation to the same extent as large consolidated enterprises. In theory it would seem, from a superficial examination, that a large number of co-operating independents might secure any and all of the valuable advantages pos- [fol. 313] sessed by the large consolidated enterprises. The facts, however, do not confirm such a theory.

Prof. E. Z. Palmer's survey of the prices of independent grocery stores and chain grocery stores (the chains representing large scale consolidated enterprises) in Lexington, Kentucky, during the month of March, 1930, showed that the chains in that city were 14.3% below the independents. Furthermore, the survey shows that the four most efficient independents were being undersold 6.3% to 9.2% by the average chain.

These four most efficient independents were even being undersold three to four percent by the least efficient chain in the city. Voluntary co-operation of independents evidently did not enable a single independent to meet the competition of even the most inefficient chain in Lexington, Kentucky. The survey of Professor E. Z. Palmer, just referred to, was published in Chain Store Progress, Volume 2, Number 9.

In "A Study of the Prices of Chain and Independent Grocers in Chicago," by Bjorklund and J. L. Palmer, published by the University of Chicago November, 1930, pages 37 and 38, we find that the so-called voluntary chain or voluntary co-operative group of independent grocers was being undersold 5.04 cents on the dollar by the chains. Professors Bjorklund and Palmer state: "It is significant to note, however, that they (the voluntary associated grocers) were not experiencing as much success in meeting

chain prices as were certain entirely independent merchants."

[fol. 314] The big advantage of the regular chain over the voluntary group of independents, which prevents the latter from achieving the ability and efficiency of the former, is to be found in the fact that the regular chain enjoys the efficiency which comes from a military organization in which the ideas, policies, and orders of the management are certain to be carried out promptly, harmoniously, and efficiently by the many units or branches. The voluntary group of small retailers is handicapped by its democratic organization. It is a case of the proverbial efficiency of the military organization or the autocratic government as compared to the proverbial inefficiency of democracy.

Voluntary co-operation of small retailers in brief does not appear to increase the ability of these smaller retailers so as to place them in the ability class represented by the large scale consolidated enterprises.

The second question which has interested me is whether or not the tax is confiscatory in its higher brackets. I do not think that a 1% tax, such as is levied upon sales in excess of $1,000,000.00 is confiscatory. This opinion comes from a study of the present returns upon property and on investment of various large scale enterprises operating in the State of Kentucky and the returns on the investment and the property of these companies after payment of the Kentucky tax. The pertinent figures are set forth in Exhibits Nos. 13 and 14 in the affidavit of J. W. Martin, [fol. 315] which exhibits are incorporated herein and made a part hereof as fully as if copied in full herein.

From these exhibits, it is evident that the per cent earned on property and also the per cent earned on invested capital of large-scale operators in Kentucky would not be reduced in general very much, and certainly the reduction would constitute a far cry from confiscation.

The third question of interest in this Kentucky tax is whether or not it tends to fill out the present tax system, remedying some of the present defects of that system. In judging a tax, one must always consider the place of that tax in the tax system. In other words, a tax system in the nature of one single tax would not be desirable.

Therefore, in the modern tax system, we have many kinds of taxes which tend to supplement one another. In the Kentucky tax system, it appears that the retail gross sales tax is a desirable addition to previous taxes in that it tends toward equalization of the tax burden imposed upon retail merchants enjoying different volumes of sales. Without the retail gross sales tax, we find (as shown by Exhibits 9, 10 and 11 of J. W. Martin's affidavit, which exhibits are incorporated herein and made part hereof as fully as if copied in full herein) that enterprises with a large volume of business are actually paying in taxes an amount which represents a very much smaller percentage of their sales than the amount actually being paid by retailers doing [fols. 316 & 317] a small volume of business. Exhibit 9 shows the situation in Louisville, Kentucky, and Exhibits 10 and 11 show the situation for the country as a whole in regard to department stores.

Thus it seems that, without the retail gross sales tax, the small retailers of Kentucky would be discriminated against. (Exhibit 9 shows, for example, that in Louisville, Kentucky, in 1928, the ratio of taxes to sales of grocery stores doing a business of less than $5,000.00 was over six times as large as the ratio of taxes to sales of grocery enterprises doing over $100,000.00. The retail gross sales tax tends to remedy this situation.

Clyde William Phelps.

(Duly verified.)

[fol. 318] AFFIDAVIT OF B. T. BREWER IN OPPOSITION TO PLAINTIFF'S MOTION FOR INTERLOCUTORY DECREE

The affiant, B. T. Brewer, first being duly sworn states that his name is B. T. Brewer; that he is thirty-seven years of age; that he resides at Frankfort, Kentucky; that he is Secretary of the State Board of Charities and Corrections [fol. 319] of the Commonwealth of Kentucky, to which position he was appointed upon the creation of the Board upon March 9, 1920, and which position he has held continuously since that date; that as Secretary of the said State Board of Charities and Corrections he is custodian of its records; and is familiar with the conditions existing at the institutions under its control.

He states that the Kentucky State Reformatory, located at Frankfort, Kentucky, is the penal institution serving that part of Kentucky located east of a line drawn roughly north and south from Louisville, Kentucky; that said institution was established about the year 1797, and that certain of the first buildings constructed at that institution are still in daily use for the housing of prisoners; that there has been no new construction of a material nature at the institution to increase its capacity for many years, and that its present normal capacity is 1,600. He further states that the daily average population at this institution for the fiscal year ending June 30, 1930, was 2,211; that the population on January 31, 1931, was 2,354, and that the population of the institution has doubled within the past ten years with practically no increases in accommodations for prisoners; that because of the increase in population in excess of the capacity of the institution it is necessary to confine two prisoners in one cell; that the cell blocks are of old type construction; the cells are not equipped with any modern sanitary conveniences; and that no cells have running water or toilet accommodations. He further states that recently in several instances it has been necessary for the authorities in charge of the Kentucky State Reformatory to request Court officials to hold convicted and sentenced men in the several county jails of the State until a sufficient number of prisoners could be discharged at the expiration of their sentences or released upon parole to allow the admission of new commitments. He states that [fol. 320] immediate relief from these conditions is imperative in order to provide accommodations for prisoners sentenced by the Courts of the State and to provide sanitary and liveable conditions for the inmates of the institution. He states that the State Board of Charities and Corrections has planned to remedy these conditions and to provide more adequate and sanitary accommodations from the moneys it anticipated would be derived from the proceeds of the so-called Gross Sales Tax Bill which was enacted by the 1930 Session of the General Assembly; and he further states that there is no other fund or appropriation from which the necessary money can be obtained to relieve the conditions existing at the present time at this institution.

He states that the Kentucky State Penitentiary, located at Eddyville, Kentucky, is the penal institution serving that part of Kentucky lying west of a line drawn roughly north and south of Louisville, Kentucky, that said institution was constructed about 1890; and that there has been no new construction of a material nature at this institution to increase its capacity for many years; that the present normal capacity of said institution is 600. He further states that the daily average population at this institution for the fiscal year ending June 30, 1930, was 1,018, that the population on January 31, 1931, was 1,099, and that the population has practically trebled within the past ten years. He further states that the cells at this institution are of old type construction, containing no running water, toilets or other sanitary conveniences. He further states that it is necessary at this institution to sleep prisoners upon cots, one touching the other, located in rows, in the corridors of the cell houses. He states that immediate relief from these conditions is imperative in order to provide accommodations for prisoners sentenced by the Courts of the State and to provide sanitary and liveable conditions [fol. 321] for the inmates of the institution. He states that the State Board of Charities and Corrections has planned to relieve these conditions from the moneys it anticipated would be derived from the proceeds of the so-called Gross Sales Tax Bill which was enacted by the 1930 Session of the General Assembly; and he further states that there is no other fund or appropriation from which the necessary money can be obtained to relieve the conditions existing at the present time at this institution.

He further states that the Kentucky Institution for the Feeble-Minded, located at Frankfort, Kentucky, is the State Institution for the care and custody of the feeble-minded, and that said institution was established about the year 1860. He states that the present capacity of this institution is approximately 500; that the average population of the institution for the fiscal year ending June 30, 1930, was 545; and that the population on January 31, 1931, was 635. He states that there are hundreds of feeble-minded persons in the State of Kentucky who should be confined in this institution, and who are entitled to the care and protection of the State, and that the public at large is entitled to pro-

tection from these feeble-minded persons upon whom no restraint is exercised, and who are permitted to go at large begetting their kind to become future charges upon the State of Kentucky. He further states that these hundreds of feeble-minded persons cannot be admitted because of lack of room; that the doors of this institution are closed, and have been closed for many years, to new admissions and that new inmates can only be admitted upon the death or discharge of one of the present inmates. He states that there are many Court Orders of admission on file at the institution at the present time for persons who have been properly committed by the Courts but who cannot be accepted because of lack of room. He further states there is no hospital for the care of the sick at this institution and [fol. 322] that it is necessary to confine those inmates who are sick in a portion of a dormitory where other inmates sleep; and that there is no provision for the isolation of inmates who are ill of a contagious or infectious disease. He states that immediate relief from these conditions is imperative, and that the State Board of Charities and Corrections has planned to remedy them from the moneys it anticipated would be derived from the proceeds of the so-called Gross Sales Tax Bill which was enacted by the 1930 Session of the General Assembly; and he further states that there is no other fund or appropriation from which the necessary money can be obtained to relieve the conditions existing at the present time at this institution.

He states that the Kentucky State Houses of Reform, located at Greendale, Kentucky, is the State institution for juvenile delinquents; and that said institution was constructed about the year 1893. He states there has been no construction of a material nature for the purpose of increasing the capacity of this institution for many years. He states that the present capacity of the institution is 350 and that the average population for the fiscal year ending June 30, 1930, was 678. He states that the population on December 31, 1930, was 669. He states that because of these conditions it is necessary to crowd inmates of all ages, and offenders of all descriptions into the same dormitories without any degree of segregation or classification, the youngest children with the older ones, and those convicted of minor offenses with those who have been con-

victed on charges of the most serious nature. He states that the institutions for boys and girls are both located upon the same ground; and that there are no adequate facilities or buildings for the education and proper vocational training of these inmates; that there is no Chapel of sufficient size for their religious and moral training; [fol. 323] no assembly hall; and no gymnasium or building for necessary physical training during the winter months. He states there are no adequate hospital facilities for the boys, and that there are no accommodations of any character for inmates who are tubercular; nor are there any adequate facilities for the isolation of the venereally diseased. He states that the State Board of Charities and Corrections has planned to remedy these deplorable conditions from the moneys which it anticipated would be derived from the proceeds of the so-called Gross Sales Tax Bill which was enacted by the 1930 Session of the General Assembly; and he further states that there is no other fund or appropriation from which the necessary money can be obtained to relieve the conditions existing at the present time.

He states that there are three State hospitals for the insane in Kentucky; the Central State Hospital at Lakeland, Kentucky erected about 1870; the Eastern State Hospital at Lexington, Kentucky, erected at about 1820; and the Western State Hospital at Hopkinsville, Kentucky, established about 1840. He states that there has been no material construction at these institutions for the purpose of increasing their capacity in many years. He states the present capacity of the Central State Hospital at Lakeland, Kentucky, is 1,650; that the average population for the fiscal year ending June 30, 1930, was 2,058, and that the population on December 31, 1930 was 2,177. He states the present capacity of the Eastern State Hospital at Lexington is 1,250; that the average population for the fiscal year ending June 30, 1930, was 1,499; that the population on December 30, 1930, was 1,618; and that the original building constructed at this institution about 1820 is still standing and in daily use. He states that the capacity of the Western State Hospital at Hopkinsville is 1,500; that the average population for the fiscal year ending June 30, 1930, was 1,677 and that the population on January 31,

[fol. 324] 1931, was 1,691. He states that each of these institutions is crowded beyond its capacity to an extent where proper medical care and treatment cannot be afforded the patients; that the expedient has been considered from time to time of closing the doors of these institutions to further admissions; that not one of these institutions is equipped with a modern infirmary; nor with a Receiving or Detention Building in which new admissions can be confined for observation; that not one is equipped with hydrotherapeutic or other modern methods of treatment; that because of their type of construction both the Eastern and Western State Hospitals have been repeatedly described as fire traps by Grand Juries and by persons familiar with modern fire prevention methods; that neither the Eastern nor the Western State Hospitals is protected with automatic sprinkling systems. He states that immediate relief from these conditions is imperative in order to provide necessary accommodations and treatment for the helpless inmates of these institutions; and that the State Board of Charities and Corrections has planned to remedy these conditions from the moneys it anticipated would be derived from the proceeds of the so-called Gross Sales Tax Bill which was enacted by the 1930 Session of the General Assembly; and he further states that there is no other fund or appropriation from which the necessary money can be obtained to relieve the conditions existing at the present time at these institutions.

He further states that in Kentucky there is no institution or hospital for the care and treatment of epileptics and that it is necessary to confine this class of persons with the insane and feeble-minded, indiscriminately, and without regard to their proper treatment and care. He states that at the present time there are approximately 600 epileptics confined in the three State Hospitals for the Insane and at the Institution for the Feeble-Minded. He states [fol. 325] it is the plan of the State Board of Charities and Corrections to establish an institution or colony for the epileptics of the State where they can be properly supervised and cared for, and to provide for them methods of treatment. He states it is the purpose of the Board to establish such an institution from the moneys it anticipated would be derived from the proceeds of the so-called Gross

Sales Tax Bill which was enacted by the 1930 Session of the General Assembly; and he further states that there is no other fund or appropriation from which the necessary money can be obtained for this purpose.

He further states that neither the Kentucky State Reformatory at Frankfort nor the State Penitentiary at Eddyville owns any land which can be cultivated for the purpose of providing food for the inmates of the institutions and labor for the prisoners confined therein. He states that for the first six months of the fiscal year ending June 30, 1930, there was a daily average of 1,058 idle prisoners at the Kentucky State Reformatory at Frankfort and a daily average of 138 idle prisoners at the Kentucky State Penitentiary at Eddyville; and that this large number of idle prisoners is due to a population in excess of that for which work can be provided within the confines of the institutions as they exist today; and to the general business depression which has resulted in curtailment of production in the factories located within the prison walls. He states that it is the plan of the Board of Charities and Corrections to purchase, from the moneys it anticipated would be derived from the proceeds of the so-called Gross Sales Tax Bill which was enacted by the 1930 Session of the General Assembly, a large farm upon which unemployed prisoners can be put to work for the purpose of producing food for the penal and other institutions of the State, and to erect thereon, at the proper time, a modern reformatory in which can be housed prisoners convicted [fol. 326] of minor felonies. He states there is no other fund or appropriation from which the necessary money can be obtained for this purpose.

Affiant further states that there is no Women's Prison or Reformatory in Kentucky, and that women who are convicted of felonies are confined in a separate department of the Kentucky State Reformatory at Frankfort on a small V-shaped tract of ground, upon which the cell house for women is located, but that the proximity of the men's section renders discipline difficult and conditions unsatisfactory. He states that the cell block in the Women's Departmen is of old type construction, and that the cells contain no sanitary conveniences; neither do they contain toilets or running water. He states that because of the limited ca-

pacity of the Women's Department, it is necessary to confine two women in one cell; and that in some instances it has been necessary to provide beds for women prisoners on the cell block walks, placing the mattresses and bed clothing on the floor of the walk and removing them each morning before the inmates in the cells can leave the cells. He states that the Women's Department, because of its crowded condition, is a serious fire hazard to the entire institution. He states that the State Board of Charities and Corrections has planned to remedy these conditions from the moneys it anticipated would be derived from the proceeds of the so-called Gross Sales Tax Bill which was enacted by the 1930 Session of the General Assembly.

He further states that the increase in population at the seven institutions under the control of the State Board of Charities and Corrections is unprecedented, and that the institutions now house the largest number of inmates in the history of the State; but that the increase in population has been reflected over a period of ten years at an increasing yearly rate, and that there is no immediate prospect [fols. 327 & 328] of any relief from the growing number of commitments. He submits that the average populations of these institutions by years, beginning with the fiscal year ending June 30, 1921, has been as follows:

Year ending June 30	Average population
1921	6,762
1922	6,998
1923	7,570
1924	7,560
1925	7,877
1926	8,086
1927	8,208
1928	8,351
1929	9,106
1930	9,530
*1931	10,194

* First six months.

Affiant further states that architects have been employed by the State Board of Charities and Corrections who have

drawn plans for the enlargement and improvement of buildings and the construction of new buildings for the purpose of relieving the present existing conditions, but the State Board of Charities and Corrections has been prevented from putting said plans into effect because of litigation which has been commenced affecting the validity of the so-called Gross Sales Tax Bill, enacted by the 1930 Session of the General Assembly, from the proceeds of which it was planned and contemplated to make the improvements which are necessary.

Further affiant saith not.

B. T. Brewer.

(Duly verified.)

[fol. 329] ENTRIES IN SENATE JOURNAL

House Bill 111—In the House

January 21, 1930.

By Mr. J. D. Via.

H. B. 111. An Act to restrain the unfair competition of chain stores, and in aid of individual merchants in the Commonwealth.

To Committee on Kentucky Statutes.

February 14, 1930.

By Mr. J. D. Via of the Committee on Kentucky Statutes.

H. B. 111. An Act to restrain the unfair competition of chain stores, and in aid of individual merchants in the Commonwealth.

With a Committee Amendment thereto by way of Substitute therefor.

February 18, 1930.

Mr. Via moved that the Rules be suspended and that a bill entitled

H. B. 111. An Act to restrain the unfair competition of chain stores, and in aid of individual merchants in the Commonwealth.

Be made a Special Order for Wednesday, February 19, at eleven o'clock A. M.

Said motion was agreed to.

February 19, 1930.

The hour of eleven o'clock having arrived, that being the hour heretofore set for the Special Order of the Day, the House took up for consideration from the Orders of the Day said Special Order, to-wit, a bill entitled:

H. B. 111. An Act relating to revenue and taxation, imposing an excise or license tax on merchants, as the word "Merchant" is defined in this Act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing [fol. 330] fines and penalties for the violation of this Act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act.

With a Committee Amendment thereto by way of substitute therefor.

(See certified copy of bill attached hereto.)

The yeas and nays being required thereon by Messrs. Ardery and Peters, were as follows, viz:

Those who voted in the affirmative were:

F. B. Adcock,
U. C. Anderson,
Wm. B. Ardery,
W. O. Baxter,
S. A. Blackburn,
D. C. Bradley,
T. L. Britton,
John Young Brown,
Wm. A. Eimer,
J. O. Evans,
Virgil Eversole,
F. A. Gnau,
H. G. Handmaker,
J. F. Harrison,
Robt. L. Horn,
C. E. Houck,
Grover C. Johnson,
J. Roy Johnson,
A. R. Kincheloe,
H. R. Marquette,
B. K. Marshall, Jr.,
Joseph Martin,
Dr. R. A. Byers,
J. J. Davis,
S. J. Douthitt,
C. B. Dowling,
W. C. Dugan,
Thomas Dunn,
J. W. Edwards,
Graland Embry,
Joseph B. Everhart,
John B. Furlong,
L. B. Hamilton,
Geo. H. McIntosh,
T. R. McRoberts,
Henry Meiman,
Clarence Miller,
Russell O. Miller,
F. Tyler Munford,
L. B. Murphy,
Andrew W. Nichols,
Fred A. Nolte,
Cabel A. Page,
James I Peters,

W. K. Randall,
H. L. Taylor,
C. B. Truesdell,
J. E. Walters,
G. W. Wiggonton,
J. Watt Brown,
John H. Pickett,
Dorsey Ratcliff,
Thomas H. Troxel,
H. Speed Tye,
Dr. Vallandingham,
Robert Williams.

Those who voted in the negative were:

E. S. Allison,
John R. Buckman,
James A. Campbell,
Lee Clark,
Bradley Combs,
Elmer Cook,
Lenoard Cook,
W. W. Cooper,
Ben L. Cox,
H. G. Crabtree,
G. Cunningham,
William J. Curtis,
E. C. Dennington,
James R. Dorman,
Kelly J. Francis,
H. L. Jackson,
M. F. Jordan,
John B. Klefot,
Frank LeBus,
Martin Light,
James A. May,
Harry J. Meyers,

[fol. 331]

M. F. Moore,
B. T. Morris,
Curtis F. Park,
J. D. Patton,
John W. Preston,
D. O. Stanley,
Frank L. Strange,
E. J. Thomas,
J. D. Via,
L. M. Weathers,
Elmer J. Terry.

The substitute as offered by the Committee was then adopted as amended.

Ordered that said bill be engrossed and read the third time.

The Constitutional provisions as to the third reading of said bill at length being dispensed with and the same being engrossed, said bill was read the third time by its title only and passed.

The yeas and nays being taken thereon in accordance with the provisions of the Constitution, were as follows, viz:

Those who voted in the affirmative were:

F. B. Adcock,
L. A. Allison,
J. J. Davis,
Winn Davis,

U. S. Anderson,
S. A. Blackburn,
L. C. Bradley,
T. L. Britton,
John Young Brown,
J. Watt Brown,
John R. Buckman,
James A. Campbell,
Lee Clark,
Bradley Combs,
Elmer Cook,
Leonard Cook,
W. W. Cooper,
Ben L. Cox,
H. G. Crabtree,
G. Cunningham,
William J. Curtis,
E. C. Dennington,
James R. Dorman,
S. J. Douthitt,
C. B. Dowling,
W. C. Dugan,
Thomas Dunn,
Henry Mieman,
J. W. Edwards,
Clarence Miller,
M. F. Moore,
F. Tyler Munford,
M. L. Napier,
Curtis F. Park,
John H. Pickett,
Dorsey Ratliff,
Frank L. Strange,
Elmer J. Terry,

[fol. 332]

Thos. H. Troxel,
H. Speed Tye,
J. E. Walters,
G. W. Wigginton,
William A. Eimer,
Graland Embry,
J. O. Evans,
Joseph B. Everhart,
Virgil Eversole,
Kelly J. Francis,
John B. Furlong,
F. A. Gnau,
L. B. Hamilton,
H. G. Handmaker,
Rev. B. L. Hargrove,
Robert L. Horn,
C. E. Houck,
R. L. Jackson,
Grover C. Johnson,
Theron M. Johnson,
J. R. Johnson,
M. F. Jordan,
A. R. Kincheloe,
John B. Klefot,
Frank LeBus,
Martin Light,
H. F. Marquette,
B. K. Marshall, Jr.,
Joseph Martin,
James A. May,
George R. McIntosh,
Harry J. Meyers,
T. H. McRoberts,
Russell O. Miller,
B. T. Morris,
L. B. Murphy,
Fred A. Nolte,
J. D. Patton,
John W. Preston,
D. O. Stanley,
H. L. Taylor,
E. J. Thomas,
C. B. Truesdall,
J. D. Via,
L. M. Weathers,
Robert Williams.

Those who voted in the negative were:

W. O. Baxter, Cabel A. Page,
J. Roy Johnson, Dr. Vallandingham.

Mr. Via offered the following amendment to the title of said bill, viz:

"Amend the title to said bill by striking from the original bill the title thereof and substituting the title of the substitute for the title of the bill which is in words and figures as follows: * * *"

(For this title see title to Substitute in Journal of today ante.)

Said Amendment was agreed to.

Resolved that the title thereof be as amended.

Mr. Via moved that the vote by which said bill was passed be reconsidered and that said motion lie on the table.

[fol. 333] Said last named motion was agreed to.

Mr. Dorman moved that the session of today be extended indefinitely.

Said motion was agreed to.

Mr. Dorman moved that when the hour of twelve o'clock Merid-an arrived today that the House do then recess for one hour.

Said motion was agreed to.

[fol. 334] I, Ella Lewis, Secretary of State for the Commonwealth of Kentucky, hereby certify that the three (3) typewritten pages hereto attached, were by me carefully compared with the official senate journal (Senate Journal 1930 Session of the General Assembly, in the hands of the public printer) and found to be a true and correct copy of entries in said journal relating to the introduction, passage and approval and enrollment of House Bill 111 of said 1930 Session.

Ella Lewis, Secretary of State. (Seal Office of Secretary of State, Commonwealth of Kentucky.)

[fol. 335] Journal of the Senate

February 20, 1930.

The hour of 1.30 P. M. having arrived, the Senate reconvened.

A message was received from the house that they had passed the following bills:

"H. B. 111. "An Act relating to revenue and taxation, imposing an Excise or License Tax on retail merchants as the words 'retail merchants' are used in this Act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this Act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act."

To Committee on Revenue and Taxation.

February 28, 1930.

Committee Reports

Senator Booles, of the Committee on Revenue and Taxation, to which had been referred bills of the following title:

H. B. 111. "An Act relating to revenue and taxation, imposing an excise or license tax on retail merchants as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this act."

Reported with expression of opinion that same ought to pass.

March 3, 1930.

Calendar

Senator Chandler moved that the second reading at length of said bills be dispensed with, and said bills be read by their titles only.

Said motion was agreed to.

H. B. 111. "An Act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words "retail merchants" are used in this Act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this Act; de-

claring an emergency to exist, and repealing all laws in conflict with the provisions of this Act."

[fol. 336] March 4, 1930.

The Senate took up for consideration from the Orders of the Day a bill entitled:

H. B. 111. "AN ACT relating to revenue and taxation, imposing and excise or license tax on retail merchants as the words "retail merchants" are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this act."

Senator Dacher offered the following Amendment:

"Amend House Bill 111 by inserting the word 'Cash' between the words 'gross' and 'sales' in lines number 4, 5, 7, 9, 12, 15, 17, 20 and 22 on page 2 and in lines number 10 and 26 on page 3 of the printed bill, and by adding to said bill as Section 14 thereof the following:

"Section 14. Gross cash sales are hereby defined to be sales made where cash, checks or anything of value are exchanged for goods, wares, or merchandise on the day of sale; also goods, wares, or merchandise sold on cash on delivery."

The question being taken thereof, it was decided in the negative, and said Amendment was lost.

Senator Gates Young offered the following Amendment:

Amend House Bill No. 111, section two in line six by striking out the words "or less" and inserting in lieu thereof 'in excess of the first $50,000.00.' "

"Further amend by inserting the words 'except those doing an annual gross of $50,000.00 or less' after the word 'Merchant' and before the word 'as' in line one of section three."

The question being taken thereon, it was decided in the affirmative, and

Said amendment was lost.

Said bill reads as follows:

* * * * * * *

(See certified copy filed herewith.)

Ordered that said bill be read the third time.

Mr. Allie Young moved that the third reading of said bill be by its title only. Said motion was agreed to by a majority of the members elected. The constitutional provision as to [fol. 337] the third reading of said bill at length being dispensed with.

Said bill was read the third time by its title and passed.

The yeas any nays being taken on the passage of said bill in accordance with the provision of the Constitution were as follows, viz:

Resolved that the title thereof be as aforesaid.

Mr. Allie Young moved that the vote by which said bill was passed be reconsidered and that said motion lie on the table.

Said motion was agreed to.

Roll Call

Senate, March 4, 1930, Session 1930

	Yea	Nay
Adams, Samuel W.	1	..
Bartlett, Clarence	2	..
Bond, N. U.	3	..
Bondurant, Jas. H.	4	..
Booles, W. W.	..	1
Brock, H. M.	5	..
Brooks, O. H.	..	1
Chandler, A. B.	6	..
Cline, H. M.	7	..
Dacher, Frank	8	..
Davis, W. H.	..	2
Dawson, Edwin C.	9	..
Fitspatrick, H. D.	10	..
Franklin, Chas. G.	..	3
Gaines, P. B.	11	..
Gartin, O. C.	12	..
Glenn, R. E.	13	..
Holloway, Jno. S. W.	14	..
Jacobs, Silas	15	..
Johnson, Alex. E.	..	4
Littrell, L. C.	16	..
Luker, C. R.	17	..
McBrayer, J. J.	18	..
McCaw, C. W.	..	1

Moore, E. C.	19	
Pogue, Marion F.	20	
Poole, J. V.		5
Regenstein, Ellsworth	21	
Rose, Dr. J. M.		6
Ryans, Dr. L.		7
Stewart, Joe	22	
Turner, T. O.	23	
Vincent, B. M.		8
White, Frank M.	24	
Williams, Sewell B.	25	
Yates, W. A	26	
Young, Allie W.	27	
Young, Gates F.		9
Yea		27
Nay		11

[fol. 338] AN act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words "retail merchants" are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalfies for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

§1. The words "retail merchant," as used in this act, shall mean and include every person, firm, association, copartnership, or corporation opening, establishing, operating or maintaining any "store," as defined herein, for the purpose of and selling goods, wares or merchandise at retail in this State, except those actually engaged in gardening or farming and selling garden or farm products raised by them in this State. The term "store," as used in this act, shall be construed to mean and include any store or stores or any mercantile establishment or establishments in this State which are owned, operated, maintained or controlled by the same "retail merchant," as defined herein, either domestic or foreign, in which goods, wares or merchandise of any kind are sold at retail. The provisions of this act shall be construed to apply to every "retail merchant" and "store," as defined herein, which is controlled or held with others by

majority stock ownership or ultimately controlled or directed by one management or association of ultimate management.

§ 2. Every retail merchant, as defined herein, shall pay an annual license tax for the opening, establishing, operating or maintaining of any store or stores, as defined herein, determined by computing the tax on the amount of gross sales as follows:

One-twentieth of one per cent of the gross sales of Four hundred thousand ($400,000.00) Dollars or less; two-twentieths of one per cent on the excess of the gross sales over Four hundred thousand ($400,000.00) Dollars and not exceeding Five hundred thousand ($500,000.00) Dollars; five-twentieths of one per cent on the excess of the gross sales over Five hundred thousand ($500,000.00) Dollars and not exceeding Six hundred thousand ($600,000.00) Dollars; eight-twentieths of one per cent on the excess of the gross sales over Six hundred thousand ($600,000.00) Dollars and not exceeding Seven hundred thousand ($700,000.00) Dollars; eleven-twentieths of one per cent on the excess of the gross sales over Seven hundred thousand ($700,000.00) Dollars and not exceeding Eight hundred thousand ($800,000.00) Dollars; fourteen-twentieths of one per cent on the excess of the gross sales over Eight hundred thousand ($800,000.00) Dollars and not exceeding Nine hundred thousand ($900,000.00) Dollars; seventeen-twentieths of one per cent on the excess of the gross sales over Nine hundred thousand ($900,000.00) Dollars and not exceeding One million ($1,000,000.00) Dollars; one per cent on the excess of the gross sales over One million ($1,000,000.00) Dollars.

§ 3. Every retail merchant, as defined herein, in order to ascertain the amount of taxes due and payable under the next preceding section, shall file with the State Tax Commission on or before the first day of February each year a written report verified by the affidavit of the owner or chief officer on such forms as it may prescribe, giving the number and location of its store or stores, as defined herein, the name and postoffice address of its owner or principal officer, the name and address of its officer or agent in charge of its business at each separate store, the nature and kind of business, the total gross sales during the preceding year ending the thirty-first day of December, and such other

facts bearing on the proper taxation as the Tax Commission may require.

The State Tax Commission may, in any case, require such additional information as it may deem necessary to enable it to perform its duties herein. It shall be the duty of the State Tax Commission from such reports, and from such additional information as it may obtain, to ascertain the amount of taxes due, and to certify to every such retail merchant the amount of taxes due for the preceding year, based upon such reports and information as it may ascer- [fol. 339] tain. Upon final action by the State Tax Commission, it shall certify to the Auditor of Public Accounts and to the retail merchant the amount of such tax due by each retail merchant, as defined herein, and it shall be the duty of each retail merchant to pay the amount of such tax to the Auditor of Public Accounts not later than thirty days thereafter.

In reporting the gross sales for the year, 1930, retail merchants shall include only those sales made between the date that this act becomes effective and December 31, 1930, and the license tax due for the year 1930 shall be based on the amount of those sales only.

§ 4. The license or excise tax levied herein, shall not be in lieu of any special state license, excise, occupational or corporation license tax due under the provisions of any law now in force, or that may hereafter be enacted. Should any retail merchant, as defined herein, be liable for *any* pay any special state license, excise, occupational or corporation license tax under the laws now in force, or that may hereafter be enacted, credit may be taken on the tax levied in this act for the amount of such special license, excise, occupational or corporation license tax so paid not to exceed the amount of the license or excise tax levied herein.

§ 5. If any retail merchant, as definied herein, neglects or refuses to file the verified report or pay the tax due at the time herein provided, the amount thereof with an addition of a penalty of twenty per centum thereof, with interest at the rate of six per centum per annum from the date when due until paid, shall be collected on an account settled by the State Tax Commission as other taxes are settled and collected; and if collected by proceedings in any court, an additional penalty of twenty per centum shall be collected, as is

authorized to be collected in revenue agent's proceedings under Section 4263-4 of the Kentucky Statutes.

The said twenty per centum penalty thereon and interest due shall be paid into the State Treasury as part of the tax, and the twenty per centum penalty collected in revenue agent's proceedings shall be distributed as provided in section 4263-4 of the Kentucky Statutes.

§ 6. The State Tax Commission, or any assistant or representative thereof, appointed in writing by it, is hereby authorized to examine the books, records, papers, files and equipment of any retail merchant, as defined herein, made taxable by this act, and to that end, shall have the power to examine witnesses under oath to verify the accuracy of any return made under the provisions of this act, or to ascertain whether or not any tax is due under the provisions of this act by any retail merchant; and in the collection of said tax, the State Tax Commission shall have the power to institute legal proceedings for the purpose of ascertaining the amount of tax due and the collection thereof with the penalties thereon, and the State Tax Commission shall be vested with all the powers under the law of the State for the collection of taxes. The State Tax Commission may, at or after the commencement of an action for the purpose of collecting the amount of tax due and penalties and interest due thereon, as set out herein, have an attachment against the property of the defendant, including garnishees, without the execution of a bond upon the filing of an affidavit showing the nature of the claim, that it is just, the sum which the State Tax Commission believes the plaintiff ought to recover and that the collection of the demand will be endangered by delay in obtaining judgment or a return of no property found. Any information gained by the State Tax Commission, or any assistant, agent or representative thereof, as a result of the reports, investigations or verification herein required to be made, shall be confidential, and any person divulging such information shall be guilty of a misdemeanor, and upon conviction, shall be fined not exceeding Five Hundred ($500) Dollars; provided, that this prohibition shall not extend to information required in prosecutions for making false reports or returns or in the preparation and prosecution of legal proceedings, for the collection of any tax due under the provisions of this act,

or any prosecutions for any other infraction of the tax laws of this State.

§ 7. Any retail merchant, as defined herein, or any officer, director, trustee or agent, who shall fail, neglect or refuse to make the reports and pay the tax herein prescribed, or [fol. 340] shall refuse to permit the State Tax Commission, its assistants, agents or representatives appointed by it in writing to examine the books, records, papers, files and equipment of such retail merchant, as defined herein, or who does, or attempts to do, anything whatever to avoid a full disclosure of the amount of business done, or to avoid the payment of the whole or any part of the tax or penalties due, shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding One Thousand ($1,000.00) Dollars, and in case the offender is an individual, he may be imprisoned in the county jail not exceeding six months, or both so fined and imprisoned. Such penalty shall be in addition to the penalty imposed in Section 5 of this act.

§ 8. It shall be the duty of the State Tax Commission to administer and enforce the provisions of this act, and it is hereby authorized and empowered to prescribe all blanks, forms and reports necessary to carry out the provisions of this act, and all costs and expenses incurred by the State Tax Commission in the administration of this act shall be paid out of the funds collected hereunder.

§ 9. All taxes collected under the provisions of this act shall be paid to the Auditor of Public Accounts, and of such amounts so received by the Auditor in any fiscal year, one-half part shall be set aside and credited to the Board of Charities and Corrections for the specific purpose of repairing, maintaining and constructing permanent improvements for the use of the institutions under the control of said board. The remainder of the amounts so collected and received by the Auditor in any fiscal year shall be credited to a fund to be used for the specific purpose of liquidating any indebtedness of the Commonwealth.

§ 10. No suit shall be maintained in any court to restrain or delay the collection or payment of the tax herein imposed upon any ground whatever, but the aggrieved taxpayer shall pay the tax as and when due, and if paid under protest may at any time within two years from the date of such payment sue the Auditor of Public Accounts in an action at

law to recover the tax so paid, with legal interest thereon, from the date of payment. If it is finally determined that said tax, or any part thereof, was wrongfully collected for any reason, it shall be the duty of the Auditor of Public Accounts then in office to issue his warrant on the Treasurer of the Commonwealth of Kentucky for the amount of such tax so adjudged to have been wrongfully collected, together with interest thereon, and the Treasurer shall pay same out of the General Fund of the State. A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made, and which are not barred by the limitations of two years herein imposed.

§ 11. The provisions of this act are severable and if any of its provisions or any penalty provided by this act shall be held unconstitutional, such provision or the particular penalty held to be invalid may be rejected without affecting the remainder of the act or such part of the penalties as are not held to be invalid and the decisions of the courts shall not affect or impair the remaining provisions of this act or any of the other penalties anywhere in this act provided. It is hereby declared as a legislative intent that this act would have been adopted had such unconstitutional provisions or such invalid penalties not been included therein.

§ 12. All laws and parts of laws in conflict herewith are hereby repealed to the extent of such conflict.

§ 13. Whereas, the present state revenue does not meet the immediate needs for the maintenance and development of the State government and its agencies, an emergency is declared to exist, and this act shall become a law and be effective upon its passage and approval by the Governor.

Approved March 17, 1930.

[fol. 341] [Endorsed:] Gross Retail Sales Tax Law of the State of Kentucky. Enacted by the General Assembly, Session 1930. Effective on and after March 17th, 1930. State Tax Commission, Frankfort, Ky.

[fol. 342] COMMONWEALTH OF KENTUCKY,
Frankfort, Ky.:

Office of Secretary of State

I, Ella Lewis, Secretary of State for the Commonwealth of Kentucky, hereby certify that the foregoing bill has been

carefully compared with the original enrolled bill now in my official custody as Secretary of State and remaining on file in my office and found to be a true and correct copy of the enrolled bill passed by the General Assembly of Kentucky, 1930 Session, approved by the Governor March 17, 1930, and known as the Gross Retail Sales Tax Law.

In witness whereof I have hereunto set my hand and affixed my official seal.

Done at Frankfort this 5th day of February, 1931.

Ella Lewis, Secretary of State.

[Seal Commonwealth of Kentucky, Office of Secretary of State.]

[fol. 343] In United States District Court

Order Approving Statement of Evidence

It appearing that the herewith and foregoing statement of evidence was lodged in due time with the Clerk of this Court, and that the attorneys for all parties to the said action have agreed that said statement may be approved without further notice to any of said parties, and it appearing that said statement is true, complete and properly prepared, and that it contains all the evidence relevant and material to a hearing of questions to be presented on the appeal in said action,

It is, therefore, ordered that the same be allowed, settled and approved as a true, complete and correct statement of the evidence of said action.

Dated this 23 day of March, 1932.

Chas. H. Moorman, Circuit Judge. A. M. J. Cochran, District Judge. Chas. I. Dawson, District Judge.

[fol. 344] In United States District Court

Order Continuing Temporary Restraining Order, Etc.—February 14, 1931

This day the above-styled three cases came on for hearing before Hon. Charles H. Moorman, Circuit Judge, Hon.

Charles I. Dawson, District Judge, and Hon. A. M. J. Cochran, District Judge, on motion of the respective plaintiffs for an interlocutory injunction.

By agreement of parties plaintiff and defendant, the above-styled three cases are heard together upon the pending motions for an interlocutory injunction, and the same evidence was heard in these cases as in the case of Kroger Grocery & Baking Company against the same defendants, pending in the Eastern District of Kentucky and heard at the same time.

The plaintiffs by counsel filed and read the deposition of Shirley E. Haas and exhibits therewith and the affidavits of the following persons:

Robert W. Lyons,	John B. Bonham,	W. A. Steiden,
D. T. Petty,	Gilbert J. Schneider,	Albert Berger,
John E. Donahue,	John Scanlan,	Chris Schumann,
Louie J. Jones,	Brack M. Ferrill,	Arch B. Davis,
M. R. Anderson,	C. J. Henry,	Harman Noe,
R. W. Owens,	Crawford Lee,	Robert J. McKim,
Fred Levy,	Dann Byck,	C. B. Turley,
N. A. Bash,	G. H. Parker,	James R. Karibo,
B. E. Van Antwerp,	C. R. Leininger,	E. R. Probasco,
M. S. Gesley,	W. G. Howell,	E. C. Purvis,
W. T. Morgan,	A. C. Miller,	O. A. Rhodes,
H. H. Craven,	W. G. Jenkins,	Robert Wright,
C. W. Gowin,	B. E. Willis,	I. O. Wolverson,
J. A. Gude,	T. B. Jones,	J. D. Delano,
L. M. Ross,	B. A. Alstrop,	H. C. Amstutz,
Milton Marx,	Dolph Wile,	C. H. Parsons,
Paul H. Nystrom,	Daniel M. Cohen,	James W. Stites,

and a synopsis and analysis of reports concerning the Gross Sales Tax in controversy, signed by Joseph Martin, Supervisor of the Gross Sales Tax Department, and A. H. Brendel, Certified Public Accountant.

Came the defendants by counsel and entered a motion to dismiss the bill of complaint in each of the above-styled three cases, and, not waiving same, entered motion to strike [fol. 345] out certain parts of the bill of complaint in each case, and, not waiving same, filed an answer in each case.

Likewise defendants filed and read in evidence upon the hearing of plaintiffs' motion for an interlocutory injunction in each of the above cases the affidavits of Henry F. Walradt, together with Exhibits A, B, C, D, E, F, G, H, I, and J; the affidavit of James W. Martin, together with Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16; the affidavit of Clyde W. Phelps; the affidavit of B. T. Brewer; and a certified copy of the House and Senate Journal relating to the

introduction, passage, approval, and enrollment of House Bill No. 111 of the 1930 Session; and a certified copy of the Gross Retail Sales Tax Law; the deposition of Walter Burr and a paper dated Feb. 13, 1931, in regard to retail gross sales tax reports audited.

Thereupon these cases were argued by counsel for the respective plaintiffs and defendants and ordered to be submitted upon plaintiffs' pending motions for an interlocutory injunction, and the Court, not being fully advised, takes time.

Leave is given to plaintiffs to February 28, 1931, and to defendants to March 10, 1931, within which to file briefs.

It is further ordered and adjudged that the temporary restraining order heretofore entered in each of the above-styled cases be and the same is hereby continued in full force and effect until the determination of plaintiffs' motion for an interlocutory injunction entered therein respectively.

Chas. H. Moorman, Circuit Judge. A. M. J. Cochran, District Judge. Chas. I. Dawson, District Judge.

[fol. 346] IN UNITED STATES DISTRICT COURT

KROGER GROCERY & BAKING COMPANY, Plaintiffs,

vs.

JOHN B. LEWIS, SELDEN GLENN, and HENRY M. CLINE, as Members of the State Tax Commission of the Commonwealth of Kentucky, and CLELL COLEMAN, Auditor of Public Accounts of the Commonwealth of Kentucky, Defendants

Before Moorman, Circuit Judge, and Cochran and Dawson, District Judges

OPINION—Filed Dec. 9, 1931

In this action plaintiff, an Ohio corporation, owning and operating a chain of retail grocery stores in the United States, two hundred and sixty-three of which are located in different parts of the Commonwealth of Kentucky, attacks Chapter 149 of the 1930 Acts of General Assembly of the Commonwealth of Kentucky, commonly known as the

Retail Merchants' Gross Sales Tax Act, as violative of the Federal and State Constitutions. The case is now before us on application of the plaintiff for an interlocutory injunction, under Section 266 of the Judicial Code (28 U. S. C. A., Section 380).

At the threshold of the case we are met with the contention of the defendants that a Federal court of equity is without power to grant the relief sought, for the reason that the law of Kentucky affords plaintiff an adequate remedy at law for any injury sustained by it resulting from [fol. 347] its enforced compliance with the terms of the Act. A decision of this question involves a construction of Section 10 of the Act, which reads as follows:

"No suit shall be maintained in any court to restrain or delay the collection or payment of the tax herein imposed upon any ground whatever but the aggrieved taxpayer shall pay the tax as and when due, and if paid under protest may at any time within two years from the date of such payment sue the Auditor of Public Accounts in an action at law to recover the tax so paid, with legal interest thereon from the date of payment. If it is finally determined that said tax, or any part thereof, was wrongfully collected for any reason, it shall be the duty of the Auditor of Public Accounts then in office to issue his warrant on the Treasurer of the Commonwealth of Kentucky for the amount of such tax so adjudged to have been wrongfully collected, together with interest thereon, and the Treasurer shall pay same out of the General Fund of the State. A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made, and which are not barred by the limitation of two years herein imposed."

If this section of the Act affords to the aggrieved taxpayer a remedy as certain, complete, practicable and efficient as is available in equity, and if the remedy thus afforded is available in the Federal courts, other jurisdictional requirements appearing, then this action must be dismissed. The declared purpose of Section 10 is to prevent injunctive interference with the operation of the law. It is quite apparent from a reading of this section that its draftsman was familiar with the rule, that in order to make effective the prohibition against injunctive interference, the stat-

ute must furnish an adequate remedy at law in lieu thereof. The effort in Section 10 is to afford such adequate remedy at law, and, in view of the well settled rule that such a remedy must be available in the Federal courts, if the necessary jurisdictional facts exist, it will not be presumed that the legal remedy provided was intended to be confined to the State courts, unless the language of the Act requires such construction. On the contrary, the statute will be construed to render effective the evident legislative intent, if such construction is not inconsistent with the plain language of the Act. Of course, the common law action authorized [fol. 348] by Section 10 against the Auditor of Public Accounts is, in reality, an action against the State. The section does not contemplate that the Auditor shall personally satisfy any judgment obtained under its provisions. By its express terms the ultimate liability is that of the State, and the Auditor is simply designated as a convenient alter ego of the State in suits for the recovery of taxes and interest claimed to have been illegally collected under the Act in question. Highway Commission of Wyoming v. Utah Construction Co., 278 U. S. 194. So we must regard Section 10 as the standing consent of the State, subject to the conditions therein imposed, to be sued for the recovery of taxes exacted under the provisions of the Act in question. Of course, when a sovereign consents to be sued, it may fix the conditions under which such suit may be maintained. It may even name the court in which such suit may be maintained, and the State's consent to be sued in its own courts can not be enlarged into a consent to be sued in a Federal court. Chandler v. Dix, 194 U. S. 590; Murray v. Wilson Distilling Co., 213 U. S. 151.

We are unable, however, to agree with the suggestion of the plaintiff that Section 10 limits the common law action therein provided for to State courts. The section contains no language, expressly or by implication, so limiting the cause of action. The language is certainly broad enough to authorize actions in the Federal courts, and having in mind the evident purpose of the General Assembly to provide an adequate remedy at law for all taxpayers under the Act, we conclude that the legal remedy provided by Section 10 was intended to be available in the Federal courts, as well as in the State courts. Such being the case, Section 10 operates as a waiver the immunity against suits in Fed-

eral Courts granted to States by the Eleventh Amendment to the Federal Constitution.

[fol. 349] The plaintiff contends that even conceding that it is the purpose of Section 10 to make the legal remedy provided by that section available in the Federal courts, such purpose is aborted by reason of the fact that the suit at law authorized by that section is a mandamus proceeding, of which United States District Courts have no original jurisdiction. If the premise thus advanced is sound, the conclusion necessarily follows, as it is well settled that Federal courts are without jurisdiction to issue a writ of mandamus in an original action brought for the sole purpose of securing relief by such writ. Marbury v. Madison, 1 Cranch, 137; Covington Bridge Co. v. Hagar, 203 U. S. 109; Knapp v. Lake Shore & Michigan Southern Ry. Co., 197 U. S. 536. But we can not agree with the premise. The common law suit authorized by Section 10 is not an original mandamus proceeding. It is an ordinary common law action against the Auditor of Public Accounts in his official capacity as the agent and representative of the State for a money judgment for the amount of taxes paid under the Act under protest, and interest thereon. The suit has none of the characteristics of an original mandamus proceeding. If, after judgment is obtained, the Auditor then in office declines to issue a warrant for the amount of such judgment and interest, the Federal court which rendered the judgment could issue a mandamus to compel the issual of such a warrant. Such a writ, however, would not be one issued in an original mandamus proceeding, but would be one issued in aid of the court's jurisdiction, which had already attached in the common law action for a money judgment. The issual of the writ in such a situation is authorized by Section 262 of the Judicial Code (Title 28, Section 377, U. S. C. A.) and is fully justified by the authorities. County of Green v. Daniel, 102 U. S. 187; Davenport v. County of Dodge, 105 U. S. 237.

We do not agree with the suggestion of the plaintiff that [fol. 350] the settled and approved practice under Section 162 of Kentucky Statutes fixes the nature of the proceeding under Section 10 of the Act in question. Section 162 is, in part, as follows:

"When it shall appear to the Auditor that money has been paid into the treasury for taxes when no such taxes

were in fact due, he shall issue his warrant on the Treasurer for such money so improperly paid in behalf of the person who paid the same."

This section makes no provision whatever for a common law action against the Auditor for a money judgment. It simply lays upon the Auditor the duty in a proper case of issuing his warrant for the taxes illegally or improperly collected. If he fails in the performance of this statutory duty, then mandamus in the state court is the only remedy against him, and in such proceeding the court must determine if he wrongfully refused to issue warrant for the amount claimed. Under Section 10 of the Act under consideration, however, the statutory duty of the Auditor to issue his warrant never arises until the amount for which the warrant is to be issued has been fixed by a money judgment in a common law suit. The difference between the two provisions of the statute is obvious. Furthermore, if the remedy under Section 10 is the same remedy granted by Section 162 of Kentucky Statutes, there would have been no occasion for the incorporation of Section 10 in the Act under consideration. We must and do regard Section 10 as a specific remedy at law, intended to apply only to the recovery of taxes exacted under the Gross Sales Tax Act.

The plaintiff suggests that conceding that Section 10 gives a right of action in Federal courts, still the remedy at law is not adequate, for the reason that the General Fund of the State, out of which Section 10 directs the warrants to be paid, is not in such condition as to enable these warrants to be paid within a reasonable time after they are issued. In support of this argument plaintiff has introduced proof, showing that there are now outstanding nearly ten million dollars of warrants against the General [fol. 351] Fund, and that this fund is usually over two years behind in the redemption of warrants drawn against it. It may be conceded that if taxpayers obtaining judgments under Section 10 were compelled to wait an unreasonable length of time for their money, the remedy at law given by this section would not be adequate; but no such unreasonable delay is indicated. The fair and reasonable meaning of that part of Section 10 which provides

for the payment of warrants issued in satisfaction of judgments obtained under that section is that such warrants shall be paid when presented, if there is sufficient money in the General Fund to do so, even though there may be outstanding other and prior warrants against this fund. The general law of Kentucky contains no express direction to the Treasurer to pay warrants drawn on the treasury in the order of their issue, although such is probably the fair inference to be drawn from language used in Section 4688a-4, Kentucky Statutes, Carroll's 1930 Edition, and the Court of Appeals in the case of Rhea v. Newman, 153 Ky., 604, held that the Treasurer should pay them in the order issued, for the purpose of insuring fair treatment to all. Bearing in mind, however, that the purpose of Section 10 is to afford the taxpayers entitled to its provisions a full and complete remedy at law, and that this remedy would not be full and complete unless the holders of judgments obtained under its provisions could secure the reasonably prompt payment thereof, it seems entirely consistent to hold that it was the purpose of the General Assembly to give warrants issued in satisfaction of judgments obtained under Section 10 priority of payment over other outstanding warrants against the General Fund, and to that extent to make an exception to the general rule as to the order of payment of State warrants. Such a construction of the section does no violence to its language and works no impairment of any contract obligation of the State to holders of prior warrants, as such outstanding warrants do not [fol. 352] pledge the State to redeem them at any particular time. Even if we should be mistaken in this construction of Section 10, and if warrants issued under its provisions enjoy no priority of payment, we would not be justified in holding that taxpayers recovering judgments under Section 10 would be required to wait an unreasonable length of time to realize on such judgments.

Under the general law of Kentucky, when a warrant against the General Fund is presented for payment, and the fund is not sufficient to satisfy same, the Treasurer must stamp same as interest bearing, and it thereafter draws interest at the rate of five per cent per annum, payable semi-annually, until called for redemption. (Section

4688a-2, Kentucky Statutes, Carroll's 1930 Edition.) Such warrants by the law of Kentucky are made negotiable instruments and are exempt from State and local taxation. (Section 4688a-8, Kentucky Statutes, Carroll's 1930 Edition.) It appears that these warrants are readily salable, and the record fails to disclose that any concession in the way of discount must be made to effect their sale. It will be observed that Section 10 not only provides for the recovery of the taxes paid, but for interest thereon as well. So far as we are advised, the Supreme Court has never held that the recovery of interest on taxes paid is necessary in order to make the remedy at law adequate. On the contrary, it is fairly deductible from the cases that the remedy at law is adequate, even though no recovery of interest is allowed. In the cases of Shelton v. Platt, 139 U. S. 591, and Allen v. Pullman Palace Car Co., 139 U. S. 658, the Supreme Court held that a law of Tennessee which permitted a taxpayer to recover from the State taxes paid under protest if they were wrongfully collected, but which made no provision for the recovery of interest, afforded an adequate remedy at law. Inasmuch as it is a settled principle of law that interest can not be collected from a sovereign State unless its recovery is specifically authorized [fol. 353] by a State statute, we can not presume that the Supreme Court in the cases referred to went on the assumption that interest as a matter of right followed the judgment. So we think it may be safely said that in permitting the recovery of interest under Section 10, the Commonwealth has bound itself to return more than was necessary in order to meet the test of an adequate remedy at law. Therefore, even if it appeared as a fact that some discount must be accepted by those who sell warrants issued under Section 10, it is probable that such discount would not exceed the interest which had accumulated on the tax from the date of its payment to the date of the rendition of the judgment. Furthermore, the State of Kentucky has no bonded indebtedness and is entirely solvent. Subject to the requirement of uniformity, the power of the General Assembly to tax for public purposes of the State is unlimited, and with this unlimited power residing in the General Assembly, this court will not assume that under Section 10 an aggrieved taxpayer can not recover within a reasonable time the full amount of the taxes paid.

Neither are we impressed with the contention of the plaintiff that Section 10 does not afford an adequate remedy at law, because under it a taxpayer would be compelled to resort to a multiplicity of suits to recover the various payments made under the Act. There is no necessity for a multiplicity of suits under Section 10. That section specifically provides that—

"A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made, and which are not barred by the limitation of two years herein imposed."

This is the law even though such a provision had not been incorporated in Section 10. Therefore the plaintiff may unite in one suit its claims growing out of each payment of taxes made under the Act up to the time of filing its suit, [fol. 354] and that action would fully determine every question which could be determined in an equitable action. There would be no necessity for other suits, except possibly to avoid the running of the statute of limitations pending the final determination of the suit already filed. A court of equity will not interfere on the ground of multiplicity of suits, where such multiplicity consists of suits by the same plaintiff against the same defendant for causes of action arising out of the same facts and legal principles. A multiplicity of suits in such a situation would be a multiplicity of the plaintiff's own making, and would afford no ground for equitable intervention. Boise Artesian Water Co. v. Boise City, 213 U. S. 276; Standard Oil Co. v. Atlantic Coast Line Co., 13 Fed. (2d) 653. We will not assume that after the validity of the tax has been once definitely settled in an action at law, the State will make any attempt to enforce further collections.

Finally, the fact that the Act imposes drastic penalties for failure to comply with its terms, and pay the tax when due, affords no basis for equitable intervention. The Act visits these penalties upon the taxpayer only in event of failure to comply with its terms and pay the tax. To test the validity of this Act in an action at law, it is not necessary for the plaintiff to refuse to pay the tax and take the hazard of the courts deciding against him when

the State undertakes in a legal action to enforce the penalties. All the taxpayer is required to do is to pay the tax, and when he has done this, he not only avoids the imposition of penalties, but has open to him a simple and direct way in a common law suit of attacking the validity of the law and of recovering the taxes paid, with interest thereon.

We therefore conclude that the remedy afforded by Section 10 of the Act is an adequate one within the Federal rule, and the motion to dismiss for want of equitable jurisdiction must be sustained.

[fol. 355] November 6, 1931.

Chas. H. Moorman, U. S. Circuit Judge. A. M. J. Cochran, U. S. District Judge. Chas. I. Dawson, U. S. District Judge.

Nichols, Morrill, Wood, Marx & Ginter, Cincinnati, O.; Trabue, Doolan, Helm & Helm, Louisville, Ky., Attorneys for Plaintiff.

J. W. Cammack, Attorney General, Frankfort, Ky.; S. H. Brown, Asst. Attorney General, Frankfort, Ky.; H. S. Gentry, Batson, Cary & Welch, Louisville, Ky.; Leslie W. Morris, Frankfort, Ky., Attorneys for Defendants.

[fol. 356] In United States District Court

Decree—Dec. 9, 1931

This cause having been heard by consent of parties, together with the causes of Fred Levy et al., against the same defendants, and the J. C. Penney Company, against the same defendants, pending in this court, and the cause of The Kroger Grocery & Baking Company against the same defendants, pending in the United States District Court for the Eastern District of Kentucky, and having been submitted with them on February 14, 1931, upon plaintiff's motion for an interlocutory injunction heard by the court upon the depositions, affidavits and exhibits referred to in the order of submission as having been introduced by plaintiffs and defendants respectively, this Court, being advised, on November 6, 1931, delivered its written opinion entitled in the cause of The Kroger Grocery and Baking

Company against John B. Lewis et al., a copy of which opinion is now filed in this cause as a part of the record herein and as equally applicable to this cause, and pursuant thereto, and solely for the reasons stated in said opinion, plaintiff's said motion for an interlocutory injunction herein is hereby denied, to which the plaintiff excepts.

It is further ordered by the Court that this cause be and it is hereby submitted upon motion of the defendants to dismiss the bill, and the Court, being of opinion that there is a plain, adequate and complete remedy at law, afforded to the plaintiff for the reasons set forth in its said opinion, declines to consider any issue or question raised herein except the single question as to the adequacy of the remedy at law, and, solely for the reasons stated in its said opinion, sustains the motion of defendants to dismiss the bill, and denies to the plaintiff a permanent injunction or any in-
[fol. 357] junctive or other relief prayed by it.

It is therefore adjudged and decreed that the plaintiff's bill herein be dismissed, and that the defendants recover of the plaintiff their costs herein expended: to all of which the plaintiff excepts.

The plaintiff having this day stated in Court its intention to appeal from this Order and Decree, denying plaintiff's motion for an interlocutory injunction, and denying its application for a permanent injunction, and dismissing its bill of complaint, it is hereby further ordered and adjudged that the Temporary Restraining Order heretofore issued in this cause shall be continued in effect as to the plaintiff, and as to each retail merchant listed of record (by Order entered herein March 30, 1931, and supplemented as to Ben Snyder, Incorporated, by later Order) as included in the same class of taxpayers as plaintiff, and shall remain in full force and effect as to the plaintiff and each of said taxpayers so listed, until the final determination of plaintiff's said appeal, to all of which defendants except and object; Provided, however, that the plaintiff, for itself only, and each of said taxpayers so listed desiring to avail himself or itself of the benefit of said restraining order pending such appeal, for himself or itself only (and not one for another), shall within thirty (30) days from the entry of this Decree execute such bond or make such deposit of money or securities as required herein and as may be rea-

sonably necessary to secure the Commonwealth of Kentucky against loss of any taxes, interest, court costs, and all other proper charges that may be or become due from such taxpayer under the Act assailed herein by plaintiff, in the event the validity of such Act should be finally established.

The amount of any such bond given and the amount or value of securities or money deposited by any taxpayer, [fols. 358-360] shall be fixed at an amount equal to the estimated taxes claimed from said taxpayer for the taxable period of 1930 and 1931, and said bond shall be secured by corporate surety or the pledge and deposit of negotiable securities acceptable to the Attorney General of Kentucky.

In the event the plaintiff or any one of said taxpayers shall fail to execute such bond or give such security as required of it or him or them, within thirty (30) days from the entry of this Order and Decree, said restraining order as to such taxpayer so failing shall be thereupon immediately dissolved and shall afford no further protection to such taxpayer.

Upon the execution by the plaintiff herein of a bond secured as herein provided, the bond or bonds heretofore executed by the plaintiff in this cause shall be cancelled as to all future liability, and the like order is made as to the bond heretofore executed herein by Ben Snyder, Inc., upon its compliance, within thirty (30) days, with the provisions of this Order by the execution of a new bond or the deposit of securities as herein required.

Chas. H. Moorman, Circuit Judge. Chas. I. Dawson, District Judge. A. M. J. Cochran, District Judge.

[fols. 361-377] In United States District Court

Order Substituting Auditor of Public Accounts, etc.—March 1, 1932

This day came the parties herein and filed a stipulation noting that the term of office of the defendant, Clell Coleman, has expired within six months of the date hereof, and the said defendant has retired from said office and was thereupon succeeded therein by J. Dan Talbot.

And it appearing to the Court that there is a substantial need for continuing and maintaining this cause and obtaining an adjudication of the questions involved,

It is ordered that J. Dan Talbot, Auditor of Public Accounts of the Commonwealth of Kentucky, be and he is hereby substituted as a defendant herein in lieu of the defendant, Clell Coleman, and with the same effect as if he had been an original defendant to the bill of complaint herein, and said cause is continued and maintained against the said J. Dan Talbot, Auditor of Public Accounts of the Commonwealth of Kentucky.

Chas. H. Moorman, Circuit Judge. A. M. J. Cochran, District Judge. Chas. I. Dawson, District Judge.

[fols. 378 & 379] Bond on appeal for $1,000, approved and filed March 1, 1932, omitted in printing.

[fols. 380-395] Citation, in usual form, showing service on John B. Lewis et al., filed March 1, 1932, omitted in printing.

[fol. 396] IN UNITED STATES DISTRICT COURT

MANDATE OF UNITED STATES SUPREME COURT

UNITED STATES OF AMERICA, *ss:*

[SEAL.]

The President of the United States of America, to the Honorable the Judges of the District Court of the United States for the Western District of Kentucky, Greeting:

Whereas, lately in the District Court of the United States for the Western District of Kentucky, before you, or some of you, in a cause between The Stewart Dry Goods Company, Plaintiff, and John B. Lewis, Selden R. Glenn, and Henry M. Cline, Individually and as Member of the State Tax Commission of the Commonwealth of Kentucky, et al., etc., Defendants, wherein the decree of the said District Court, in favor of the said defendants, was duly entered in said cause on the 9th day of December, A. D. 1931, which decree is fully set out in the record of said cause in the office of the Clerk of said District Court and is incorporated

herein by reference thereto; as by the inspection of the transcript of the record of the said District Court, which was brought into the Supreme Court of the United States by virtue of an appeal agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and thirty-two, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered, ad- [fol. 397] judged, and decreed by this Court that the decree of the said District Court, in this cause be, and the same is hereby, reversed with costs; and that the said Plaintiff, The Stewart Dry Goods Company, recover against the said Defendants Nine Hundred and Twenty-one Dollars and Fifteen Cents for its costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the said District Court for final hearing upon the merits, without prejudice to a determination upon evidence with respect to the questions of the status of outstanding warrants upon the General Fund in the State Treasury, and whether warrants of the sort contemplated by section 10 of the Act in question are accorded preference in payment over other warrants and the basis, if any, for the assurance that such preference will be continued so that in the event of actions by the plaintiffs at law under section 10 they would be afforded a certain, reasonably prompt and efficacious remedy.

October 24, 1932.

You, therefore, are hereby commanded that such execution and further proceedings be had in such cause, in conformity with the opinion and decree of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Charles E. Hughes, Chief Justice of the United States, the nineteenth day of November, in the year of our Lord one thousand nine hundred and thirty-two.

Charles Elmore Cropley, Clerk of the Supreme Court of the United States.

[fol. 398] IN UNITED STATES DISTRICT COURT

ORDER FILING MANDATE—Entered December 10, 1932

This day came the parties, plaintiff and defendants, by their respective counsel, and on motion of plaintiffs, the mandate and opinion of the Supreme Court of the United States, reversing the orders and the final decree entered herein December 11, 1931, are filed of record, and pursuant to such mandate, it is now ordered and adjudged that the order and decree herein entered on December 11, 1931, be and every part thereof is hereby set aside, vacated and held for naught, and this cause is now reinstated upon the docket of the court for further proceedings in accordance with said mandate and the opinion of the Supreme Court.

By consent of parties, J. Dan Talbott, the present duly elected, qualified and acting Auditor of Public Accounts, is made defendant, individually and as such Auditor, in substitution for Clell Coleman, whose term of office has expired; and in like manner, W. P. Sullivan, at present a duly appointed, qualified and acting member of the State Tax Commission, in succession to Henry M. Cline, whose term [fol. 399] of office has expired, is made a party defendant, individually and as such member of the State Tax Commission, in substitution for said Henry M. Cline.

Chas. H. Moorman, A. M. J. Cochran, Chas. I. Dawson

Trabue, Doolan, Helm & Helm, Nichol, Morrill, Wood, Marx & Ginter, Solicitors for Pl'ff.

Bailey P. Wootton, Attorney General.

Dec. 10, 1932.

[fol. 400] IN UNITED STATES DISTRICT COURT

ORDER GRANTING INTERLOCUTORY INJUNCTION—Entered December 10, 1932

This day came the parties, plaintiffs and defendants, by their respective counsel, and the plaintiffs renewed their motion for an interlocutory injunction, made herein January 24, 1931.

Said motion having been heretofore heard and submitted, and the Court being sufficiently advised, it is considered,

ordered and adjudged that said motion be sustained and that the defendants and each of them be, and each of them is hereby, enjoined and restrained, until the further order of court herein:

(1) From enforcing or executing, either directly or indirectly, against these plaintiffs and/or other taxpayers similarly situated, the provisions of Chapter 149 of the Acts of the General Assembly of Kentucky at its 1930 session, entitled:

"An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this act."

[fol. 401] (2) From instituting or maintaining against the plaintiffs and/or other taxpayers similarly situated, any prosecution or action at law, or any suit or suits in equity, to recover of or from the plaintiffs or other taxpayers similarly situated any portion of the alleged tax sought to be exacted of them under said Act, or for the infliction of any of the penalties prescribed in said Act for the non-payment of such tax or for failure to make or file any reports or returns required thereunder, or from taking any steps looking to the prosecution of the plaintiffs or any of their agents or servants or employes, or any other person, firm or corporation similarly situated, or any of their agents or servants or employes, for a violation of said Act in any of its provisions.

The interlocutory injunction herein granted shall, until further order of court herein, continue in effect as to the plaintiffs and as to each retail merchant listed of record (by order entered herein March 30, 1931, and supplemented as to Ben Snyder, Incorporated, by later order) as included in the same class of taxpayers as plaintiffs, and shall remain in full force and effect as to the plaintiffs and each of said taxpayers so listed, until the final determination of this cause by this Court, or until further order of Court herein.

To all of which the defendants and each of them object and except.

Provided, however, that the plaintiffs, for themselves only, and each of said taxpayers so listed, desiring to avail himself or itself of the benefit of said interlocutory injunction pending the final determination of this cause, for himself or itself only (and not one for another), shall within thirty (30) days from the entry of this order execute such bond or make such deposit of money or securities as required herein and as may be reasonably necessary to secure the Commonwealth of Kentucky against loss of any taxes accruing for the calendar years 1930, 1931 and 1932 under the Act assailed herein by plaintiffs, in the event the valid-
[fol. 402] ity of said Act should be finally established, and also against the loss of any interest or court costs or other proper charges that may be or become due from each such taxpayer under said Act.

The amount of any such bond given and the amount or value of securities or money deposited by the plaintiffs or by any taxpayer entitled hereunder to the benefit of the interlocutory injunction herein granted, shall be fixed at an amount equal to the estimated taxes claimed from said taxpayer for the taxable period of the years 1930, 1931 and 1932, and said bond shall be secured by corporate surety or by a pledge and deposit of negotiable securities acceptable to the Attorney General of Kentucky, and if the parties can not agree upon the amount of such bond or the amount or character of such negotiable securities, then the amount of such bond or the amount and character of negotiable securities, and the pledge and deposit thereof, shall be as prescribed by the regular Judge of this Court, without the necessity of calling in the other two Judges for that purpose.

In the event the plaintiffs or any one of said taxpayers entitled hereunder to the benefit of the interlocutory injunction herein granted shall fail to execute such bond or to give such security as may be required of it or him or them, within thirty (30) days from the entry of this order, said interlocutory injunction as to such taxpayer so failing shall be thereupon immediately dissolved and it shall afford no further protection herein to such taxpayer.

Upon the execution by the plaintiffs or by any one of said listed taxpayers entitled hereunder to the benefit of

the interlocutory injunction herein granted, or a bond secured as herein provided, or the making by the plaintiffs or such taxpayer of a pledge or deposit of securities as herein provided, the bond or bonds heretofore executed by the plaintiffs in this cause shall be canceled as to all future liability, and any such pledge or deposit released as to all future liability, and all deposits of securities thereto-
[fol. 403] fore made by the plaintiffs, or by any such taxpayer shall be released, and such deposited securities shall be redelivered to the persons respectively depositing same.

December 10, 1932.

Chas. I. Dawson, Judge.

Have seen.

Trabue, Doolan, Helm & Helm, Nichol, Morrill, Wood, Marx & Ginter, Solicitors for Plaintiff. Bailey P. Wootton, Atty. General. S. H. Brown, Assist. Atty. Gen. Francis M. Burke, Assist. Atty. Gen. Batson, Carey & Welch, Leslie W. Morris, Solicitors for Defts.

[fol. 404] IN UNITED STATES DISTRICT COURT

AGREED ORDER AMENDING ORDER GRANTING INJUNCTION—
Entered December 20, 1932

By agreement of parties, it is now ordered that the order entered herein on December 10, 1932, granting an interlocutory injunction, be amended in the following particulars only:

(1) Plaintiffs or those taxpayers herein who have hitherto given bond for the payment of taxes accruing from sales for the calendar years 1930 and 1931 may, if they, or any of them, so elect, continue said bonds in force, and may give an additional bond for the estimated taxes accruing from sales made in the year 1932, said additional bond to be in all respects as required in said order of December 10, 1932, except as herein limited.

(2) Said bonds for the taxes accruing from sales for the calendar years 1930 and 1931 shall, in the event the taxpayer so elects, be and remain in full force and effect unless

substituted bonds for the three years' taxes be filed in lieu thereof.

Dec. 20, 1932.

Chas H. Moorman, Circuit Judge. A. M. J. Cochran, District Judge. Chas. I. Dawson, District Judge.

Bailey P. Wootton, Attorney for Defendants. Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Attorneys for Plaintiffs.

[fol. 405] IN UNITED STATES DISTRICT COURT

In Equity. No. 609

AMENDMENT TO BILL OF COMPLAINT—Filed February 18, 1933

The plaintiff, by leave of Court, amends its bill of complaint herein in respect to the matters hereinafter set out, and by way of amendment now makes the following averments:

Paragraph I

Amending Paragraph X of its original bill of complaint, plaintiff repeats the averments contained therein, and in addition thereto states:

That for the calendar year 1931 plaintiff has paid to the Commonwealth of Kentucky, in addition to the payment of its annual ad valorem taxes and excluding similar taxes paid for prior years, the following special State licenses, excises, occupational and corporation license taxes, to wit:

Corporation license taxes	$989.78
Other license taxes	68.00
Automobile license taxes	350.07
Total	$1,407.85

That for the calendar year 1932 plaintiff has paid to the Commonwealth of Kentucky, in addition to the payment of its annual ad valorem taxes and excluding similar taxes paid for prior years, the following special State licenses, excises, occupational and corporation license taxes, to wit:

Corporation license taxes	$929.40
Other license taxes	68.00
Automobile license taxes	350.00
Total	$1,347.40

[fol. 406] Paragraph II

Amending Paragraph XIII of its original bill of complaint, plaintiff repeats the averments therein contained with respect to the calendar year 1930, and further states:

That during the calendar year 1931 the total gross retail sales made by this plaintiff, in all departments conducted by it in its retail store, aggregated $3,618,126.00.

Applying to said gross sales claimed by defendants to be subject to taxation under Chapter 149, Acts of 1930, the rates of taxation prescribed by said challenged Act, and taking the credits allowed by Section 4 of said challenged Act, would produce the following result in taxes claimed of this plaintiff for the calendar year 1931:

1/20 of one per cent on first $400,000 of sales	$200.00 tax
2/20 of one per cent on next $100,000 of sales	100.00 tax
5/20 of one per cent on next $100,000 of sales	250.00 tax
8/20 of one per cent on next $100,000 of sales	400.00 tax
11/20 of one per cent on next $100,000 of sales	550.00 tax
14/20 of one per cent on next $100,000 of sales	700.00 tax
17/20 of one per cent on next $100,000 of sales	850.00 tax
One per cent on excess over $1,000,000 of sales	26,181.26 tax
Total tax above computed	$29,231.26
Credits allowed under Section 4 of Act, as per Paragraph I of this amendment	1,407.85
Net tax demanded of plaintiff for 1931	$27,823.41

That during the calendar year 1932 the total gross retail sales made by this plaintiff in all departments conducted by it in its retail store aggregated $2,812,683.00.

Applying to said gross sales for 1932, claimed by defendants to be subject to taxation under said challenged Act, the rates of taxation thereby prescribed, and taking the credits allowed by Section 4 of said challenged Act, would produce the following result in taxes claimed of this plaintiff for the calendar year 1932:

[fol. 407]

1/20 of one per cent on first $400,000 of sales	$200.00	tax
2/20 of one per cent on next $100,000 of sales	100.00	tax
5/20 of one per cent on next $100,000 of sales	250.00	tax
8/20 of one per cent on next $100,000 of sales	400.00	tax
11/20 of one per cent on next $100,000 of sales	550.00	tax
14/20 of one per cent on next $100,000 of sales	700.00	tax
17/20 of one per cent on next $100,000 of sales	850.00	tax
One per cent on excess over $1,000,000 of sales	18,126.83	tax
Total tax above computed	$21,176.83	
Credits allowed under Section 4 of Act, as per Paragraph I of this amendment	1,347.40	
Net tax demanded of plaintiff for 1932	$19,829.43	

Paragraph III

Amending Paragraph XIV of its original bill of complaint, the plaintiff repeats the averments therein contained with respect to the calendar year 1930, and states:

That the same averments apply in full force and effect and are hereby restated by this plaintiff with respect to its gross sales in each of the calendar years 1931 and 1932 and with respect to the taxes exacted of plaintiff for each of said years 1930, 1931 and 1932, under the Act assailed in its original bill of complaint.

Paragraph IV

Amending Paragraph XV of its original bill of complaint, this plaintiff repeats all the averments contained in said paragraph with respect to the operation of said Act during each of the calendar years 1930, 1931 and 1932, and with respect to the unjust and unequal discrimination effected by said Act between the plaintiff and the 25 other taxpayers listed of record as similarly situated and as protected by orders of Court herein, on the one hand, and from 20,000 to 25,000 other competing retail merchants conducting a general retail store in Kentucky, on the other hand.

In addition thereto, plaintiff states that in its actual operation for the years 1930 and 1931, said challenged Act of 1930 has in fact produced the following results, as disclosed by the records of the State Tax Commission of Kentucky, which afford complete returns from all taxpayers [fol. 408] with the exception of plaintiff and others listed by order of Court herein as entitled to the benefits of this litigation and of the restraining order heretofore granted herein:

Aside from the plaintiff and the 25 other taxpayers in the several classes represented in this litigation and protected by the restraining orders issued herein, it appears from the records of the State Tax Commission that there are or were in the State of Kentucky 24,096 retail merchants who were required to and did make reports to said Commission for the calendar year 1930, and 20,084 retail merchants who were required to and did make reports to said Commission for the calendar year 1931.

The following summaries show the actual operation and effect of said challenged Act as to the taxpayers who have made the reports required of them under said Act, down to and including December 2, 1932:

Summary of Reports to Kentucky State Tax Commission Relative to Gross Retail Sales in Calendar Year 1930

Number of Reports filed by Retail Merchants showing—	Number filed	Number indicating tax	Number indicating no tax
Retail sales less than $400,000	24,061	16,374	7,687
Retail sales between $400,000 and $500,000	13	7	6
Retail sales between $500,000 and $600,000	8	5	3
Retail sales between $600,000 and $700,000	5	4	1
Retail sales between $700,000 and $800,000	4	2	2
Retail sales between $800,000 and $900,000	1	0	1
Retail sales between $900,000 and $1,000,000	0	0	0
Retail sales in excess of $1,000,000	4	3	1
Totals	24,096	16,395	7,701

Statement Showing Number of Retail Merchants Reporting for the Year 1930 Classified by Amounts of Tax Paid Pursuant to Reports

Number of taxpayers reporting tax less than 50¢	2,630
Number of taxpayers reporting tax 50¢ to $1.00	2,187

[fol. 409]

Number of taxpayers reporting tax $1.00 to $2.00	2,743
Number of taxpayers reporting tax $2.00 to $3.00	1,750
Number of taxpayers reporting tax $3.00 to $4.00	1,186
Number of taxpayers reporting tax $4.00 to $5.00	889
Number of taxpayers reporting tax $5.00 to $10.00	2,046
Number of taxpayers reporting tax $10.00 to $15.00	816
Number of taxpayers reporting tax $15.00 to $20.00	429
Number of taxpayers reporting tax $20.00 to $25.00	342
Number of taxpayers reporting tax $25.00 to $50.00	495
Number of taxpayers reporting tax $50.00 to $100.00	175
Number of taxpayers reporting tax $100.00 to $200.00	60
Number of taxpayers reporting tax $200.00 to $300.00	6
Number of taxpayers reporting tax $300.00 to $400.00	4
Number of taxpayers reporting tax $400.00 to $500.00	1
Number of taxpayers reporting tax $500.00 to $600.00	0
Number of taxpayers reporting tax $600.00 to $700.00	2
Number of taxpayers reporting tax $700.00 to $800.00	1
Number of taxpayers reporting tax over $1,000,000	3
Total	15,765
Undetermined and unclassified	630
Total	16,395

Number of Merchants reporting sales of—	Showing tax liability	Showing no tax liability
Less than $10,000.00	8,784	5,353
$10,000.00 and under $25,000.00	4,439	1,553
$25,000.00 and under $50,000.00	1,905	507
$50,000.00 and under $75,000.00	596	148
$75,000.00 and under $100,000.00	241	45
$100,000.00 and under $150,000.00	216	40
$150,000.00 and under $200,000.00	90	19
$200,000.00 and under $250,000.00	48	12
$250,000.00 and under $300,000.00	27	3
$300,000.00 and under $400,000.00	36	7
Over $400,000.00	21	14
Total	16,395	7,701

Analysis of reports showing tax liability—	Number of returns	Gross sales	Gross tax	Credits allowed	Net tax	Credits shown in excess of tax liability
Sales less than $400,000	24,061	$338,870,755.00	$167,214.07	$78,211.02	$89,003.05	$222,674.01
Sales between $400,000 and $500,000	13	5,866,935.00	3,454.81	2,193.44	1,261.37	5,709.42
Sales between $500,000 and $600,000	8	4,416,568.00	3,440.42	2,123.02	1,317.40	5,306.50
Sales between $600,000 and $700,000	5	3,234,563.00	3,266.68	1,498.12	1,768.56	177.20
Sales between $700,000 and $800,000	4	2,989,019.00	4,110.66	2,727.57	1,383.09	2,298.47
Sales between $800,000 and $900,000	1	814,559.00	636.15	636.15	0	1,755.24
Sales between $900,000 and $1,000,000	0	0	0	0	0	0
Sales in excess of $1,000,000	4	5,329,123.00	25,491.24	14,099.48	11,391.76	4,593.15
Total	24,096	$361,521,522.00	$207,614.03	$101,488.80	$106,125.23	$243,513.99

[fol. 410]

Summary of Reports to Kentucky State Tax Commission Relative to Gross Retail Sales in Calendar Year 1931

Number of reports filed by Retail Merchants showing—	Number filed	Number indicating tax	Number indicating no tax
Retail sales less than $400,000	20,053	11,992	8,061
Retail sales between $400,000 and $500,000	10	6	4
Retail sales between $500,000 and $600,000	9	6	3
Retail sales between $600,000 and $700,000	3	3	0
Retail sales between $700,000 and $800,000	2	1	1
Retail sales between $800,000 and $900,000	3	2	1
Retail sales between $900,000 and $1,000,000	2	2	0
Retail sales in excess of $1,000,000	2	2	0
Totals	20,084	12,014	8,070

Analysis of Reports Showing Tax Liability—	Number of returns	Gross sales	Gross tax	Credits allowed	Net tax	Credits shown on reports in excess of tax liability
Sales less than $400,000	20,053	$286,786,721.00	$143,464.51	$77,551.95	$65,912.56	$173,735.79
Sales between $400,000 and $500,000	10	4,520,653.00	2,520.64	1,513.05	1,007.59	3,260.06
Sales between $500,000 and $600,000	9	4,887,385.00	3,572.59	2,212.57	1,360.02	5,699.06
Sales between $600,000 and $700,000	3	1,927,791.00	2,161.17	700.00	1,461.17	.....
Sales between $700,000 and $300,000	2	1,472,166.00	2,296.25	1,391.17	905.08	3,109.00
Sales between $800,000 and $900,000	3	2,549,814.00	5,548.72	2,429.98	3,118.74	237.08
Sales between $900,000 and $1,000,000	2	1,895,680.00	5,218.29	1,084.94	4,128.35	.....
Sales in excess of $1,000,000	2	2,389,404.00	9,994.07	3,607.85	6,386.22	.....
Totals	20,084	$306,429,614.00	$174,771.24	$90,491.51	$84,279.73	$186,040.99

[fol. 411] Paragraph V

Amending Paragraph XXVIII of its original bill of complaint, plaintiff repeats the averments therein contained, and in addition thereto, it makes the following averments:

For more than ten years past there has been a constantly increasing deficit in said General Fund, which has been continuously during said period, and is now, wholly insufficient to meet the warrants drawn upon it by the Auditor of Public Accounts in discharge of claims properly allowable against and payable out of it, and by reason thereof, holders of warrants drawn against it have been compelled to hold the same for as much as five years, awaiting the accumulation in the General Fund of funds sufficient to pay such warrants in their proper sequence as provided by law.

In addition thereto, there are many other undisputed claims against the General Fund which have been held up for long periods of time in the office of the Auditor and for which no warrants have been issued by the Auditor although such claims are properly allowable and payable out of the General Fund. Without a prolonged and expensive accounting, it is impossible to state the amount of such claims for which no warrants have been issued, but they aggregate a large sum of money, amounting to many thousands of dollars.

By Section 4688a-1, a-2 and a-4, Kentucky Statutes, as construed by the Court of Appeals of Kentucky, in the case of Rhea, Treasurer, v. Newman, 153 Ky. 604, and in Bosworth, State Treasurer, v. Shuck, 118 Ky. 458, it is made the duty of the State Treasurer to pay outstanding warrants against the General Fund, in the order in which they were issued and as money appropriated and available for the purposes of the General Fund reaches the treasury.

The effect of this statute, as construed by the Court of Appeals, is to require that unpaid warrants against the General Fund drawn first in point of time shall be paid in priority to warrants drawn later in point of time, and if the [fol. 412] payment thereof exhausts the General Fund, warrants subsequently issued must await their turn in serial order before payment thereof can be compelled by process of law.

By Section 4688a-1, Kentucky Statutes, it is provided that the State Treasurer shall receive and redeem warrants issued against the Auditor

"if there be sufficient money in the treasury appropriated for that purpose."

If there is no money in the General Fund available for the payment of such warrants in the order prescribed by law, the State Treasurer can not pay such warrants, and the Courts can not by mandamus compel him to pay same, as was held by the Court of Appeals of Kentucky in Bosworth, State Treasurer, v. Shuck, 118 Ky. 458.

The mounting deficit in the General Fund was recognized by the General Assembly of Kentucky at its 1924 session by the enactment of Chapter 122, Acts of 1924, which submitted to a vote of the people a bond issue of $6,000,000 to pay warrants then outstanding against the General Fund. Such bond issue was defeated at the polls.

At its 1926 session, the General Assembly enacted Chapter 13 of the Acts of 1926, submitting to the people of the State, for a vote, a bond issue of $4,000,000 for the purpose of raising money with which to pay warrants against the General Fund then outstanding. This bond issue was likewise defeated at the polls.

At the time the challenged Act was in process of enactment, it was a notorious fact, which was well known to the members of the General Assembly and to the officials of the State, that warrants drawn against the General Fund for the refund of taxes prescribed in said Act could not and would not be paid out of said Fund for several years, and, knowing these facts, the General Assembly made no provision to levy any tax for the augmentation of the General Fund. The only provision made for the payment of warrants *theretofore* outstanding was to enact the challenged [fol. 413] law and therein to appropriate *one-half* the taxes exacted thereunder, to the payment of the *then* existing indebtedness of the Commonwealth, it being *already* provided by law that such payments should be applied on warrants in sequence according to their respective dates of issue.

At the time these suits were brought, as shown by a monthly financial statement officially issued by the State Treasurer of Kentucky, as of January 1, 1931, the amount of money in the General Fund on January 1, 1931, less minor

accounts, was $12,565.81, as against which Fund there were at the time outstanding warrants, theretofore issued, aggregating $9,880,502.76, which had been drawn against the State Treasurer by the Auditor of Public Accounts and had been presented for payment but were not paid for lack of funds.

At its 1932 session the General Assembly of the Commonwealth of Kentucky again recognized and declared the insolvency of the General Fund and its insufficiency to pay outstanding warrants issued against it by the Auditor of Public Accounts. Accordingly it enacted Chapter 20 of the Session Acts of 1932, the title of which Act reads in part as follows:

"An act authorizing the funding of certain indebtedness of the Commonwealth of Kentucky which is evidenced by outstanding state warrants, by the issuing of funding bonds and acknowledging and confirming the validity of such warrants and the indebtedness evidenced thereby."

In the preamble and body of said Act the General Assembly ascertained and declared the following facts:

(1) That there were then outstanding warrants beginning with warrant No. A 49, dated July 5, 1927, and including all unpaid interest thereon.

(2) That there was then no money in the State treasury available for the payment of such warrants, or any part thereof.

(3) That some of such warrants have been issued and outstanding for approximately five years.

[fol. 414] In State Budget Commission v. Lebus, 244 Ky. 701, 714, the Court of Appeals affirmed a judgment of the Franklin Circuit Court, holding invalid said Chapter 20 of the Session Acts of 1932, on the ground that it did not provide for submitting the proposed bond issue to a vote of the people, as required by the State Constitution.

The facts with respect to the condition of the General Fund are now, and for years past have been, as above declared by the General Assembly in the Acts hereinbefore set forth, excepting that the deficiency in the said General Fund has shown a progressive increase and there is no prospect of such deficiency being reduced.

Since the adjournment of the 1932 session of the General Assembly, the deficiency in the General Fund has constantly increased and, as shown by a monthly financial statement officially issued by the State Treasurer of Kentucky as of November 1, 1932, the amount of then outstanding warrants drawn by the Auditor of Public Accounts upon the General Fund of the Commonwealth was $14,279,558.11 as of October 31, 1932, and there was no money whatever in the General Fund, but, on the contrary, it had been overdrawn by reason of its indebtedness to other funds of the State in the sum of $275,261.48.

By reason of the facts hereinbefore set forth, a warrant against the General Fund which plaintiff might obtain under Section 10 of the challenged Act at the end of such litigation as is authorized therein could not, consistently with the law of the State as expounded by the Court of Appeals, be paid out of said General Fund for several years.

By reason of such insolvency of the General Fund, warrants drawn against it can not be collected with reasonable or any promptness, and they can not be sold except at a discount of from 10 to 15 per cent of their face value.

This fact has been recognized by the defendants herein, [fol. 415] members of the State Tax Commission of Kentucky, who gave their depositions in the Franklin Circuit Court in the suit above referred to, which reached the Court of Appeals of Kentucky as State Budget Commission v. Lebus, 244 Ky. 701, 714.

In said action, the defendant Seldon R. Glenn, under oath, stated in his deposition, given at the State Capitol on May 23, 1932, that he was familiar with the present market for State warrants against the General Fund, and that such warrants on such market were worth 87 to 88 cents on the dollar, but that there was not a ready market for them at any price, and his opinion was that, unless something is done to relieve the situation, such as upholding the validity of the 1932 Funding Act held void by the Courts, before September, 1932, outstanding warrants would sell at 75 per cent of face value.

In like manner, the defendant John B. Lewis, at the same time and place, stated under oath that the last sale of State warrants that he knew of was made at 90 cents on the dollar; and he added that he understood buyers were not offer-

ing 90 then, but were offering a little less than that. He also stated that in the event said Funding Act should be held invalid—as it was held by the Courts—the warrants would go considerably lower, and he believed they would go below 75 cents on the dollar of face value.

Plaintiff states that it is now extremely difficult to find a purchaser for State warrants drawn by the Auditor of Public Accounts against the General Fund of the State, and that if and when a purchaser can be found it is impossible to realize upon a sale of such warrants a sum in excess of 80 to 90 per cent of their face value.

Plaintiff says that no State warrants against the General Fund have been called for payment that have been issued since July 31, 1927; and in his deposition, given at the time and place and in the case above referred to, the defendant Seldon R. Glenn, under oath, stated that the last call of warrants was made as of July 8, 1931, and it called [fol. 416] for warrants that had been issued between June 12, 1927, and July 1, 1927, inclusive.

On the average, throughout the last eight or ten years, interest-bearing State warrants drawn against the General Fund have been delayed in payment approximately five years after issue thereof, on account of the lack of funds legally available therefor. The only exceptions to this general rule are those made in disregard of the rule of law prescribing the order of payment, because of special circumstances deemed sufficient to excuse or palliate such disregard.

Had the plaintiff herein paid the taxes exacted of it under the challenged Act as and when due in February, 1931, and February, 1932, and had the defendants been required to issue warrants for the refund of said taxes as provided in Section 10 of the challenged Act, the plaintiff herein, under the law of the State as construed and applied by the Court of Appeals, would have been compelled ever since to hold said warrants, and would still be required to hold said warrants for years to come, unpaid, or to endeavor to sell same at a great discount, in addition to the loss of interest on said tax money, and plaintiff would not have had at the time of filing this bill, and it has not since had, any adequate remedy at law for obtaining a refund thereof under said challenged Act or any other Act of the Commonwealth of Kentucky.

The Commonwealth of Kentucky itself, under the advice of its Attorney General, declines to accept its own warrants in payment of its demands for taxes, even though such warrants may have been issued for necessary governmental purposes, such as the payment of jurors in the Circuit Courts of the State, and in point of fact, the executive officers of the State, in charge of its finances, have recently made public announcement of the fact that they intended, on behalf of the State, to apply to the Reconstruction Fi- [fol. 417] nance Corporation, organized under Act of Congress, for a loan to the State of Kentucky of a large sum of money to enable the State to meet its daily recurring governmental obligations in the matter of salaries of public officials. As a matter of fact, the State Treasurer of Kentucky has only been able to pay salary checks of public officials through the expedient of encroaching upon other funds for the benefit of the General Fund, as shown by the overdraft in the General Fund hereinbefore set forth, as officially reported as of November 1, 1932.

In the opening paragraph of its annual report to the Governor of Kentucky for the year 1931, the State Tax Commission of Kentucky called his attention to the condition of the General Fund, stating that the General Assembly, at its 1930 session, had enacted certain legislation transferring approximately one-half million dollars from the General Fund and providing for large appropriations made in favor of the School Equalization Fund, with no provision to pay same other than to issue warrants against the General Fund, and the Commission emphasized the fact that such legislation

"naturally caused an unprecedented deficit in the General Fund *for the year* of over $2,500,000.00."

thus adding to the deficiency in said fund theretofore existing.

Moreover, in said report, the State Tax Commission criticised

"the utter disregard of the General Assembly in late years for a balance budget,"

and added:

"Since this law-making body holds the power of appropriating state funds and of fixing the tax rate to be

levied for state purposes, it remains to be seen if any power, however great, can balance a state budget without their cooperation."

[fol. 418] Paragraph VI

Amending Paragraph XXIX of its original bill, plaintiff repeats the averments therein contained and extends such averments to include and apply to taxes and penalties claimed of plaintiff on account of its gross sales for the calendar years subsequent to 1930, the amounts of such gross sales and resulting taxes being set forth in Paragraph II of this amendment.

Wherefore, having amended its bill in the respects hereinbefore set forth, plaintiff prays as in its original bill of complaint, and for all other proper and equitable relief.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors for Plaintiff.

Duly sworn to by Robert J. McKim. Jurat omitted in printing.

[fol. 419] In United States District Court

In Equity. No. 609

Answer to Amendment to Bill of Complaint—Filed April 14, 1933

Come the defendants and by leave of court, without waiving their objection heretofore made to the filing of plaintiff's amended bill of complaint, for answer to same plead as follows, to-wit:

Paragraph I

Defendants say that they repeat all of the averments, denials, and statements contained in their answer to Paragraph X of the original bill of complaint, and in addition thereto and in further answer to said paragraph as amended, they say that they have not sufficient information to form a belief, and therefore neither admit nor deny the allegations contained in the second literary paragraph of paragraph I of the amendment to said original paragraph, but require strict proof thereof.

Paragraph II

Defendants repeat all of the averments and denials contained in their answer to Paragraph XIII of the original bill of complaint and in addition thereto and in further answer to said paragraph as amended, they say that they have not sufficient information to form a belief and therefore neither admit nor deny the averments contained in the amendment to said paragraph but require strict proof [fol. 420] thereof.

Paragraph III

Defendants repeat all of the averments and denials contained in their answer to Paragraph XIV of the original bill of complaint and in addition thereto and in further answer to said paragraph as amended, they say that they have not sufficient information to form a belief and therefore neither admit nor deny the averments contained in the amendment to said paragraph but require strict proof thereof.

Paragraph IV

Defendants repeat all of the averments and denials contained in their answer to Paragraph XV of the original bill of complaint and in addition thereto and in further answer to said paragraph as amended, they say that they have not sufficient information to form a belief and therefore neither admit nor deny the averments contained in the amendment to said paragraph but require strict proof thereof.

Paragraph V

Defendants repeat all of the averments and denials contained in their answer to Paragraph XXVIII of the original bill of complaint and in addition thereto and in further answer to said paragraph as amended, they say that they have not sufficient information to form a belief and therefore neither admit nor deny the averments contained in the amendment to said paragraph but require strict proof thereof.

For further answer defendants deny that for more than ten years past, or at all, there has been a constantly increasing deficit in the General Fund of the Commonwealth, or that same has been continuous during said period or at

all, or is now insufficient to meet the warrants drawn upon it by the Auditor of Public Accounts in discharge of claims properly allowable against or payable out of it, or that by reason thereof, holders of warrants drawn against it have been compelled to hold the same for as much as five years or at all, awaiting the accumulation in the General Fund of funds sufficient to pay such warrants in their proper sequence as provided by law.

Defendants deny that in addition thereto or at all there are many other undisputed claims against the General [fol. 421] Fund, or that such claims have been held up for a long period of time in the office of the Auditor of Public Accounts, or that no warrants have been issued by the Auditor although such claims are properly allowable or payable, or are allowable or payable, out of the General Fund. Deny that without a prolonged or expensive accounting, it is impossible to state the amount of such claims for which warrants have been issued, or that they aggregate a large or any sum of money, or that they amount to many thousands of dollars or any dollars.

Deny that by Sections 4688a-1, a-2, or a-4, Kentucky Statutes, as construed by the Court of Appeals of Kentucky, in the case of Rhea, Treasurer, v. Newman, 153 Ky. 604, or in Bosworth, State Treasurer, v. Shuck, 118 Ky. 458, or that in any case, it is made the duty of the State Treasurer to pay outstanding warrants against the General Fund, in the order in which they were issued or as money appropriated or available for the purposes of the General Fund reaches the treasury.

They further deny that any moneys paid in to the General Fund from the operation of the Act in question will have to be paid out or refunded with regard to other monies in such fund.

Deny that the effect of this statute, as construed by the Court of Appeals, is to require that unpaid warrants against the General Fund drawn first in point of time should be paid in priority to warrants drawn later in point of time, or that if the payment thereof exhausts the General Fund, warrants subsequently issued must await their turn in serial order before payment thereof can be compelled by process of law.

Deny that at the time the challenged act was in process of enactment, or at any time, that it was a fact, or that such

a fact was well known, to the members of the General Assembly or to the officials of the State, or to any one, that warrants drawn against the General Fund for the refund of taxes, as prescribed in said Act, could not and would not be paid out of said fund for several years, or that there was [fol. 422] any delay in the payment of said refund, and state that said refunds were always and have been always promptly paid.

Deny that knowing these facts, or that such were the facts, the General Assembly made no provision to levy any tax for the augmentation of the General Fund, but say that the General Assembly did augment the General Fund by the Act in question. Deny that the only provision for the payment of warrants theretofore outstanding was to enact the challenged law or therein to appropriate one-half the taxes exacted thereunder for the payment of the then existing indebtedness of the Commonwealth, or that there was any existing indebtedness, or that it was only provided by law that such payments should be applied on warrants in sequence according to their respective dates of issue.

They say that other laws were passed which were calculated to and did bring vast sums of revenue, which revenue was paid into the General Fund.

Defendants deny that at the time these suits were brought, or at all, as shown by a monthly financial statement officially issued by the State Treasurer of Kentucky, or at all, as of January 1, 1931, the amount of money in the General Fund on January 1, 1931 less minor accounts, was $12,565.81, or that as against said Fund there was at the time outstanding warrants theretofore issued aggregating $9,880,502.76, which had been drawn against the State Treasurer by the Auditor of Public Accounts, or had been presented for payment, or were not paid for lack of funds.

Deny that the 1932 Session of the General Assembly of Kentucky recognized or declared the insolvency of the General Fund or its insufficiency to pay outstanding warrants issued against the Auditor of Public Accounts, or for that reason it enacted Chapter 20 of the Session Acts of 1932.

[fol. 423] Deny that the facts with respect to the condition of the General Fund are now, or for years past, or at all, have been as above declared by the General Assembly in the Acts hereinbefore set forth, or that the deficit in

the General Fund has shown a progressive increase or there is no prospect of such deficiency being reduced.

Deny that since the adjournment of the 1932 General Assembly, or at all, the deficit in the General Fund has increased, or as shown by a monthly financial statement officially issued by the State Treasurer of Kentucky as of November 1, 1932, the amount of the then outstanding warrants drawn by the Auditor of Public Accounts upon the General Fund of the Commonwealth was $14,279,558.11, or any sum, or that as of October 31, 1932, or there was no money whatever in the General Fund, or that on the contrary, it had been overdrawn by reason of its indebtedness to other funds of the State in the sum of $275,261.48, or at all, or in any sum, or that by reason of the facts above alleged, or at all, upon or against the General Fund which plaintiff might obtain under such intention of the challenged act, at the end of any litigation as authorized therein could not, consistently with the law of the State as expounded by the Court of Appeals, be paid out of said General Fund for several years.

Deny that by reason of such insolvency of the General Fund, Warrants drawn against it can not be collected with reasonable- or with promptness, or that they can not be sold except at a discount of 10% or any per cent of their face value.

Deny that said fact has been recognized by the defendants herein, members of the State Tax Commission of Kentucky, who gave their depositions in the Franklin Circuit Court in the suit above referred to, which reached the Court of Appeals of Kentucky as State Budget Commission v. Lebus, 244 Ky. 701, 714.

[fol. 424] Deny that in said action, the defendant, Seldon R. Glenn, under oath, stated in his deposition, given at the State Capitol on May 23, 1932, that he was familiar with the present market for State Warrants against the General Fund, or that such warrants on such market were worth 87 to 88 cents on the dollar, or that there was not a ready market for them at any price, or his opinion was that, unless something is done to relieve the situation, such as upholding the validity of the 1932 Funding Act held void by the Courts, before September, 1932, or at all, outstanding warrants would sell at 75 per cent of face value.

Defendants state that in any event said warrants have never reached the price above indicated, but now are selling between 95 cents and 100 cents on the dollar.

Deny that in like manner or at all the defendant, John B. Lewis, at the same time and place stated under oath that the last sale of State Warrants that he knew of was made at 90 cents on the dollar; or that he heard they were not offering 90 then, or were offering a little less than that.

Deny that he also stated that in the event said Funding Act should be held invalid, the warrants would go considerably lower, or that he believed they would go below 75 cents on the dollar of face value.

Deny that it is extremely difficulty to find a purchaser for State Warrants drawn by the Auditor of Public Accounts against the General Fund of the State, or that if and when a purchaser can be found it is impossible to realize upon a sale of such warrants a sum in excess of 80 to 90 per cent of their face value, but state upon the other hand, such warrants have a ready sale at from 95 cents to par, and the same are regarded as a prime investment.

[fol. 425] Defendants deny that no state warrants against the General Fund have been called for payment that have been issued since July 31, 1927, or that in his deposition, given at the time and place and under oath, stated that the last call of warrants was made as of July 8, 1931, or that he called for warrants that had been issued between June 12, 1927 and July 1, 1927, inclusive.

Deny that on the average, throughout the last eight or ten years, or at all, interest-bearing State warrants drawn against the General Fund have been delayed in payment approximately five years, or at all, after issue thereof, on account of the lack of funds legally available thereof, or the only exceptions are those made in disregard of the rule of law prescribing the order of payment, because of special circumstances deemed sufficient to excuse or palliate such disregard.

Deny that had the plaintiff herein paid the taxes exacted of it under the challenged act as and when due in February, 1931, and February, 1932, or had the defendants been required to issue warrants for the refund of said taxes as provided in section 10 of the challenged Act, the plaintiff herein, under the law of the State, as construed or applied by the Court of Appeals, would have been compelled ever since to hold said warrants for years to come, or at all, un-

paid or to endeavor to sell same at a great or any discount, in addition to the loss of interest on said tax money, or that there would be any loss of interest on said tax money, or that plaintiff did not have had at the time of the filing of this bill, or has not since had, any adequate remedy at law for obtaining a refund thereof under said challenged act, or any other Act of the Commonwealth of Kentucky.

Deny that the Commonwealth of Kentucky itself, under the advice of its Attorney General, or at all, declined to accept its own warrants in payment of its demands for taxes, even though such warrants may have been issued for necessary governmental purposes, such as payment of [fol. 426] jurors in the circuit courts of the State, or that in point of fact, the executive officers of the State, in charge of its finances, have recently made public announcement of the fact that they intended, on behalf of the State, to apply to the Reconstruction Finance Corporation, organized under Act of Congress, for a loan to the State of Kentucky of a large sum of money to enable the State to meet its daily recurring governmental obligations in the matter of salaries of public officials.

Deny that the State Treasurer has only been able to pay salary checks of public officials through the expedient of encroaching upon other funds for the benefit of the General Fund, as shown by the overdraft in the General Fund hereinbefore set forth, as officially reported as of November 1, 1932; or that there is any overdraft in the General Fund as of November 1, 1932, or at all.

Deny that in the opening paragraph of its annual report to the Governor of Kentucky for the year 1931, the State Tax Commission of Kentucky called his attention to the condition of the General Fund, stating that the General Assembly, at its 1930 session, had enacted certain legislation transferring approximately one-half million dollars from the General Fund and providing for large appropriations made in favor of the School Equalization Fund, with no provision to pay same other than to issue warrants against the General Fund, or the Commission emphasized the fact that such legislation

"naturally caused an unprecedented deficit in the General Fund for the year of over $2,500,000.00",

thus adding to the deficiency in said fund theretofore existing.

Deny that in said report the State Tax Commission criticized

"the utter disregard of the General Assembly in late years for a balanced budget,"

or added:

"Since this law-making body holds the power of appro [fol. 427] priating state funds and of fixing the tax rate to be levied for state purposes, it remains to be seen if any power, however great, can balance a state budget without their cooperation."

Paragraph VI

Defendants repeat all of the averments and denials contained in their answer to Paragraph XXIX of the original bill of complaint and in addition thereto and in further answer to said paragraph as amended, they say that they have not sufficient information to form a belief and therefore neither admit nor deny the averments contained in the amendment to said paragraph but require strict proof thereof.

Paragraph VII

Defendants repeat, reiterate, and rely upon each and every defense made in their original action.

Wherefore, defendants pray as in their original answer Bailey P. Wootton, Attorney General. S. H. Brown, Assistant Attorney General. Francis M. Burke, Assistant Attorney General. Batson, Cary & Welch, Louisville, Kentucky. Leslie W. Morris, Frankfort, Kentucky, of counsel.

[fol. 428] In United States District Court

Second Amended Answer—Filed July 6, 1933

Come the defendants, by leave of Court, and for further answer to plaintiff's petition, as amended, plead as follows:

Paragraph I

Defendants say that plaintiff has a plain, adequate, complete and speedy remedy at law. That under the provisions of section 10 of the act challenged, as construed by the

court of highest resort of Kentucky, plaintiff could sue for and recover any taxes improperly paid under any of the provisions of said act; that in the event of a judgment for the recovery of any such taxes, said judgment could and would be paid from the general expenditure fund of the Commonwealth of Kentucky, within a reasonable time after the rendition thereof.

Defendants state that the receipts in the said general expenditure fund, as shown by the official reports of the Treasurers of the Commonwealth of Kentucky, for each of the fiscal years 1926 to 1932 inclusive, have been as follows:

[fol. 429]

For the fiscal year ending June 30,	1926	$ 7,706,538.28
" " " " " " "	1927	8,059,517.85
" " " " " " "	1928	9,294,798.97
" " " " " " "	1929	9,907,769.29
" " " " " " "	1930	12,949,027.10
" " " " " " "	1931	11,573,065.01
" " " " " " "	1932	10,000,000.00 (approximately)
" " " " " " "	1933	9,000,000.00 (approximately)

(Official Treasurer's report for the fiscal years 1932 and 1933 not yet published.)

Defendants say that there will be collected under the tax laws of this State and paid into the said general expenditure fund approximately Eight Million Dollars for the fiscal year ending June 30, 1934; that a great portion of said sum is already due and in process of collection; that in fact there is approximately Seven Million Dollars now due the general expenditure fund of the Commonwealth of Kentucky against which there are no preferred claims; that money is constantly flowing into the said general expenditure fund from the operation of tax laws in force in this Commonwealth; that any judgment for refund of taxes paid by this plaintiff under the provisions of the challenged act will be a preferred claim against said general fund, under the laws of this Commonwealth as construed by the courts of this State.

Paragraph II

For a separate and distinct defense in point of law arising upon the face of the bill of complaint as amended

herein, defendants say that the facts alleged in said bill of complaint as amended are insufficient ot constitute a valid cause of action.

Wherefore defendants pray as in their original answer.

Bailey P. Wootton, Attorney General of Kentucky. S. H. Brown, Assistant Attorney General. Francis M. Burke, Assistant Attorney General. Batson, Cary & Welch, Louisville, Kentucky. Leslie W. Morris, Frankfort, Kentucky.

[fol. 430] IN UNITED STATES DISTRICT COURT

No. 609

STIPULATION AS TO HEARING—Filed July 24, 1933

In the above-styled case it is stipulated by the parties, plaintiff and defendants, as follows:

(1) Upon the final hearing of this case, the parties, plaintiff and defendants, respectively, may read in evidence, as if they were depositions regularly taken on due notice to the opposing side, any or all of the ex parte affidavits heretofore filed or read in evidence upon the hearing of plaintiff's motion for an interlocutory injunction herein, and may also read in evidence all depositions heretofore taken and filed and heretofore read in evidence upon the hearing of plaintiff's motion for an interlocutory injunction herein,

Subject, however, in the case of such affidavits and depositions,

(a) to exceptions for competency and relevancy of the subject-matter or any portion thereof contained in any of said ex parte affidavits, and

(b) to the right of the adverse party, on due notice, to cross-examine orally any witness whose ex parte affidavit is so offered or read in evidence.

(2) The plaintiff shall conclude the taking of proof on its behalf, including the cross-examination of witnesses whose ex parte affidavits have been heretofore filed, on or before June 10, 1933.

[fol. 431] All objections to mere matters of form or to the ex parte character of affidavits heretofore filed on the motion for an interlocutory injunction, and all objections on

account of the ex parte character thereof, are waived, and all formalities as to the cross-examination of witnesses giving such affidavits are hereby waived.

(3) Subject to all the provisions of this stipulation, all the evidence offered or heard in this case or in the case of Kroger Grocery and Baking Company v. John B. Lewis, et al., No. 3908, filed in the Eastern District of Kentucky, or in the cases of Fred Levy, et al. v. John B. Lewis, et al., No. 610, and J. C. Penney Company v. John B. Lewis, et al., No. 611, filed in the Western District of Kentucky, may be read in this case or in any one or all of the other three cases.

(4) The defendants shall conclude the taking of depositions or the cross-examination on their behalf of plaintiff's witnesses, on or before June 25, 1933.

(5) On or before the 10th of June, 1933, each party shall give to the adverse party or parties a written notice specifying the ex parte affidavits proposed to be read by such party upon the final hearing and no ex parte affidavits other than those so specified shall be read on behalf of such party or parties.

(6) It is further stipulated that the following statement made up from the record of the State Treasurer of Kentucky by Jerry King, Bookkeeper in the State Treasurer's Office correctly sets forth as to each of the dates below given.

(a) the balance to credit of General Fund, and

(b) outstanding warrants against the General Fund as follows:

[fol. 432]

Date	Balance to credit of general fund	Outstanding warrants against general fund
June 30, 1922	$297,967.85	$4,702,709.11
June 30, 1923	2,590,470.14	5,947,750.40
June 30, 1924	167,535.74	4,089,151.37
June 30, 1925	310,242.68	4,127,746.17
June 30, 1926	10,387.44	4,329,772.33
June 30, 1927	257,566.83 (Deficit)	4,664,820.89
June 30, 1928	440,328.14	6,715,347.99
June 30, 1929	1,880,084.77	8,060,920.69
June 30, 1930	1,826,244.05	8,533,384.79
Dec. 31, 1930	1,250,168.22	9,880,501.76
June 30, 1931	2,440,128.46	11,023,911.53
Dec. 31, 1931	838,269.63	12,637,990.48
June 30, 1932	1,302,267.69	13,851,414.57
Dec. 31, 1932	573,831.32	14,415,503.69
May 25, 1933	1,898,229.25	14,668,744.57

(7) It is understood that neither side shall be required to produce for cross-examination by the adverse party any witness whose ex parte affidavit may be offered or read under this stipulation.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors for Plaintiffs. Bailey P. Wootton, S. H. Brown, Solicitors for Defendants.

[fol. 433] In United States District Court

Order Substituting Party Defendant—Entered August 21, 1933

This day came the parties herein and filed a stipulation noting that the defendant Seldon R. Glenn had resigned as a member of the State Tax Commission of Kentucky and was no longer a member of the said State Tax Commission, and was succeeded therein by Emerson Beauchamp.

And it appearing to the Court that there is a substantial need for continuing and maintaining this cause and obtaining an adjudication of the questions involved,

It is ordered that Emerson Beauchamp, member of the [fol. 434] State Tax Commission of the Commonwealth of Kentucky, be and he is hereby substituted as a defendant herein in lieu of the defendant Selden R. Glenn, and with the same effect as if he had been originally a defendant to the Bill of Complaint herein, and said cause is continued and maintained against the said Emerson Beauchamp individually and as a member of the State Tax Commission of the Commonwealth of Kentucky.

Xen. Hicks, Circuit Judge. A. M. J. Cochran, District Judge. Chas. I. Dawson, District Judge.

[fol. 435] In United States District Court

Order of Submission—Entered August 21, 1933

This day the above-styled three cases came on for hearing before Hon. Xenophon Hicks, Circuit Judge, Hon. A. M. J. Cochran, District Judge, and Hon. Chas. I. Dawson, District Judge.

By agreement of parties plaintiff and defendant, the above-styled three cases are heard together, and the same evidence was heard in these cases as in the case of Kroger Grocery & Baking Company against the same defendants pending in the Eastern District of Kentucky, and heard at the same time.

By agreement of parties plaintiff and defendant, the proof heard and all exhibits filed as set out in the order of submission herein, dated February 14, 1931, was likewise read and heard upon he final submission hereof, together with the stipulation filed in these cases in the Clerk's office on or about July 24, 1933, and now filed by order of Court.

In addition to the said evidence, plaintiffs by counsel filed and read the depositions and exhibits therewith of W. P. Sullivan, W. R. Robinson, A. H. Brendel, Albert H. Morrill, Harry W. Schacter.

[fol. 436] Plaintiffs likewise read in evidence the following Statutes and Acts of the General Assembly of Kentucky and decisions of the Court of Appeals of Kentucky, as set out in their amended bills herein:

Ky. Stat., Sec. 3688a-1, a-2 and a-4,
Rhea, Treas., v. Newman, 153 Ky. 604,
Bosworth, Treas., v. Shuck, 118 Ky. 458,
Chap. 13 of the Acts of the General Assembly of Ky. of 1926,
Chap. 20 of the Acts of the General Assembly of Ky. of 1932,
State Budget Commission v. Lebus, 244 Ky. 701,

and certain paragraphs of the Report of the State Tax Commission of Kentucky for the year 1931, as set out in the amended bill.

Likewise defendants filed and read the depositions and exhibits therewith of Jerry King, James W. Martin, Clyde William Phelps, Selden R. Glenn, R. C. Ilg, Elam Huddleston.

Thereupon these cases were argued by counsel for the respective plaintiffs and defendants and ordered to be submitted, and the Court not being fully advised takes time.

It is further ordered and adjudged that the interlocutory injunctions heretofore entered in each of the above-styled cases be and the same are hereby continued in full force and

effect until the final determination of each of the above-styled cases in this Court.

Xen. Hicks, Circuit Judge. A. M. J. Cochran, District Judge. Chas. I. Dawson, District Judge.

Aug. 21, 1933.

Have seen the foregoing order.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors for Plaintiffs. Bailey P. Wootton, Atty. Gen., S. H. Brown, Assist. Atty. Gen., Homer W. Batson, Leslie W. Morris, Solicitors for Defendants.

[fol. 437] IN UNITED STATES DISTRICT COURT

ORDER FILING EXHIBIT—Entered August 21, 1933

Upon certification of the official stenographer of the question of the introduction of the tax return under the Gross Sales Tax Law of the D. T. Bohon Company, filed with the State Tax Commission on September 8, 1931, it is hereby ordered that said return be filed as an exhibit in these cases for such consideration as the court may deem proper.

Xen. Hicks, Circuit Judge. A. M. J. Cochran, District Judge. Chas. I. Dawson, District Judge.

Aug. 21, 1933.

[fol. 438] IN UNITED STATES DISTRICT COURT

ORDER APPROVING SUPPLEMENTAL STATEMENT OF EVIDENCE—Entered September 20, 1934

It appearing that the herewith and foregoing supplemental statement of evidence was lodged in due time with the Clerk of this Court, and that the attorneys for all parties to the said action have agreed that said statement may be approved without further notice to any of said parties, and it appearing that said statement is true, complete and properly prepared, and that it contains all the supplemental evidence relevant and material to the hearing of questions to be presented on the appeal in said action, the original statement of evidence upon the former appeal of this action

having been already approved and made a part of the record by order dated March 23, 1932,

It is, therefore, ordered that the said supplemental statement of evidence be allowed, settled and approved as a true, complete and correct statement of the evidence of said action supplemental to the original statement of evidence heretofore, and now, approved.

Xen. Hicks, Circuit Judge. Chas. I. Dawson, District Judge.

Sept. 20, 1934.

[fol. 439] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT.

SUPPLEMENTAL STATEMENT OF EVIDENCE—Filed Sept. 20, 1934

W. P. Sullivan

W. P. SULLIVAN, called for plaintiff, testified as follows:

He was a member of the State Tax Commission since March, 1932. Prior to that time he had been Cashier of the Farmers Deposit Bank of Frankfort and had been connected with the bank for about 20 years. As a result of his experience he was able to state the market value of Kentucky State warrants issued against the general fund. He stated that State warrants sold at par until three or four years prior to the giving of his testimony which occurred on May 29, 1933. During the last three years preceding the time his deposition was taken he had seen warrants sell as low as 85. They were selling at 92 the day of his testimony.

In 1930 State warrants issued in 1925 were purchased by him and at that time he paid 97½, plus accrued interest. He thought they sold between 90 and 100 during the year 1931 and they went as low as 85 in 1932. They did not stay at 85 very long but went back to 96 in 1932.

[fol. 440] There was no cross-examination.

W. R. Robinson

W. R. ROBINSON, called for the plaintiff, testified as follows:

He was 33 years old and resided at Frankfort, Kentucky, and was supervisor of the Gross Sales Tax Department of the State of Kentucky, having acted as such since August, 1932. His predecessor in office was Joseph Martin, who at the time the testimony was taken was no longer employed by or on behalf of the State of Kentucky. Mr. Robinson was acquainted with A. H. Brendel, an accountant residing at Cincinnati, Ohio. The latter had done work under the supervision and with the permission of Mr. Robinson which work consisted of checking over the returns and making an analysis of the retail sales tax returns. Mr. Brendel had only been in the department once since Robinson had been in charge but prior to that time Brendel was there twice to Mr. Robinson's knowledge. Mr. Robinson was assistant supervisor at the time Martin was in charge of the department.

Mr. Brendel checked the records from the receipt books. These receipts show the amount of sales, the gross sales, the exemptions and the amount of tax paid. The witness thereupon produced some books and identified them as the receipt books which were made available for examination by Mr. Brendel. He thereupon stated that these books contained the information as to the amount of the tax, who made the return and the amount paid. They also showed exemptions and deductions allowable under the law. He testified that Mr. Brendel had access to the returns themselves but he did not know whether Brendel used them or not. The witness then produced some of the actual returns which were reports for current years, being reports for the calendar year ending December 31, 1932.

[fol. 441] The witness had checked one of the reports made by Brendel and he found it to be accurate with a few minor errors. The particular analysis which he checked was the one for the year 1930, covering returns filed during the period ending December 2, 1932.

The witness then stated that the paper which he had filed showed that reports showing retail sales in excess of one million dollars were filed to the number of four, three indicating a tax and one indicating no tax.

The witness then produced the tax return for D. T. Bohon Company for the year 1930.

The witness was thereupon asked several questions about the return. Upon the advice of the Assistant Attorney

General he declined to reply to the questions. He also declined to produce the reports for the same company for the years 1931 and 1932.

The question of whether the particular report could be introduced as an exhibit was certified to the United States District Court, which court subsequently ruled in favor of the plaintiff and the report was introduced. It is attached hereto and marked Exhibit #1 Robinson.

There was no cross-examination.

(Here Follows Exhibit Robinson No. 1, Side Folios 442 and 443)

EXHIBIT ROBINSON NO. 1

284A

Sales—1

Report of Gross Retail Sales

For The Year Ending December 31st, 19____

TO BE FILED ON OR BEFORE FEBRUARY 1ST, 19____, WITH

State Tax Commission, Frankfort, Ky.

For Use of State Tax Commission Only
Date Rec'd
Am't Remitted $
Audited by

FILED

Name of Merchant
Address of Principal Office
Name and Address of ~~Owner or~~ President
Is Owner Individual, Partnership or Corporation?
If Corporation, Date Incorporated ____ In What State?
Nature and Kind of Business ____ When Begun
Was Business Discontinued During Year? ____ If so, When?
Number of Stores Operated in This State

Location of Each Store	Name and Address of Officer or Agent in Charge of Each Store	Gross Sales of Each Store
		$
		$
		$
		$

TOTAL GROSS RETAIL SALES OF ALL KENTUCKY STORES $

DEDUCT TOTAL SALES OF GASOLINE AND PRESCRIPTION WHISKEY $

TOTAL GROSS RETAIL SALES SUBJECT TO TAX $

CALCULATION OF TAX

Amount of Sales not over $400,000	$	@ 1/20 of 1% or 5c on the $100	$
Amount of Sales over $400,000 but not over $500,000	$	@ 2/20 of 1% or 10c on the $100	$
Amount of Sales over $500,000 but not over $600,000	$	@ 5/20 of 1% or 25c on the $100	$
Amount of Sales over $600,000 but not over $700,000	$	@ 8/20 of 1% or 40c on the $100	$
Amount of Sales over $700,000 but not over $800,000	$	@ 11/20 of 1% or 55c on the $100	$
Amount of Sales over $800,000 but not over $900,000	$	@ 14/20 of 1% or 70c on the $100	$
Amount of Sales over $900,000 but not over $1,000,000	$	@ 17/20 of 1% or 85c on the $100	$
Amount of Sales over $1,000,000	$	@ 1% or $1.00 on the $100	$

TOTAL AMOUNT OF TAX $

Credit by Amount of State Corporation License $ OK

Credit by Amount of State Occupational License (See Instruction Sheet, Rule 7) $

NET AMOUNT OF TAX $

Make Check for Amount of Tax Payable to State Treasurer and Mail with Report

(Over)

442

No. 16432

REPORT
OF
GROSS RETAIL SALES

S. T. Bohon Company

Harrodsburg

Chain

For the Year Ending Dec. 31, 1936

To be Filed on or Before
February 1st, Following Close of
Year for Which Report is Made.

TOTAL GROSS SALES ..... $ 460.187.04

AMOUNT OF TAX ..... $ Delayed
rubber stamp

State Tax Commission
FRANKFORT, KY.

STATE OF Kentucky
COUNTY OF Mercer

I, Henry Bohon, do solemnly swear that the statements contained in this report are true to the best of my knowledge and belief.

Henry Bohon, President
Name Title

Subscribed and sworn to before me by Henry Bohon this ____ day of Feb, 1937

C. L. Dagg
Notary Public Mercer County
my commission expires July 4 1934.
Seal

443

A. H. Brendel

A. H. BRENDEL, called for the plaintiff, testified as follows:

He resided at Cincinnati, Ohio, and was 49 years of age; was a partner in the firm of J. D. Cloud & Company, Certified Public Accountants. He had made an analysis of the returns from the files of the State Tax Department of the State of Kentucky. He had been in Frankfort about six times to make this analysis. Some times he spent a few days there and at times he was there as long as six weeks. Approximately six men worked under him in making the analysis. He had been a certified public accountant since [fol. 444] 1912. The first time that he went to Frankfort was in February, 1931. At that time Joseph Martin was supervisor of the Gross Sales Tax Department and cooperated with Mr. Brendel in making the analysis. A joint report was made to the Attorney General and to Judge Wood, counsel for the plaintiff. The witness thereupon identified a copy of the first report. Originally, compilations were made directly from the returns filed by the taxpayers but later the State Department adopted a form of receipt book and then he made his compilations from the stubs of the receipt. All analyses were made under his personal supervision, the last one having been made in April 1933. This one included the compilations made on his previous visits. The witness thereupon produced the report made as a result of his examination on April 17, 1933 for tax returns filed for the year 1930. This was introduced and marked "Brendel Exhibit No. 1." The witness examined the exhibit and stated that it was a correct analysis of the Kentucky Gross Retail Sales for 1930 and covered all returns filed during the period from the inauguration of the tax to April 17, 1933.

Similar reports had been made for the years 1931 and 1933. The witness thereupon identified the 1931 report which was offered in evidence and received as Brendel's Exhibit No. 2, and the 1932 report which was identified as Brendel's Exhibit No. 3. The witness stated that Exhibit 2 was a correct compilation of returns filed up to April, 1933. The same was true with regard to the analysis for 1932.

There was no cross-examination.

[fol. 445] EXHIBIT BRENDEL #1

[fol. 446] Accountants' Report

Analysis of Kentucky Gross Retail Sales Tax Returns for the Year 1930

Filed During the Period from the Inauguration of the Tax to April 17, 1933

J. D. Cloud & Co., Certified Public Accountants, Cincinnati, O.

[fol. 447] April 21, 1933.

Hon. Frank E. Wood, Atty., Traction Bldg., Cincinnati.

SIR:

Complying with your instructions, we have made a compilation of all the Kentucky Gross Retail Sales Tax Returns for the year 1930 filed during the period from December 2, 1932, to and including April 17, 1933, which together with our previous compilations are shown in total on the following statements:

Schedule "A"—Analysis of Kentucky Gross Retail Sales Tax Returns for the Year 1930 filed during the period from the Inanguration of the Tax to April 17, 1933.

Schedule "B"—Statement showing Number of Retail Merchants reporting Gross Sales Taxes for the Year 1930 from the Inauguration of the Tax to April 17, 1933, classified by Amounts of Tax Paid.

Schedule "A" shows in detail the Gross Sales, Gross Tax, Credits Allowed and Credits Claimed in excess of Tax Liability, for the year 1930 together with the number of Merchants reporting sales of $10,000.00 or less and graduated sales to and over $400,000.00.

Schedule "B" is a statement of the number of Taxpayers classified as to the amount of tax paid by each taxpayer.

The information contained in this report was obtained by us in the following manner:

For returns for the year 1930 filed during the period from the inauguration of the tax to May 18, 1931, from an inspection of the tax returns:

For returns for the year 1930 filed during the period from May 19, 1931, to July 21, 1931, from a report submitted to us by J. Martin, Supervisor of the Kentucky Gross Retail Sales Tax Department;

[fol. 448] For returns for the year 1930 filed during the period from July 22, 1931 to April 17, 1933, from the duplicate copy of the receipt issued to the taxpayer.

Certification

We hereby certify that the information contained in this report, based on tabulations made as stated heretofore, are to the best of our knowledge and belief, true and correct.

Respectfully submitted, J. D. Cloud & Co., Certified Public Accountants.

(Here follows table, side folio 449.)

[fol. 449]

SCHEDULE "A"

Analysis of Kentucky Gross Retail Sales Tax Returns for the Year 1930, Filed D

Number of Reports Filed by Retail Merchants—	Number filed	Num indic t
Showing Retail Sales less than $400,000	24,128	16,
Showing Retail Sales between 400,000 and 500,000	13	
Showing Retail Sales between 500,000 and 600,000	8	
Showing Retail Sales between 600,000 and 700,000	5	
Showing Retail Sales between 700,000 and 800,000	4	
Showing Retail Sales between 800,000 and 900,000	1	
Showing Retail Sales between 900,000 and 1,000,000	0	
Showing Retail Sales in excess of $1,000,000	4	
Totals	24,163	16,

Analysis of Reports Showing Tax Liability—	Number of returns
Showing Sales less than $4,000	24,128
Showing Sales between 400,000 and 500,000	13
Showing Sales between 500,000 and 600,000	8
Showing Sales between 600,000 and 700,000	5
Showing Sales between 700,000 and 800,000	4
Showing Sales between 800,000 and 900,000	1
Showing Sales between 900,000 and 1,000,000	0
Showing Sales in excess of $1,000,000	4
Totals	24,163

Number of Merchants Reporting Sales of—	Showing tax liability	Sho no liab
Less than $10,000	8,808	5,
$ 10,000 and under $ 25,000	4,436	1,
25,000 and under 50,000	1,911	
50,000 and under 75,000	596	
75,000 and under 100,000	242	
100,000 and under 150,000	217	
150,000 and under 200,000	91	
200,000 and under 250,000	48	
250,000 and under 300,000	28	
300,000 and under 400,000	36	
Over $400,000	21	
Totals	16,434	7,

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SCHEDULE "A"

Analysis of Kentucky Gross Retail Sales Tax Returns for the Year 1930, Filed During the Period from the Inauguration of the Tax to April 17, 1933

mber of Reports Filed by Retail Merchants—	Number filed	Number indicating tax	Number indicating no tax
Showing Retail Sales less than $400,000	24,128	16,413	7,715
Showing Retail Sales between 400,000 and 500,000	13	7	6
Showing Retail Sales between 500,000 and 600,000	8	5	3
Showing Retail Sales between 600,000 and 700,000	5	4	1
Showing Retail Sales between 700,000 and 800,000	4	2	2
Showing Retail Sales between 800,000 and 900,000	1	0	1
Showing Retail Sales between 900,000 and 1,000,000	0	0	0
Showing Retail Sales in excess of $1,000,000	4	3	1
Totals	24,163	16,434	7,729

lysis of Reports Showing Tax Liability—	Number of returns	Gross sales	Gross tax	Credits allowed	Net tax	Credits shown in excess of tax liability
Showing Sales less than $4,000	24,128	340,197,497.00	167,880.34	78,659.58	89,220.76	226,979.91
Showing Sales between 400,000 and 500,000	13	5,866,935.00	3,454.81	2,193.44	1,261.37	6,709.42
Showing Sales between 500,000 and 600,000	8	4,416,568.00	3,440.42	2,123.02	1,317.40	5,306.50
Showing Sales between 600,000 and 700,000	5	3,234,563.00	3,266.68	1,498.12	1,768.56	177.20
Showing Sales between 700,000 and 800,000	4	2,989,019.00	4,110.66	2,727.57	1,383.09	2,298.47
Showing Sales between 800,000 and 900,000	1	814,559.00	636.15	636.15	0	1,795.24
Showing Sales between 900,000 and 1,000,000	0	0	0	0	0	0
Showing Sales in excess of $1,000,000	4	5,329,123.00	25,491.24	14,099.48	11,391.76	4,593.15
Totals	24,163	362,848,264.00	208,280.30	101,937.36	106,342.94	247,819.89

nber of Merchants Reporting Sales of—	Showing tax liability	Showing no tax liability
Less than $10,000	8,808	5,374
$ 10,000 and under $ 25,000	4,436	1,556
25,000 and under 50,000	1,911	508
50,000 and under 75,000	596	149
75,000 and under 100,000	242	45
100,000 and under 150,000	217	41
150,000 and under 200,000	91	20
200,000 and under 250,000	48	12
250,000 and under 300,000	28	3
300,000 and under 400,000	36	7
Over $400,000	21	14
Totals	16,434	7,729

[fol. 450] SCHEDULE "B"

Statement Showing Number of Retail Merchants Reporting Gross Sales Taxes for the Year 1930 Classified by Amount of Tax Paid, Filed During the Period from the Inauguration of the Tax to April 17, 1933

Number of taxpayers reporting tax less than 50¢	2,640
" " " " " 50c to 1.00	2,192
" " " " " 1.00 to 2.00	2,748
" " " " " 2.00 to 3.00	1,754
" " " " " 3.00 to 4.00	1,187
" " " " " 4.00 to 5.00	890
" " " " " 5.00 to 10.00	2,054
" " " " " 10.00 to 15.00	818
" " " " " 15.00 to 20.00	431
" " " " " 20.00 to 25.00	342
" " " " " 25.00 to 50.00	495
" " " " " 50.00 to 100.00	176
" " " " " 100.00 to 200.00	60
" " " " " 200.00 to 300.00	6
" " " " " 300.00 to 400.00	4
" " " " " 400.00 to 500.00	1
" " " " " 500.00 to 600.00	....
" " " " " 600.00 to 700.00	2
" " " " " 700.00 to 800.00	1
Over $1,000.00	3
Total	15,804
Undetermined and unclassified	630
	16,434

[fol. 451] EXHIBIT BRENDEL #2

[fol. 452] Accountants' Report

Analysis of Kentucky Gross Retail Sales Tax Returns for the Year 1931

Filed During the Period from December 7, 1932, to April 18, 1933

J. D. Cloud & Co., Certified Public Accountants, Cincinnati, O.

[fol. 453] April 21, 1933.

Hon. Frank E. Wood. Atty., Traction Bldg., Cincinnati.

SIR:

Complying with your instructions, we have made a compilation of all the Kentucky Gross Retail Sales Tax Returns for the year 1931 filed during the period from December 7, 1932 to April 18, 1933 which together with our

previous compilations are shown in total on the following statements:

Schedule "A"—Analysis of Kentucky Gross Retail Sales Tax Returns for the Year 1931 filed during the period from January 1, 1932 to April 18, 1933.

Schedule "B"—Statement showing Number of Retail Merchants reporting Gross Sales Taxes for the Year 1931 from January 1, 1932 to April 18, 1933 classified by amount of tax paid.

Schedule "A" shows in detail the Gross Sales, Gross Tax, Credits Allowed and Credits Claimed in excess of Tax Liability for the Year 1931 together with the number of merchants reporting sales of $10,000.00 or less and graduated sales to and over $400,000.00.

Schedule "B" is a statement of the number of taxpayers classified as to amount of tax paid by each taxpayer.

The information contained in this report was compiled from the duplicate copies of receipts issued to the taxpayers.

Certification

We hereby certify that the information contained in this report, based on tabulations as stated heretofore, are to the best of our knowledge and belief, true and correct.

Respectfully submitted, J. D. Cloud & Co., Certified Public Accountants.

(Here follows table, side folio 454.)

[fol. 454]

Analysis of Kentucky Gross Retail Sales Tax Returns

Number of Reports Filed by Retail Merchants—

Showing Retail Sales less than $400,000.....
Showing Retail Sales between 400,000 and 500,000.....
Showing Retail Sales between 500,000 and 600,000.....
Showing Retail Sales between 600,000 and 700,000.....
Showing Retail Sales between 700,000 and 800,000.....
Showing Retail Sales between 800,000 and 900,000.....
Showing Retail Sales between 900,000 and 1,000,000.....
Showing Retail Sales in excess of 1,000,000.....

Totals.....

Analysis of Reports Showing Tax Liability—

Showing Sales less than $400,000.....
Showing Sales between 400,000 and 500,000.....
Showing Sales between 500,000 and 600,000.....
Showing Sales between 600,000 and 700,000.....
Showing Sales between 700,000 and 800,000.....
Showing Sales between 800,000 and 900,000.....
Showing Sales between 900,000 and 1,000,000.....
Showing Sales in excess of 1,000,000.....

Totals.....

Number of Merchants Reporting Sales of—

Less than $10,000.00.....
$10,000 and under $25,000.....
25,000 and under 50,000.....
50,000 and under 75,000.....
75,000 and under 100,000.....
100,000 and under 150,000.....
150,000 and under 200,000.....
200,000 and under 250,000.....
250,000 and under 300,000.....
300,000 and under 400,000.....
Over $400,000.....

Totals.....

SCHEDULE "A"

Analysis of Kentucky Gross Retail Sales Tax Returns for the Year 1931, Filed During the Period from January 1, 1932 to April 18, 1933

of Reports Filed by Retail Merchants—	Number filed	Number indicating tax	Number indicating no tax
wing Retail Sales less than $400,000	20,351	12,173	8,178
wing Retail Sales between 400,000 and 500,000	10	6	4
wing Retail Sales between 500,000 and 600,000	9	6	3
wing Retail Sales between 600,000 and 700,000	3	3	0
wing Retail Sales between 700,000 and 800,000	2	1	1
wing Retail Sales between 800,000 and 900,000	3	2	1
wing Retail Sales between 900,000 and 1,000,000	2	2	0
wing Retail Sales in excess of 1,000,000	2	2	0
Totals	20,382	12,195	8,187

of Reports Showing Tax Liability—	Number of returns	Gross sales	Gross tax	Credits allowed	Net tax	Credits shown on reports in excess of tax liability
wing Sales less than $400,000	20,351	290,824,180.00	145,489.13	78,719.31	66,769.82	179,339.94
wing Sales between 400,000 and 500,000	10	4,520,653.00	2,520.64	1,513.05	1,007.59	3,260.06
wing Sales between 500,000 and 600,000	9	4,887,385.00	3,572.59	2,212.57	1,360.02	5,699.06
wing Sales between 600,000 and 700,000	3	1,927,791.00	2,161.17	700.00	1,461.17	.....
wing Sales between 700,000 and 800,000	2	1,472,166.00	2,296.25	1,391.17	905.08	3,109.00
wing Sales between 800,000 and 900,000	3	2,549,814.00	5,548.72	2,429.98	3,118.74	237.08
wing Sales between 900,000 and 1,000,000	2	1,895,680.00	5,213.29	1,084.94	4,128.35	.....
wing Sales in excess of 1,000,000	2	2,389,404.00	9,994.07	3,607.85	6,386.22	.....
Totals	20,382	310,467,073.00	176,795.86	91,658.87	85,136.99	191,645.14

of Merchants Reporting Sales of—	Showing tax liability	Showing no tax liability
s than $10,000.00	8,531	4,942
0,000 and under $25,000	1,818	2,160
5,000 and under 50,000	1,006	759
0,000 and under 75,000	388	145
5,000 and under 100,000	175	45
0,000 and under 150,000	128	68
0,000 and under 200,000	63	27
0,000 and under 250,000	24	12
0,000 and under 300,000	19	11
0,000 and under 400,000	21	9
r $400,000	22	9
Totals	12,195	8,187

[fol. 455] SCHEDULE "B"

Statement Showing Number of Retai Merchants Reporting Gross Sales Taxes for the Year 1931 Classified by Amount of Tax Paid, Filed During the Period from January 1, 1932 to April 18, 1933

Number of Taxpayers Reporting Tax					less than	50¢			2,220
"	"	"	"	"	50¢	to	1.00		1,838
"	"	"	"	"	1.00	"	2.00		2,323
"	"	"	"	"	2.00	"	3.00		1,239
"	"	"	"	"	3.00	"	4.00		733
"	"	"	"	"	4.00	"	5.00		585
"	"	"	"	"	5.00	"	10.00		1,490
"	"	"	"	"	10.00	"	15.00		642
"	"	"	"	"	15.00	"	20.00		339
"	"	"	"	"	20.00	"	25.00		212
"	"	"	"	"	25.00	"	50.00		400
"	"	"	"	"	50.00	"	100.00		126
"	"	"	"	"	100.00	"	200.00		31
"	"	"	"	"	200.00	"	300.00		7
"	"	"	"	"	300.00	"	400.00		2
"	"	"	"	"	400.00	"	500.00		1
"	"	"	"	"	500.00	"	600.00		0
"	"	"	"	"	600.00	"	700.00		0
"	"	"	"	"	700.00	"	800.00		0
"	"	"	"	"	800.00	"	900.00		1
"	"	"	"	"	900.00	"	1,000.00		2
Over $1,000.00									4
Total									12,195

[fol. 456] EXHIBIT BRENDEL #3

[fol. 457] Accountants' Report

Analysis of Kentucky Gross Retail Sales Tax Returns for the Year 1932

Filed During the Period from January 1, 1933, to April 17, 1933

J. D. Cloud & Co., Certified Public Accountants, Cincinnati, O.

[fol. 458] April 21, 1933.

Mr. Frank E. Wood, Atty., Traction Bldg., Cincinnati.

SIR:

In accordance with your instructions, we have made a compilation of all the Kentucky Gross Retail Sales Tax Returns for the year 1932 filed during the period from January 1, 1933 to April 17, 1933 and we submit herewith the following statements showing the results of this compilation:

Schedule "A"—Analysis of Kentucky Gross Retail Sales Tax Returns for the Year 1932 filed during the period from January 1, 1933 to April 17, 1933.

Schedule "B"—Statement showing Number of Retail Merchants reporting Gross Sales Taxes for the Year 1932—classified by amounts of tax paid—filed during the period from January 1, 1933 to April 17, 1933.

Schedule "A" shows in detail the Gross Sales, Gross Tax Credits Allowed and Credits Claimed in excess of Tax Liability for the year 1932 together with the number of Merchants reporting sales of $10,000.00 or less and graduated sales up to and over $400,000.

Schedule "B" is a statement showing the number of Taxpayers classified as to the amount of tax paid.

The information contained in this report was compiled from the duplicate copies of the receipts issued to the taxpayers.

Certification

We hereby certify that the information contained in this report, based on tabulations made as stated heretofore, are true and correct to the best of our knowledge and belief.

Respectfully submitted, J. D. Cloud & Co., Certified Public Accountants.

(Here follows table, side folio 459.)

[fol. 459]

Analysis of Kentucky Gross Retail Sales Tax Returns for th

	Numb file
Number of Reports Filed by Retail Merchants—	
Showing Retail Sales less than $400,000	14,5
Showing Retail Sales between 400,000 and 500,000	
Showing Retail Sales berween 500,000 and 600,000	
Showing Retail Sales between 600,000 and 700,000	
Showing Retail Sales between 700,000 and 800,000	
Showing Retail Sales between 800,000 and 900,000	
Showing Retail Sales between 900,000 and 1,000,000	
Showing Retail Sales in excess of 1,000,000	
Totals	14,5

	Numb retur
Analysis of Reports Showing Tax Liability—	
Showing Sales less than $400,000	14,5
Showing Sales between 400,000 and 500,000	
Showing Sales between 500,000 znd 600,000	
Showing Sales between 600,000 and 700,000	
Showing Sales between 700,000 and 800,000	
Showing Sales between 800,000 and 900,000	
Showing Sales between 900,000 and 1,000,000	
Showing Sales in excess of 1,000,000	
Totals	14,5

	Show tax liabil
Number of Merchants Reporting Sales of—	
Less than 10,000	5,9
$10,000 and under $25,000	1,1
25,000 and under 50,000	6
50,000 and under 75,000	1
75,000 and under 100,000	
100,000 and under 150,000	
150,000 and under 200,000	
200,000 and under 250,000	
250,000 and under 300,000	
300,000 and under 400,000	
Over 400,000	
Totals	8,07

[fol. 459]

SCHEDULE "A"

Analysis of Kentucky Gross Retail Sales Tax Returns for the Year 1932, Filed During the Period from January 1, 1933, to April 17, 1933

Number of Reports Filed by Retail Merchants—	Number filed	Number indicating tax	Number indicating no tax
Showing Retail Sales less than $400,000	14,582	8,068	6,514
Showing Retail Sales between 400,000 and 500,000	4	2	2
Showing Retail Sales berween 500,000 and 600,000	5	5	.....
Showing Retail Sales between 600,000 and 700,000	1	.....	1
Showing Retail Sales between 700,000 and 800,000	2	1	1
Showing Retail Sales between 800,000 and 900,000	1	1	.....
Showing Retail Sales between 900,000 and 1,000,000	1	.....	1
Showing Retail Sales in excess of 1,000,000	1	1	.....
Totals	14,597	8,078	6,519

Analysis of Reports Showing Tax Liability—	Number of returns	Gross sales	Gross tax	Credits allowed	Net tax	Credits shown on reports in excess of tax liability
Showing Sales less than $400,000	14,582	176,783,514.26	88,522.10	52,573.72	35,948.38	152,954.91
Showing Sales between 400,000 and 500,000	4	1,835,261.79	1,035.27	752.99	282.28	6,163.47
Showing Sales between 500,000 znd 600,000	5	2,764,557.75	2,071.04	963.54	1,107.50	.....
Showing Sales between 600,000 and 700,000	1	601,558.29	556.23	556.23	.....	35.73
Showing Sales between 700,000 and 800,000	2	1,522,598.66	2,574.30	1,277.24	1,297.06	908.68
Showing Sales between 800,000 and 900,000	1	864,205.61	1,949.44	415.00	1,534.44	.....
Showing Sales between 900,000 and 1,000,000	1	939,417.13	2,535.04	2,535.04	.....	117.45
Showing Sales in excess of 1,000,000	1	1,001,903.32	3,169.03	422.00	2,747.03	.....
Totals	14,597	186,313,016.81	102,412.45	59,495.76	42,916.69	160,180.24

Number of Merchants Reporting Sales of—	Showing tax liability	Showing no tax liability
Less than 10,000	5,903	4,157
$10,000 and under $25,000	1,185	1,688
25,000 and under 50,000	636	446
50,000 and under 75,000	181	96
75,000 and under 100,000	58	46
100,000 and under 150,000	50	38
150,000 and under 200,000	25	18
200,000 and under 250,000	11	9
250,000 and under 300,000	13	6
300,000 and under 400,000	6	10
Over 400,000	10	5
Totals	8,078	6,519

[fol. 460] SCHEDULE "B"

Statement Showing Number of Retai Merchants Reporting Gross Sales Taxes for the Year 1932 Classified by Amount of Tax Paid, Filed During the Period from January 1, 1933 to April 17, 1933

Number of Taxpayers Reporting Tax less than 50¢										1,667
"	"	"	"	"	of	50¢	to	1.00		1,247
"	"	"	"	"	"	1.00	"	2.00		1,569
"	"	"	"	"	"	2.00	"	3.00		813
"	"	"	"	"	"	3.00	"	4.00		494
"	"	"	"	"	"	4.00	"	5.00		369
"	"	"	"	"	"	5.00	"	10.00		1,000
"	"	"	"	"	"	10.00	"	15.00		381
"	"	"	"	"	"	15.00	"	20.00		195
"	"	"	"	"	"	20.00	"	25.00		114
"	"	"	"	"	"	25.00	"	50.00		164
"	"	"	"	"	"	50.00	"	100.00		50
"	"	"	"	"	"	100.00	"	200.00		9
"	"	"	"	"	"	200.00	"	300.00		2
"	"	"	"	"	"	300.00	"	400.00		1
"	"	"	"	"	"	400.00	"	500.00		0
"	"	"	"	"	"	500.00	"	600.00		0
"	"	"	"	"	"	600.00	"	700.00		0
"	"	"	"	"	"	700.00	"	800.00		0
"	"	"	"	"	"	800.00	"	900.00		0
"	"	"	"	"	"	900.00	"	1,000.00		0
"	"	"	"	"	over	1,000.00				3
Total										8,078

[fol. 461] Albert H. Morrill

ALBERT H. MORRILL, called for the plaintiff, testified as follows:

He resided in Cincinnati, Ohio and his business address was 35 E. Seventh Street, Cincinnati, Ohio. He was an attorney at law but had not been practicing since April 1, 1930. Since that time he had been President of The Kroger [fol. 462] Grocery & Baking Company and of the Piggly Wiggly Corporation. Prior to the time he became President he was counsel for The Kroger Grocery & Baking Company for approximately 15 years, and as such he was in close touch with their business affairs. He had charge of the acquisition of various stores during the period 1927, 1928 and 1929. He was also familiar with the business of the Piggly Wiggly Corporation and had been familiar with it since 1928. At that time he supervised the acquisition of the stock of the Piggly Wiggly Corporation by The Kroger Grocery and Baking Company.

The Kroger Grocery & Baking Company was engaged in the distribution of food at retail. Piggly Wiggly Corporation owns patents, trade names, copyrights, all of which are

leased out to operators in various parts of the United States, Kroger being next to the largest operator under these licenses and paying a license fee the same as any other operator. The organizations are entirely separate. All of the Piggly Wiggly licensees are engaged in the grocery business, being retail distributors. They operate all over the United States with the exception of some territories. They also operate in some foreign countries, including Australia, Hawaii, Alaska and Canada.

Mr. Morrill's association with the operations of the Piggly Wiggly Corporation bring him into touch with economic conditions pertaining to the food industry and with competitive conditions thereon throughout the United States.

The Kroger Grocery & Baking Company engages in business in seventeen states in the middle west, beginning in the northwest with Wisconsin and running substantially south taking in Oklahoma, then east through Mississippi, Tennessee, southwestern Virginia and western part of Pennsylvania and along the northern boundary of the United States, east from Wisconsin. In addition to being connected with The Kroger Grocery & Baking Company and [fol. 463] the Piggly Wiggly Corporation he had been associated from about 1915 on with The Colter Company, a wholesale concern which ran a chain of 350 stores, having served as a Director of that company. In connection with that business, he had become familiar with the organization and operation of so-called cooperative or voluntary grocery chains. He had organized and drafted the cooperative contracts with what is known as Associated Community Stores. For two and one-half years he filled positions in the National Chain Store Association and for a while he acted as President. During his term of President he became familiar with the economics and general operation of large-scale business enterprises which he studied. At that time he spoke at various institutions, before places of learning, legislature and trade associations. He has also had close contact with the General Stores Association in Germany, France, Austria and England and he had attended some of their meetings and had negotiated the sale of Piggly Wiggly rights to the largest chain in England. He had visited foreign countries and talked to operators and studied their bookkeeping, delivery, warehousing methods and every-

thing connected with the business. At the time of his testimony he was Vice President of the National Chain Store Association.

He has had constant contact with legislation effecting business in the United States on behalf of the Kroger Company and other companies. He was qualified to testify as an expert in cases involving taxes on retail merchants in Hamtramck, Michigan, and Maplewood, Missouri. He has appeared before a great number of legislative committees and has lectured on merchandising subjects at the Northwestern University, the University of Virginia and the Washington and Lee University, at Lexington, Vir-
[fol. 464] ginia. He thought he has sufficient experience and qualification to testify as an expert concerning economics and operations, and management and the relation thereto in the food industry generally in the United States.

He stated that the primary purpose of The Kroger Grocery & Baking Company is to distribute food through retail stores throughout the middle west. Its objective is to cut down the cost of distribution and for the purpose of securing this result it seeks to get as close to the producer, the farmer and other producers as it can and it also seeks to bring their food products through a rapid movement and fast turnover and as small a mark-up as possible to the customers who come into the stores. For the purpose of securing this result, it operates dairies, farms, packing houses, bakers' shops, coffee plants, creameries and butter factories. The prime object is to secure food stuffs from a source which is as close to the producer as possible and bring it to the consumer with only one mark-up. The Kroger Company and all similar businesses are built on an extremely small margin of profit, the percentage varying from a red figure to 2.50% or 3.8%, the higher figure being the exception.

The average percentage of net profit in the United States during the three years that the tax had been in effect in Kentucky, namely, 1930, 1931 and 1932 was 1%. Since a company of the character of the Kroger Company only secures a small profit, it must have a large volume of sales in order to exist. In addition to grocery stores working on this method, there are also such organizations as mail order houses with separate retail stores such as Sears-Roebuck & Company and Montgomery Ward & Company.

In the moderate price department store field there are Penney and Grant. The drug field is represented by Walgreen, Dows and many others. The Melville Shoe Company is an example of such an organization which sells shoes. Retail sales of the Kroger Company in Kentucky [fol. 465] have been as follows:

1931	$14,653,448.00
1931	13,496,915.00
1932	11,447,611.00

The profits in the company made on its Kentucky business in the State of Kentucky during the three years, without regard to Kentucky Gross Sales Tax but after all other taxes, was as follows:

1930	$172,892.93
1931	151,734.19
1932	86,230.98

The Kentucky Gross Sales Tax for the three years, without consideration of credits, amounted to—

1930	$139,584.48
1931	128,019.15
1932	107,526.12

The credits due Kroger on account of license taxes paid were:

1930	$15,369.00
1931	15,643.84
1932	12,271.75

When the credits are considered the Kroger tax under the Kentucky Gross Sales Tax was as follows:

1930	$124,215.48
1931	112,377.31
1932	95,254.37

The net profit in Kentucky after deducting the Kentucky Sales Tax was as follows:

1930	$48,677.45
1931	39,358.88
1932	9,023.39

In other words, in 1932 the application of the Kentucky Sales Tax would turn a net profit of over $80,000.00 into a loss in excess of $9,000.00. It took all of the profits and absorbed part of the capital.

The percentage of net profits before and after the tax was as follows:

[fol. 466]

	per cent of net profit before tax.	Per cent of net profit after tax.
1930	1.18%	.33%
1931	1.13%	.29%
1932	.75%	Loss .078%

The defendants objected to the introduction of the above evidence.

The company does not operate any stores except food stores, in which is included groceries, meats, some delicatessen items, produce and green groceries. It sells butter, eggs, milk, cream, cheese of all sorts, vegetables, pork, lamb, beef, canned goods, everything that comes off of a farm and goes on to the table for food. It also distributes seed and in some sections of the country fertilizer.

Kroger operated 289 stores in Kentucky in 1930, 254 in 1931 and 249 in 1932. Profits per store before and after the tax were as follows:

	Profits per store before tax.	Profits per store after tax.
1930	$598.00	$168.00
1931	598.00	155.00
1932	347.00	Loss 36.00

The tax per store under the Kentucky Act was as follows:

1930	$429.00
1931	442.00
1932	382.00

When special license taxes which must be paid are added then the tax per store was $483.00 for 1930, $504 for 1931 and $432.00 for 1932. In addition to that the Kroger Company paid taxes on its physical property in the State of Kentucky the same as all other property owners. Kroger owned land, buildings, machinery, equipment, leaseholds and inventories, which at the close of 1932 amounted to

$1,211,876.17. It owned a large plant at Louisville, Kentucky. It leased its stores for the most part at higher rentals then they would cost if the property was purchased. The stores were always located in what was considered desirable locations.

[fol. 467] Kroger rentals as a rule are based on the taxes paid by the landlord.

The Kroger Company paid direct to the Federal Government on the Kentucky business, that is, allocating such part of it as was proper, $20,291.51 in 1931 and it collected and turned over to the Federal Government in the way of taxes on various things like oleomargarine and cigarettes $204,701.38.

Witness stated that to the best of his recollection taxes represented approximately 25% of the rent. At the end of 1932 rental commitments such as leases amounted to $332,297.52, many of them being on long leases, two and three years, and some as much as five years.

Outside of the gross sales tax the company paid the State of Kentucky in 1932 $169,971.59. In addition to that the company is subjected to taxes on store operations by various municipalities.

The company operated 5302 stores in 1930; 4980 stores in 1931 and 4816 stores in 1932. Profits and sales of the company during those three years were as follows:

	Sales.	Profits.
1930	$267,094,345.26	$1,475,671.06
1931	244,371,147.17	2,199,444.46
1932	213,159,742.69	2,441,089.41

The profit represents what was made from the operation of the grocery business, exclusive of any income from investments. The percent of net profit to sales was .55% in 1930, 90% in 1931 and 1.15% in 1932.

If the same sales tax in effect in the State of Kentucky had applied to Kroger's business in each of the states in which Kroger operates then Kroger would have lost $767,000 in 1930, made $171,000 in 1931 and $650,548 in 1932. The Kroger tax runs pretty close to 1% and unless a profit of 1% is made on sales then the Kentucky tax causes a loss. The percent of tax to sales in Kentucky would have been .84 of 1% in 1930, .83 of 1% in 1931 and .84 of 1% in 1932. The tax would not be passed on to the consuming pub-

[fol. 468] lic because it does not apply to everybody. It is

not the usual sales tax which has been adopted in Indiana, Mississippi and Illinois. It exempts practically everybody in the State of Kentucky, leaving only the larger concerns subject to the tax. Competition in the food industry being very keen has a great effect on the price. A concern operating on less than 2% net profit cannot keep its volume of sales up when it raises its price. Once the prices are raised the people do not shop at the store but go to competitors. Kroger could not compete with small chains like those that exist in Louisville when it has to pay a tax of the size which is imposed on it and is not imposed on other people. It would be impossible to pass on a 1% tax to the consuming public when that tax applied only to a few concerns. As a result the tax would fall directly on the corporation and would come out of capital. It actually did come out of capital in 1932.

In 1930 the tax would have caused a net loss close to One Million Dollars if it had been effective throughout the United States. A net loss of such an amount would prevent the operation of the company any longer than three years. Possibly it might exist five years. The reason for this is that the business is operated on a cash basis. Sales are made for cash and payments are made in cash. The company needs many millions of dollars to do business on. The company statement as of December 31, 1932, shows $12,000,000 in cash. If it should get below seven or eight million dollars the company would not have enough money to do business on. With a loss of one million dollars a year the company would be put out of business, from a practical standpoint, in five years. Of course, the company could not get any new money if it showed losses. No bank would lend the company money and no one would buy the securities.

[fol. 469] The rate of profit at which the company earned in 1930 and 1931 was somewhat lower than the rate of profit earned by the average grocery store chain. The rate of profit for 1932 was somewhat higher than that earned by the average grocery chain. This is based not on all the chains in the United States but from a knowledge of two or three chains that have better sales than Kroger. A majority of the stores are operated at a loss of 1%. The difference insofar as profits were concerned was not due to territory but to management. That is the entire thing in a grocery business.

The defendant objected to the introduction of the above testimony.

The chief characteristic of the economic period of American business covered by the years 1927, 1928 and 1929 was an enormons inflation of prices and expenditures. There was a public psychology which made anybody willing to buy anything irrespective of the price. In the opinion of the witness those years are not a great criterion of the profits and earnings which can normally be made in the conduct of retail merchandising, whether in the food or other retail merchandising field. The crash in these values occurred in September, 1929. This was the first one. Another one occurred in October, 1929, and a third during the next summer. Values varied thereafter causing disorganization and chaos in business generally. With a comparatively few exceptions business profits disappeared in retail business after the crash in the fall of 1929. Many of the larger companies got into the red and went into the hands of receivers. A large number of the smaller grocery chains also went into receivership and their assets melted away. Almar Stores in Pennsylvania is an example of a large grocery chain which failed and went into the hands of a receiver since 1929. The Saunders System of Louisville, Memphis and Nashville also went into the hands of a Receiver and was sold through the United States Court in the latter part of 1930 and 1931. Some smaller ones, the names of which he could not recall failed since 1929. In other types of retail merchandising Liggets, The United [fol. 470] Cigar Stores, Bellas-Hess, Grant-Silver and McCrory Stores are examples of chain store organizations which were placed in Receivership.

The Kentucky Gross Sales Tax has no relationship to what is commonly known as a sales tax. The socalled sales tax levies a tax on sales at a flat rate. In some of the states the law provides that no person selling merchandise or an article that is taxed shall advertise or say he is paying the tax. The purpose of that tax is to put it on the consumer, leaving the operations of business as little disturbed as possible. In contra distinction to that the Kentucky Sales Tax in its operations admittedly exempts all sales made provided they do not run over a certain amount. It graduates very rapidly so as to put concerns doing a large business in a hopeless competitive position with the twenty or

thirty thousand other people who are aggregating a larger volume of business but who individually do a smaller volume of business.

The witness testified that from his experience he would say that profits tend to decrease with increased sales. However, there are many exceptions to this rule. The increased sales has no necessary relation to net profits. A striking example of that was that of Clarence Saunders, who controlled stores in two or three cities and made a nice profit on his sales. As his volume of sales increased, however, his profits decreased and he was out of business in the course of a year or so. Under exceptionally skillful management the relationship between a large volume of sales and return on invested capital maintains itself and sometimes increases. But what actually happens, the so-called law of diminishing returns begins to work and when sales increase to a million or more one does not secure the same proportionate amount of profits. Actually, you have a smaller proportion of profits than under less sales.

[fol. 471] Sales are not a measure of the amount invested in business. There is no relationship between the two. The amount invested in business may be in dead assets or in poorly located stores and unless by proper management, proper location or proper use of capital it is turned into life it means nothing. It comes back again to the question of management and this is peculiarly so in the retail distribution of food stuffs through stores.

The witness had had twenty odd years of experience in retail merchandising business and from his observation he thought that prior to 1929 success was due in large measure to luck. Since that time economic success depended 90% on personnel of the organization. This referred not so much to the top of the organization as to the organization below.

Average sales per store for 1930 were $50,376.00; 1931, $49,070.00; and 1932, $44,260.00. Sales per store per week in the country as a whole average $956.50 for 1930; $943.56 for 1931 and $851.17 for 1932.

Excluding the return from investments, net profit of the company as a whole on a per store basis in 1930 was $278.32; 1931, $441.66, and 1932, $506.87. The invested capital and the return earned by Kroger on its invested capital for the three years was as follows:

	Invested capital	Return earned on invested capital
1930	$50,932,462.32	4.26%
1931	51,521,172.84	5.30%
1932	46,084,825.70	5.95%

The Kroger Company had 1,813,486 and six-twentieths of a share outstanding in 1930 and 1931. In 1932 it had 1,811,091 and six-twentieths of a share. In both 1931 and 1932 the company paid $1.00 dividend on outstanding stock. In 1930 it paid $1.00 per share, plus a part of a stock dividend of 5%. The stock is owned by approximately 20,000 shareholders, 78% of whom are located in the middle west. There are a number of stockholders in Kentucky. The [fol. 472] stock is widely scattered. Only two stockholders have any quantity of stock and three of the largest stockholders together have less than 1%. Approximately six or seven thousand shareholders own less than 100 or 200 shares. 40% of the stockholders own less than 100 shares each. A large percentage of the stockholders are women. The same is true with regard to charitable institutions.

In the event the gross sales tax act continues to absorb all profits the company could withdraw from the state but to do so would mean a total loss on all investments in Kentucky and on all rentals. It would also result in a severe loss on automotive equipment which is especially designed to meet the Kentucky laws. All monies expended in improvement on leaseholds and fixtures would be lost. There might be a salvage with regard to fixtures in the amount of 25%. The good will of the company in the state would be entirely lost. Kroger has been one of the largest users of newspaper space in Kentucky since 1927. A large amount of money has been expended in this way building up good will. Money has also been contributed to the various Chambers of Commerce for the same purpose. A fine personnel drawn almost without exception from Kentuckians has also added to the good will. The working organization which is receiving salaries from the company could not be used elsewhere in the event the company withdrew from Kentucky. A large amount of money is expended in building such an organization. Kroger trains its men, having regular training schools and diplomas. There the men learn the business. Kroger also maintains in Cincinnati the so-called Kroger-Food Foundation which

checks all of the Kroger purchases in a scientific practical way and does a great deal of consumers research work.

Kroger, a short time prior to the time of the testimony was given, gave a food show in Louisville, which cost it some Ten Thousand Dollars. The show was attended by tens of thousands of people. This has all resulted in the [fol. 473] building up of a good will for assisting the customers and removal from Kentucky would involve a loss on this intangible property as well as other.

Kroger had 865 employeees at the end of 1932. This was slightly more than they had in 1929. In 1932 Kroger paid $1,203,000, in wages in Kentucky. It purchased a large amount of food supplies and other products in Kentucky. Annual expenditures in Kentucky for products of that State's soil is a little less than Five Million Dollars. There is little difference between the store of The Kroger Grocery & Baking Company and the stores of its competitors who are engaged in the same kind of business. There is no difference between the grocery store conducted by members of the Independent Grocers Association, or I. G. A., and a grocery store conducted by The Kroker Grocery & Baking Company, or The Great Atlantic & Pacific Tea Company. The only exception is that in one case there is individual ownership by a member of the association and a corporate owner in the acse of the Kroger Company. In both cases there is one organization buying for all of the stores. In both cases they have a uniform store layout and joint advertising for the benefit of all of the stores. Deliveries are made to stores in both organizations by the same trucks of a standardized order. Both have a uniform system of accounting in the stores and contribute a part of their earnings to a common fund. The only difference is ownership.

I. G. A. is a voluntary chain which claims to have eighteen thousand member stores in the United States. They have a mass purchasing and a mass selling and advertising ability which is in excess of Kroger. In addition to the I. G. A. there are a number of other voluntary cooperative sales organizations, all of which are organized along the same lines. Today there is no difference between the Kroger stores and that of a neighborhood grocery affiliated with a voluntary chain store association. Members of voluntary chain associations purchase from wholesale grocers and also directly from the manufacturer. They sometimes pur-

[fol. 474] chase their meats through an intermediary but often they purchase it from Swift and Armour much in the same manner as Kroger does. Their purchases are once or twice or three times removed from the producer but Kroger takes it directly from the producer. Sometimes it is once removed from the producer.

The Kroger stores require no more police regulation than any other similar business and probably less. The company carries its own insurance and is very strict about fire hazards. It requires constant supervision. There is a supervisor for every twenty stores. It is his business to see that the stores are clean, that there is no inflam-able material in the cellar. The goods in the Kroger stores is similar to that in other stores insofar as fire hazards and police supervision is concerned. Kroger conforms in every case to every known regulation of the municipal authorities. One of its chief endeavors is to have a clean store. The food sold is fresh and in its urban sections it has daily deliveries. As a result it delivers perishables almost every day. With few exceptions it has mechanical refrigeration. The turn over is rapid. In the country Kroger never keeps a supply for more than thirty days and only keeps a week's supply of perishables. Everything the company buys is tested in the Kroger Food Foundation. A great deal of the products submitted are turned down. The Company is forced to conform to the law of supply and demand insofar as the prices which it pays for merchandise is concerned.

In the opinion of the witness, as a result of his years of experience, it is impossible for a grocery merchant to remain in business and earn a fair return on his investment and pay tax of $400.00 to $50.00 per store in addition to what his competitors pay. There is no difference between the business of the Kroger Company and that of its competitors. It does not require a different personnel.

[fol. 475] Cross-examination:

The witness has been President of The Kroger Grocery and Baking Comp-ny since April 1, 1930. At that time there was a complete change in the personnel of the officers, only one of officers remaining of those who held office prior to April 1, 1930.

Mr. William H. Albers, who served in the capacity of President and General Manager prior to April 1, 1930, was no longer connected with the Kroger Company. There were one or two other executives of the company who had been directors who left the company at the same time. The change in the directorship was due to the discovery of earning figures of 1928 and 1929 that were not correct.

The company was not refinanced nor was there any new money introduced at that time. Mr. Bernard H. Kroger, the original founder of the company was not connected with it at the time the witness's testimony was taken, he having retired during 1927 or the early part of 1928.

At the time Mr. Morrill took charge there was a change in the method of conducting the business.

The books of the company are kept by bookkeepers and accountants and are audited and supervised by a certified public accountant. The audit is continuous and a general audit is made each year by Lybrand Ross Bros. and Montgomery. The only records kept at each individual store are the sales sheets, inventory sheets, expense sheets, cash, miscellaneous expense, such as light and power and various other things that enter into the operation of the particular store. The records at the individual stores do not show all the expenses incurred in operating that store. They do not show hauling, warehousing and a number of other things. Bookkeeping at each store is reduced to a minimum. The books show the amount of sales at each store. [fol. 476] Bookkeeping methods are uniform throughout all the stores. Books kept at branch headquarters show the operation of the particular branch including profit and loss. One of the branches is located in Kentucky, but five of them do business in that state. Above the branch is the general office. Complete records are kept there. These records show the operations of the company as a whole and are made up from reports of the branches. The general office is at Cincinnati, Ohio.

Commencing with the middle of 1930, a system of operating was developed, but prior to that time there was no such system and for this reason there are no books showing profit and loss prior to that time. However, there are records since 1930 showing result of operation. It is im-

possible, with any degree of accuracy, to determine the results of operation preceding 1930. The present operating system shows sales, expenses and taxes, wages paid, cash discounts obtained, depreciation, net profit, etc. The records show daily, as well as weekly reports. The Kroger Grocery & Baking Company does not keep records for each month's operation. They divide every four weeks into a different period and this is combined at the end of the year for the report which is prepared by Lybrand Ross Bros. and Montgomery. Kroger operates thirteen 4-week periods in each year rather than on the actual calendar year.

At the close of 1932, Kroger operated 4816 stores. Of that number 289 were in Kentucky. Profits in Kentucky are derived by taking the profits of the different stores and combining them and taking the cost of the merchandise, the figures on gross profits and deducting expenses. The records used in reaching this result are located at Charleston, W. Va., Louisville, Ky., Carbondale, Tenn., and Cincinnati, Ohio, these being branches of the Kroger Company, and it is possible from these reports to determine the profits [fol. 477] made in Kentucky during the years 1930, 1931 and 1932. The net profit is derived by taking the sales at the various stores, the store gain, and, after combining those and adding to them the profit on manufacturing operations in Kentucky and deducting the expenses necessary and incident to the running of the stores in Kentucky. The resulting figure is the net profit. (In getting up these figures, reliance was made solely upon profit and loss from the retail business, all operations of Kentucky being included.) However, operations other than store operations are not very great. These operations include, among other things, a bakery. No part of the overhead for the central office was charged to Kentucky in getting up the figures.

Profits are determined by the store gain which represents the difference between the cost of merchandise and the various expenses in the store.

Witness stated that no separate records had been kept of the Kentucky stores for the past three years. The witness was unable to give the inventory of the Kentucky stores as of the beginning of the year 1930; that he had no information available on the cost or purchase price of the goods in the Kentucky stores; that he did not think

records were available to show these facts. He stated that he had no records to show the salaries paid in Kentucky stores during the year 1930, and that he had no records of the amount expended for rent in Kentucky for the same year. He thought the records could be collected in Cincinnati.

The witness did not personally make the examination of the record but relied upon reports of others who were employes and executives. The figures given were the result of compilation made especially for the particular law suit. [fol. 478] (Testimony, page 70.) When witness' statements of earnings were given concerning Kentucky stores, he did not draw his conclusions from the details of operations of those stores which had resulted from considering the cost of goods, salaries, earnings and every other such item of expense incurred in Kentucky. He did not arrive at his conclusion in this manner because this method would have "occupied too much time," and "one person could not have gotten this information altogether." Witness had gathered his information on these subjects from numerous sources at the branches where the records were located, from the auditing and treasury departments, he himself not having made an examination of the sources of such information, but he relied on the reports of others.

The average profits for Kentucky, before the Kentucky tax, per store for 1930 was $598.00. This was higher than the average in the United States. In the United States the average net profit per store for 1931 was $441.56, and in Kentucky, before the Kentucky tax, it was $498.00; in 1932 the average net profit was $506.87 including investments, and in Kentucky, without the tax, it was $347.00. Witness was not able to explain the reason for the fact that the average profit of the Kentucky stores in 1932 was less than the average in the United States, but he was of the opinion that the burden of the tax caused the net sales to drop off. Various branches were losing heavily in 1929 and 1930 and they improved during 1932, but the improvement was better in other branches than Kentucky. (Testimony, p. 74.) Witness cannot explain the fact that his average profits in 1932 were considerably less than the average for the whole U. S. Conditions there were worse than the United States as a whole but they were no worse than Michigan or Northern Ohio or Western Pennsylvania

and other industrial centers. Insofar as Kentucky was [fol. 479] concerned, tobacco was very low and the people in that business in Kentucky did not have any money to spend.

In referring to profits from investments, witness meant profits from stocks, such as Piggly-Wiggly Corporation. The annual report for 1932 shows net earnings of subsidiary companies, including a dividend of $299,778.03, which represents the income from investments. Nothing is credited for good will. The expense of the cooking school held in the City of Louisville, which amounted to $10,000. was charged to the general office with the exception of about 2% which was charged to the Louisville branch. None of the general office expenses are allocated to Kentucky.

The largest merchandising food firm is the Great Atlantic and Pacific Tea Company. This is one of the chief competitors of Kroger. It is not true that Kroger opens a store in the same neighborhood as the A. & P. every time that concern establishes a store. There are many instances where Kroger stores are located near A. & P. Stores but the Kroger Company does not establish stores near A. & P. stores unless business justifies it. The Great Atlantic and Pacific Tea Company operates all over the United States except in the far west. They do operate, however, in California. The First National Stores do not operate in Kentucky and the American Stores operate chiefly in Pennsylvania, Delaware, New Jersey and New York, but do not operate in Kentucky. The National Tea Company which operates in Illinois, Iowa, Wisconsin and Minnesota does not operate in Kentucky. Safeway Stores which operate in Kansas City does not do business in Kentucky. Those named are the chief grocery chains. None of those named have ever failed. Pender, operating in Virginia and the Carolinas does not operate in Kentucky. They are in the hands of banks and creditors. Southern Stores operate in Florida and adjoining states, but not in Kentucky, and they are also in the hands of creditors. All of the concerns mentioned are grocery food chains. Loblaw operating in New York and Canada, but not in Kentucky, is [fol. 480] doing all right. None of the larger firms mentioned have failed or gone into the hands of receivers, for the most part the failures having been among the smaller

chains in the grocery line. (Testimony, page 80). "Outside of Saunders I don't know of any failure since 1930."

The Atlantic and Pacific and Kroger are the only two of the large chains affected by the Kentucky law. There have been a larger number of failures among smaller individuals. According to figures shown by the Louisville Grocery Survey, the mortality rate among individual groceries was 100% every three and one-half years. Since the advent of chains in 1920, the mortality rate has not been quite as great and it has been progressively decreasing. The Louisville Grocery Survey shows that the chains actually help out the individual grocer since he learns from the chain and fixes up his store and gets better merchandising, better displays, better salesmanship and better personnel. As a result the independent grocer was not suffering the same mortality rate up to 1930 as he had in the years prior to 1919.

The witness calculated the book value of the capital stock at approximately $46,000,000.00. (Testimony, p. 81.) Witness stated that he could not give the book value of Kroger common stock, but it was between $22.00 and $22.50 per share; that some adjustments had been made last year (1932) and that they had written off a "lot of obsolete stuff." The total net earnings for the year 1930, including investments, was $2,168,247.48. In arriving at the income produced in Kentucky, the exact gross income per store was taken and in making deductions there was an allocation of such items as could not be assigned to a specific store. Advertising expense, interest charges, branch expenses, such as supervision, warehousing, hauling and administration for stores in and out of Kentucky were allocated proportionately according to the number of stores based on sales. The same was true of branch legal expense, office supplies, printing, stationery, telephone, telegraph and postage. Depreciation is charged from month to month and carried into operations as an expense charge against net income. On buildings the rate runs about fifty years and on retail store equipment the depreciation varies from a year to the period of the lease. Fixtures in the [fol. 481] store of a more or less permanent nature, such as mechanical refrigeration, shelving, etc. are written off during the term of the lease if possible.

The profits of the company for the first six months of 1933 were $2,294,794.27. The sales for that period were

$91,997,867.55. The percent of profit to the sales was 2.49. The Kroger Company business was much more profitable for the first six months of 1933 than it was for the similar period in 1932, the increase in profits being $929,749.17.

There has been an improvement in net earnings since April, 1930, the time when the witness took charge as President.

The Kroger Company took over the Piggly Wiggly Corporation in Kentucky in 1928. The company has been eliminating stores ever since the witness took charge. In the last three or four years Kroger has been consolidating its possessions in Kentucky in an attempt to improve its operations there. Kentucky is logically Kroger territory. There is no opportunity for expansion there, the necessity being for contraction. Kentucky is rather overbuilt insofar as grocery retail outlets are concerned. This is shown by the Louisville Grocery Survey. Kroger Company established stores in Kentucky in 1897. There was a gradual increase up to 1927, at which time stores belonging to other chains were purchased. These stores were located in Paducah and Louisville. They augmented the number of stores operated by Kroger by several hundred. At that time Kroger had some stores in Louisville, Newport, Covington and Lexington. Since that time Kroger has been attempting to cut out competition between its own stores. Witness estimated that the increased expense of operation due to the National Industrial Recovery Act would take all of the profits earned in the first half of 1933. He expected that there would be some adjustment in prices to meet this increased cost.

[fol. 482] Harry W. Schacter

Harry W. Schacter, called for the plaintiff, testified as follows:

He lives at 1200 Castlewood Ave., Louisville, Kentucky. He is President of The Kaufman-Straus Company of Louisville. This is a department store dealing in all kinds of goods, located on Fourth Street between Walnut and Liberty. It occupies a five store building. Its annual sales exceed one million dollars. The business is fifty-four years old and it is one of the largest and oldest department stores in Louisville.

From September, 1925, to April, 1927, the witness was connected with the American Retailers Association of New York at the central office of the organization. This was a group of 17 department stores located all over the United States, having annual sales of approximately one hundred twenty-five million dollars. Some of the stores in this group were Bloomingsale in New York, Lansburgh in Washington, Gilchrist in Boston, Wieboldt in Chicago, Boston Store of Milwaukee, and others.

In April, 1927, the witness became assistant to the general manager of Herman Straus & Sons Company of Louisville. In April, 1929 he was made general manager, holding this position until March 1, 1932, at which time he became President of Kaufman-Straus Company.

Witness has made a study of retailing ever since he went with the American Retailers Association. One of the main functions at the central office in New York was intensive research into the theory and practice of retailing. Witness has written approximately fifty articles that have been published in various magazines dealing with retailing questions. Most of these articles were published in magazines called "Retailing," "Women's Wear," and "Dry Goods Economist." His most recent article was on merchant cooperation and this comprised about one-third of the entire issue of "Retailing," issued Feb. 13, 1933. The program [fol. 483] proposed by him was sponsored by the editor as a national program. In December, 1930, Harper Brothers published a book written by the witness called "Profitable Department Store Management." In this book the witness discussed the problems of merchandising, advertising, store management and control and other items applying to retail and department store management.

Witness has made a study of the nation-wide phase of retailing. He has also studied reports of the Harvard Bureau of Business Research over a period of four or five years. Other authentic sources of information in connection with retailing are the National Retail Dry Goods Association reports and various other publications, such as "Women's Wear" and "Fairchild Directory."

Witness is a member of the board of directors of the Louisville Retail Merchants Association and is also a member of the Kentucky Retail Merchants Association. He is familiar in a general way with the larger merchandising

operations in the State of Kentucky. The National Retail Dry Goods Association has asked him to deliver an address at their mid-year convention in June and witness believes himself to be qualified to give expert opinion as to the conduct of retail merchandising on a large scale and a small scale and the economics pertaining to retail merchandising.

The witness has made a study of the gross sales tax in Kentucky and is familiar in a general way with the taxing process. He has also made a study of the retail sales taxes, as they are commonly known in the United States.

He does not consider the Kentucky Gross Sales Tax to be a real sales tax. A real sales tax applies to all merchants alike. The Kentucky law proposes to place a heavy burden of taxation on those who do a large volume of business and it practically exempts from taxation those who do a small volume. The number doing the small volume constitute the [fol. 484] vast majority. As a result, it operates as a penalty on a few merchants. The witness estimated that in Louisville there would probably be not more than three or four stores, other than food stores, doing a business over one million dollars, and he doubted if there were any more in Kentucky, but there might possibly be one or two. He estimated the number of retail merchants, other than food and dry goods, who do a business in excess of $400,000 to be somewhere between twenty and thirty.

Witness has studied the affidavits filed by the three professors, namely Henry M. Waldradt, James R. Martin and Clyde William Phelps. The figures given in these affidavits, witness testified, were principally for the year 1929. Where they were not drawn for that year, they were for 1927 and 1928, but they all stopped at the end of 1929. The changes that have taken place since 1929 were of so cataclysmic a nature that it was utterly impossible to base anything on what happened in 1927, 1928 and 1929. Those years were not a criterion upon which to base a reasonable opinion. The country during that period was emersed in a tremendous inflation, bubbling over with expansion. The basis since the events occurring in October, 1929 is tremendously different and witness did not believe that we would ever see the day when we would get back to the level of 1929. The years 1927, 1928 and 1929 were entirely abnormal in every respect and this was so when they are compared with either of the years preceding or following them. For this reason, the

three year period mentioned is not a normal basis for present day profits, values or sales. Witness did not believe that there is any difference in opinion between economists or retailers on this point.

Since October, 1929, there has been a decrease in the amount of sales, this being true in every field of merchan-
[fol. 485] dising. The relationship of profits or earnings to sales and the return on invested capital has also declined.

Witness stated that from his examination of the affidavits and exhibits attached to the testimony of Professors Waldradt, Martin and Phelps, he found that the heart of their whole contention was that net profits increased as sales increased. Witness stated that that might be correct theoretically but all the supporting facts and figures from actual experience of department stores indicated that there was no relationship; some stores with a smaller volume making a higher net profit than some with a larger volume.

The attention of the witness was then called to Exhibit 12 of Professor Martin's deposition and he was asked to point out in the long list of stores included in that exhibit, any department store operating in Kentucky which had a sales volume in excess of five million dollars. Witness replied that there was no department store in the State of Kentucky that had this volume of sales. The Stewart Dry Goods Company, of Louisville, had the largest volume. The maximum in the other large department stores would be from one to two million dollars.

Witness's attention was then called to the table with respect to the alleged increase of profits as sales increased from $400,000 to $1,000,000. He stated that Professor Martin considered only the average figures and from these average figures drew the conclusion that as volume went up the per cent of net profit went up. Witness stated that when the figures were examined closely they showed that average covered a multitude of sins. As an example, they actually indicate that some stores in the lower bracket of volume have a larger per cent of net profit to sales than other stores with a larger volume of sales. The result is that the deduction of Professor Martin, taken from the average does not give a true picture. The true picture, the witness stated, which is proven by the figures, is that the per cent of net profit does not have any definite bear-
[fol. 486] ing to the percentage of volume. A store with a

larger volume of sales can have a smaller amount of profit than another store with a smaller volume of sales. The prime factor is the difference in management. As an example, the witness stated that he would cite the fact that the Emporium, of San Francisco, did twenty million dollars' worth of sales in 1932 and was third in sales in that year, yet it was eighth on the list when the per cent of net profits to sales was figured. Actually, the Emporium, although it had a vast volume of sales, greater than anyone had in the State of Kentucky, lost one and one-half per cent on its sales. In the same year, Lazarus, of Columbus, the eleventh store in the amount of sales, was third in the per cent of net profits. The figures which he was giving, the witness stated, were taken from "Retailing" of May 1, 1933, giving the comparative results of a group of large department stores from the year 1926 up to 1933. These figures are also published in a report of "Fairchild Publications."

The same year, 1932, Burdine's, of Miami, Florida, was eighteenth on the list according to sales but sixth as to per cent of profit to sales. Burdine's had a volume of three million dollars as against twenty million dollars for the Emporium, and yet the latter lost one and one-half per cent and Burdine's made a profit of approximately 1%.

In 1931 Bamburger, of Newark, had sales of thirty-five million dollars and ranked second in amount of sales and yet in regard to profits, it ranks seventh and was preceded by a number of stores with smaller sales. All of these other stores with smaller sales made a larger per cent of net profits than Bamburger.

The same year, 1931, Lazarus, of Columbus, again was eleventh in order of sales and yet was third in the order of profit. The Outlet Company, of Providence, R. I., was first in per cent of net profit but ranked fourteenth in volume of sales.

[fol. 487] In 1930 Filene's, of Boston, with sales of forty-five million dollars ranked first in sales but sixth in per cent of profit on sales. That year Bamburger, of Newark, ranked second in sales and yet was fifteenth in per cent of profit. Bamburger's sales for 1930 were approximately 36 million dollars, or about ten times the amount of the largest sales in Kentucky, but nevertheless its profits were .7%. The same year Lazarus was twelfth in sales and

fourth in per cent of profit. Rike Kumler Company, of Dayton, was nineteenth in sales and third in per cent of profits. The Outlet Company, of Providence, one of the best managed stores in the country, was first in per cent of profit although sixteenth on the list of actual amount of sales. There were fifteen stores that had a bigger volume of sales than the Outlet Company but all of them had a smaller per cent of profit. This indicates that so far as the larger stores are concerned, there is no relation between volume of sales and the per cent of profit to sales. The basic factor in determining the per cent of profit a business makes is management. It does not depend on volume of sales. There are a number of stores with one-half the volume of other stores who make twice the profit of other stores. There is one case in Pennsylvania where, on a volume of $500,000 of sales, the store made over $150,000.00 of profit, or 10% to sales, yet Kaufman Straus Company lost approximately 3½% on the amount of sales and other stores in Louisville lost more than that in 1932.

The figures for stores having sales in excess of five million dollars are referred to because they are used by Professor Martin. However, they are not applicable to Kentucky because no merchant has a volume as large as that. Figures which are applicable are for stores having sales of less than $150,000.00 and those grouped from $150,000 to $300,000; $300,000 to $500,000; $500,000 to $750,000; and $750,000 to $1,000,000. The reports gotten [fol. 488] out by the Harvard Bureau of Business Research defined various groups in this way. The 1932 figures show that the net loss in stores doing less than $150,000 a year was 10.3%. Stores doing a volume of $150,000 to $300,000 showed a loss of 8.7%. Stores doing a business from $300,000 to $500,000, at a 6.2% loss. Stores doing a business of $500,000 to $750,000 has a loss of 8.2%, as against the lower group which only lost 6.2%. In other words, although they increased their volume of business, they lost 2% more than the merchant with a smaller volume. Stores having sales from $750,000 to $1,000,000 showed a loss of 9.5%, which was more than the $500,000 to $750,000 group and more than the $300,000 to $500,000 group. Stores having sales from one to two million dollars lost 6.8%, which figure was higher than the group doing business from $300,000 to $500,000, although it was

less than the two preceding groups. In the two million to four million dollar class the loss was 7.8%. In other words, they lost one per cent more than the store doing from one to — million dollars' worth of business.

The table referred to was thereupon introduced and marked "Schacter Exhibit #1."

The results of the research of Harvard University shows that there is no relationship between the percentage of gain to net worth and increase of sales. Stores doing less than $150,000 worth of business lost 12.2% of their net worth. Stores doing $150,000 to $300,000 lost 9% of their net worth. Stores doing business from $300,000 to $500,000 lost 5% of their net worth. Stores doing a business of $500,000 to $750,000 lost 10% of their net worth, which was twice as much as stores doing a business from $300,000 to $500,000. Stores doing a volume of $750,000 to $1,000,000 lost 6% of their net worth, or one per cent more than stores that had a volume of only $300,000 to $500,000. Stores doing a business of $1,000,000 to $2,000,000 lost 4% of their net worth, and yet stores doing a business of $2,000,000 to $4,000,000 lost 6.7% of their net worth. The loss in these stores was larger than the loss in stores having a smaller volume. This was true as to [fol. 489] the stores having a sales volume of $1,000,000 to $2,000,000, stores with a sales volume of $750,000 to $1,000,000 and stores with a volume of $300,000 to $500,000. This indicates clearly that there is no definite relationship between percentage of net profit to sales or percentage of gain to net worth and sales. Management in both cases is the primary factor.

The same results are reached by examining the figures for 1930 and 1931.

Professor Martin uses Table 34, appearing on page 45 of Bulletin 78 of the Bureau of Research of Harvard University, as an indication that there is an increase in the percentage of profit to sales as sales increase. He files part of this table as Martin Exhibit No. 1. However, there is an important omission. Professor Martin again quotes average figures and leaves out the interquartile ranges quoted in this table. For example, the increase in percentage of net worth of stores doing less than a million is 8.9%, whereas in stores doing over a million dollars in sales, the

increase in net worth is 15.5%. Professor Martin omits the very important figure of interquartile ranges. For stores under a million dollars, the range is 3.20% to 20.75%. For stores doing over a million dollars worth of sales the interquartile range goes from 10.64% up to 20.35%. That would indicate that there were some stores in the less than one million dollar group that had increased their net worth 20.75%, whereas there were some stores in the over one million dollar class that had a net increase of only 10.64%. The witness here stated that when he referred to increase in net worth he meant the gain in net worth. As a result, the figures used by Professor Martin cover up the important factor that there were some stores in the less than one million dollar group that had twice the gain in net worth as compared with stores in the more than one million dollar group. This proves the opposite of what Professor Martin was trying to prove in this case.

[fol. 490] The best showing in the smaller group is 20.75%. In the larger group the best showing is 20.35%. In other words, the best store of the smaller group had a better showing than the best store in the larger group.

There was thereupon offered in evidence Table 34, appearing on page 44 of Bulletin 78 of the Bureau of Business Research of Harvard University, which was marked Schacter Exhibit 2.

Witness stated that this exhibit was the same exhibit as had been introduced by Professor Martin and marked Martin Exhibit 1, except that the latter had omitted the important inter-quartile figures.

Attention of the witness was then called to Martin Exhibits 4 and 5 and to page 8 of Bulletin 83 of the Bureau of Business Research of Harvard University on the operating results of department stores in 1929. His attention was also called to pages 20 and 28 of the same bulletin. The witness thereupon testified that the percentage of gain to net worth, according to Professor Martin's figures, indicated that he again used the average figures all the way down the line and omitted the inter-quartile ranges. For stores doing less than $500,000 Martin showed a percentage of gain to net worth of 5.7%. For stores doing $500,000 to $2,000,000 of business he showed a percentage of gain to net worth of 7.5% and for stores having sales in excess of

$2,000,000 he showed a percentage of gain to net worth of 8.5%. He used these figures to prove his point regarding the increase in percentage of gain to net worth as sales increased, but he omitted the inter-quartile ranges in reaching his conclusions. When the inter-quartile ranges are considered, it appears that for stores doing a business of less than $500,000 the percentage of gain to net worth ranges from .84% to 11.17%; for stores doing a business of $500,000 to $2,000,000 the range is 2.88% to 12.17%; stores doing a business of $2,000,000 or over show a range of [fol. 491] 4.23% to 13.02%. The top range for stores doing less than $500,000 showed 11.17% gain. This compares with a gain of only 2.88% for some stores in the next higher bracket. In other words, some stores doing less than $500,000 of business had a four times better showing than some stores in the $500,000 to $2,000,000 group and three times a better showing than some stores which did better than $2,000,000 worth of sales. Witness stated that this led him to conclude that increase in sales volume is no criterion whatever as to what the increase in net gain to net worth will be.

Thereupon, pages 8, 20 and 28 of the Bulletin No. 78 of the Bureau of Business Research of the Harvard University were introduced in evidence and marked Schacter Exhibits 3, 4 and 5.

Witness stated that there has been a very steady drop in the percentage of profit to sales made by larger scale retail merchants engaged in department store business during the five or six years preceding the time of giving his testimony. In 1926 the average was approximately 3% of profits to sales; in 1930 there was an average of loss of .55%; in 1932 there was an average loss of 6.4% to sales.

The policy prevailing throughout the United States so far as retail merchandise department stores are concerned, is to get as large a volume as possible with a small percentage of profit, allowing the volume to produce the net profit. During the years 1930, 1931 and 1932 the average profit for department stores that had made a profit was from 1 to 3% for the best stores. Most of them had lost money. The Hahn Department Stores, on a volume of $90,000,000 worth of sales in 1931, lost $209,000. Hahn Department Stores is a group of department stores all over the country, consisting of 29 stores, the largest one being in Boston. The

closest store to Louisville, was Rollman's, at Cincinnati. Hahn had operated stores in St. Paul, Akron, and a number of other cities. In 1932 Hahn Department Stores, with a volume of $70,000,000 of sales, lost $3,700,000.

[fol. 492] In 1931 Marshall-Field & Company, of Chicago, lost $5,000,000 on a volume of $114,000,000, and in the year 1932, on a volume of $70,000,000, they lost close to $8,000,000.

Arnold Constable, Fifth Avenue, New York, did a volume of $6,300,000 in 1932 and lost $239,000. In 1931 their volume was $9,000,000 and they had a profit of $161,000. In 1930 the volume was $12,000,000 and there was a loss of $562,000. In 1929 they lost $528,000 on a volume of $12,229,000.

Crowley-Milner Company, of Detroit, Michigan, had a volume of $22,500,000 in 1930. Their volume in 1931 and 1932 was not given but it must have been somewhere between $15,000,000 and $21,000,000. In 1931 they lost $579,000 and in 1932 they lost $2,227,000.

Kaufmann Department Stores, of Pittsburgh, one of the finest department stores in the country, had a volume of $22,900,000 and a profit of $648,000 in 1931. In 1932 they had a volume of $16,000,000 and lost $555,000.

Mandel Bros., of Chicago, in 1930 had a volume of $25,000,000 and losses of $867,000. In 1931 they had a volume of $19,600,000 and they lost $371,000. In 1932 the volume was $14,800,000 and they lost $578,000. During the same years there were stores who had a smaller volume of business and made money. For example, the Emporium, of San Francisco, lost $294,000 on a volume of $20,000,000, whereas Burdine's, of Miami, Florida, on a volume of $3,000,000 made $26,700 in the same year. There were some small department stores having sales under a million dollars that made money.

The Kentucky Gross Sales Tax would add to the heavy loss that stores selling more than a million dollars worth of merchandise are bearing, and would impair their capital by the amount of the tax. Stores making an average profit for the years 1930 and 1932 inclusive, would be required to pay from one-third to their entire profit. They would not be able to pass the tax on to the consuming public because [fol. 493] the units of merchandise for the most part are small. When an article sells for fifty cents and a 1% tax

is imposed, the one-half cent cannot be charged a customer, because the article cannot be sold for fifty and one-half cents. Furthermore, they will not be able to compete with stores doing a similar business which are not taxed. Kaufman Straus has a shoe department in its store. There are two dozen shoe departments in Louisville, all of them doing less than $400,000 worth of business a year, and they all pay practically no tax. If Kaufman Straus passes the tax on to the consumer, it would not be able to meet the competition of the other stores. The same is true of hosiery. There are a dozen hosiery stores on Fourth Street doing a small business, and in the ready-to-wear field there are perhaps thirty to forty shops that would practically not be effected by the tax. Kaufman Straus would be subject to a tax, but it could not pass the tax on to the consumer because it could not compete with these other stores unless it kept its prices in line. Some of these other stores do a larger business than the particular department of Kaufman Straus. For example, the shoe department of Kaufman Straus might do a business of $50,000, and competing shoe stores might have a business of $75,000, yet the tax on sales for Kaufman Straus shoe department would be nearly twenty times as large as that imposed upon the competitors. However, Kaufman Straus could not afford to pass the tax on to its customers unless the other stores charged as much as it did.

The witness' attention was then called to Martin Exhibit No. 12 and to the concerns listed therein. He stated that he believed the percentage of profits to sales of the Great Atlantic and Pacific Tea Company was somewhere between one to two per cent.

Both J. C. Penny Company and S. S. Kresge Company, listed in the exhibit, did business in the State of Kentucky. The witness did not know whether American Stores did business in this State.

[fol. 494] Gimbel Brothers, one of the concerns listed, had a volume of $98,000,000 in 1931 and losses of $1,800,000. In 1932 they had a volume of $72,000,000 and losses of approximately $4,500,000.

Federated Department Stores, Hahn Department Stores, and May Department Stores, all of which were listed on the exhibits, did not do any business in Kentucky. The last

named had a volume of $93,000,000 in 1931 and made a profit of $2,197,000; in 1932 they had a volume of $72,500,000 and made $948,000. The witness stated that this is considered to be one of the best managed stores in America. However, the tax would have taken two-thirds of the profits made by this concern.

Both Liggett Brothers and United Cigar Stores Company did business in the State of Kentucky, and both were listed on Exhibit 12. They were both in the hands of a receiver.

W. T. Grant, listed on Exhibit 12, is a 25¢ to $1.00 store, one of the best in America. In 1931 they did a volume of $75,500,000 and made a profit of $2,100,000. In 1932 the volume was $73,000,000 and the profit was $1,500,000. It was one of the best of its kind and only showed a percent of profit of 2.6%.

City Stores did business in Kentucky, Kaufman Straus being a subsidiary. In 1930 City Stores had a volume of $47,000,000, and a profit of $475,000. In 1931 they had a volume of $35,600,000 and a loss of apprxoimately $2,300,000. In 1932 the loss was $1,800,000 on a volume of $29,500,000. The City Stores subsidiary in Louisville, Kaufman Straus, lost approximately $170,000 in 1931. The witness took over the store March 1, 1932, and for that year the store lost $50,000, or $120,000 less than in 1931. The actual operating loss for 1932 was $9,000, the rest being depreciation.

The witness here states that the figures he was giving were taken from "Retailing" of May 1, 1933, and also from "Fairchild's Financial Report" for May, 1933. They are [fol. 495] compiled by these publications from the financial statements as published by the various companies and are considered reliable statistical data. In every case they report the statements which are certified to by reputable accountants.

Mercantile Stores have one store in Louisville, this being J. Bacon and Company, which lost money. National Bellas Hess was in the hands of a receiver. Walgreen Drug Company operated in Louisville but the witness had no information regarding them. McCrory Stores, a five and ten cent store, operate in Louisville and are in the hands of a receiver. The same is true of Schulte Retail Stores.

Fashion Park and F. W. Grant are in the hands of receivers. The last named operates in Kentucky. Child's Restaurant operates in Kentucky and has been through the process of reorganization. Bohack's, a grocery chain, does not operate in Kentucky. J. J. Newberry have a store in Louisville. In 1931, on sales of $31,000,000, they made a profit of $1,000,000; in 1932, on a sales volume of $33,000,000, they made $819,000. They are considered excellent operators and show a 2½% profit in 1932. Shattuck does not operate in Kentucky. Interstate Department Stores have gone through reorganization, the founder of the company having severed his connections with it. In 1931 they had sales of $25,000,000 and a profit of $547,000. In 1932 they had sales of $22,000,000 and a loss of $600,000. The Dominion Stores do not operate in Louisville. McLellan do operate in Kentucky and in 1931 they had a volume of $22,000,000 and profits of $360,000, or 1.6%. Hartman Corporation is a furniture chain which was in the hands of a receiver and has just been sold at auction. Consolidated Retail Stores have had a complete reorganization, having had losses so drastic that they had to go out of business and change their name. Lerner's are doing business in Kentucky. They are asking for reductions from a num-
[fol. 496] ber of their landlords and are threatening bankruptcy if they do not secure the reductions. In 1931 they had a volume of $26,000,000, a profit of $379,000, or 1.4% on sales. Bryant is in bad shape. Their volume for the fiscal year ending May 31, 1931, was $17,700,000, with profits of $227,000. For the years 1931 and 1932 they had a volume of $13,000,000 and losses of $156,000. Neisner operate in Kentucky. In 1930 they had a volume of $16,000,000 and a profit of $330,000. In 1931 their volume was the same, but they lost $639,000. In 1932 their volume was $14,000,000 and they lost $46,800.

Best and Company, Reliable Stores, National Grocery Company, do not operate in Kentucky. The same is true of Ludwig, Bauman & Company and Magnin.

American Department Stores had a volume of $3,300,000 in 1930 on which they suffered a loss of $84,000. In 1931 their volume was $1,700,000 and their losses $168,000. The volume in 1932 is not given. They lost $248,000.

Mangel Stores operate in Kentucky. A receiver was applied for recently and they effected a reorganization and secured a substantial reduction in rentals. Feltman & Curme are in the hands of their bankers. Loft, Inc., is an eastern chain in reorganization. Southern Department Stores operated five stores, two in Louisville, one in Nashville, one in Evansville and one in Birmingham. They closed the Louisville store of John C. Lewis and Company and the Birmingham Store. They are losing money.

Sally Frocks operate in Louisville. They are in the hands of a receiver.

(Here follow photolithographs of Schacter Exhibits, Nos. 1, 2, 3, 4, and 5, side folios 497, 498, 499, 500, 501, 502, 503 and 504.)

EXHIBIT SCHACTER #1

Table 2. Operating Results of Department Stores by Sales Volume Groups: 1932

(Common Figures; Net Sales = 100%, except where noted)

Items	Sales Volume Groups (000 omitted)									
	Less than $150	$150–300	$300–500	$500–750	$750–1,000	$1,000–2,000	$2,000–4,000	$4,000–10,000	$10,000–20,000	$20,000 or more
Number of Reports	78	70	45	33	24	65	45	47	15	6
Aggregate Sales (in millions)	$7	$17	$18	$21	$21	$96	$165	$287	$213	$223
Typical Net Sales (in thousands)	$80	$210	$395	$610	$890	$1,375	$2,650	$5,750	$14,000	$32,000
Index of Change in Sales (1932/1931)	74.8	74.5	75.5	77.0	76.5	77.0	77.7	77.2	76.1	77.5
Population of City (in thousands)	10	25	40	70	95	125	350	500	1,700	2,500
Total Merchandise Costs (Net)	73.0%	72.8%	69.0%	69.1%	69.7%	68.0%	67.3%	67.4%	65.8%	65.1%
GROSS MARGIN	20.1	27.2	31.0	30.9	30.3	32.0	32.7	32.6	34.2	34.9
Total Pay Roll	19.3%	18.4%	19.5%	19.9%	19.9%	19.1%	18.5%	18.7%	18.6%	18.2%
Real Estate Costs (See Appendix, page 55)	4.6	4.6	4.2	4.9	5.9	5.3	6.3	6.45	6.8	7.7
Newspaper Advertising	*	2.1	2.5	3.35	*	3.3	4.0	4.0	3.45	*
Direct Advertising	*	0.2†	0.25†	0.15†	*	0.1	0.3	0.3	0.15	*
Other Advertising	*	0.3†	0.35†	0.25†	*	0.3	0.3	0.2	0.2	*
Total Advertising (subtotal)	2.5	(2.6)	(3.1)	(3.75)	3.75	(3.7)	(4.6)	(4.5)	(3.8)	3.3
Taxes (except on real estate and income)	0.8	0.75	0.7	0.65	0.55	0.55	0.5	0.4	0.35	0.4
Interest (except on real estate)	3.4	3.1	2.6	2.55	2.5	2.6	2.6	2.4	2.2	2.2
Supplies	0.85	1.05	1.25	1.4	1.5	1.6	1.8	1.8	1.7	1.8
Service Purchased	1.15	1.25	1.3	1.4	1.2	1.1	1.15	1.09	0.8	0.8
Unclassified: Losses from Bad Debts	0.4	0.55	0.45	0.5	0.6	0.65	0.7	0.65	0.7	0.85
Other	0.75	0.6	0.7	0.9	0.85	0.65	0.95	0.75	0.85	1.0
Travelling	0.3	0.35	0.45	0.35	0.35	0.45	0.5	0.45	0.3	0.3
Communication	0.45	0.55	0.6	0.6	0.6	0.6	0.6	0.6	0.55	0.5
Repairs	0.15†	0.2	0.25	0.3	0.3	0.3	0.3	0.3	0.3	0.35
Insurance (except on real estate)	0.7	0.6	0.6	0.45	0.4	0.4	0.4	0.3	0.3	0.3
								1.05	1.25	1.35

EXHIBIT SCHACTER #1

Table 2. Operating Results of Department Stores by Sales Volume Groups: 1932

(Common Figures; Net Sales = 100%, except where noted)

Items	Sales Volume Groups (000 omitted)									
	Less than $150	$150–300	$300–500	$500–750	$750–1,000	$1,000–2,000	$2,000–4,000	$4,000–10,000	$10,000–20,000	$20,000 or more
Number of Reports	78	70	45	33	24	65	45	47	15	6
Aggregate Sales (in millions)	$7	$17	$18	$21	$21	$96	$165	$287	$213	$223
Typical Net Sales (in thousands)	$80	$210	$395	$610	$890	$1,375	$2,650	$5,750	$14,000	$32,000
Index of Change in Sales (1932/1931)	74.8	74.5	75.5	77.0	76.5	77.0	77.7	77.2	76.1	77.5
Population of City (in thousands)	10	25	40	70	95	125	350	500	1,700	2,500
Total Merchandise Costs (Net)	73.9%	72.8%	69.0%	69.1%	69.7%	68.0%	67.3%	67.4%	65.8%	65.1%
Gross Margin	20.1	27.2	31.0	30.9	30.3	32.0	32.7	32.6	34.2	34.9
Total Pay Roll	19.3%	18.4%	19.5%	19.9%	19.9%	19.1%	18.5%	18.7%	18.6%	18.2%
Real Estate Costs (See Appendix, page 55)	4.6	4.6	4.2	4.9	5.9	5.3	6.3	6.45	6.8	7.7
Newspaper Advertising	*	2.1	2.5	3.35	*	3.3	4.0	4.0	3.45	*
Direct Advertising	*	0.2†	0.25†	0.15†	*	0.1	0.3	0.3	0.15	*
Other Advertising	*	0.3†	0.35†	0.25†	*	0.3	0.3	0.2	0.2	*
Total Advertising (subtotal)	2.5	(2.6)	(3.1)	(3.75)	3.75	(3.7)	(4.6)	(4.5)	(3.8)	3.3
Taxes (except on real estate and income)	0.8	0.75	0.7	0.65	0.55	0.55	0.5	0.4	0.35	0.4
Interest (except on real estate)	3.4	3.1	2.6	2.55	2.5	2.6	2.6	2.4	2.2	2.2
Supplies	0.85	1.05	1.25	1.4	1.5	1.6	1.8	1.8	1.7	1.8
Service Purchased	1.15	1.25	1.3	1.4	1.2	1.1	1.15	1.05	0.8	0.8
Unclassified: Losses from Bad Debts	0.4	0.55	0.45	0.5	0.6	0.65	0.7	0.65	0.7	0.85
Other	0.75	0.6	0.7	0.9	0.85	0.65	0.95	0.75	0.85	1.0
Travelling	0.3	0.35	0.45	0.35	0.35	0.45	0.5	0.45	0.3	0.3
Communication	0.45	0.55	0.6	0.6	0.6	0.6	0.6	0.6	0.55	0.5
Repairs	0.15†	0.2	0.25	0.3	0.3	0.3	0.3	0.3	0.3	0.35
Insurance (except on real estate)	0.7	0.6	0.6	0.45	0.4	0.4	0.4	0.3	0.3	0.3
Depreciation (except on real estate)	0.9	1.0	0.9	0.9	0.9	1.15	1.0	1.05	1.25	1.35
Professional Services (See Appendix, page 56)	0.15†	0.3†	0.6	0.55	0.5	0.65	0.6	0.6	0.6	0.55
Total Expense	36.4%	35.9%	37.2%	39.1%	39.8%	38.8%	40.5%	40.0%	39.1%	39.6%
Net Profit or Loss	L. 10.3%	L. 8.7%	L. 6.2%	L. 8.2%	L. 9.5%	L. 6.8%	L. 7.8%	L. 7.4%	L. 4.9%	L. 4.7%
Net Other Income (including interest on capital owned)	3.6	3.3	3.6	3.2	5.0	4.2	4.0	4.4	3.8	4.2
Net Gain:										
Percentage of Net Sales	L. 6.7%	L. 5.4%	L. 2.6%	L. 5.0%	L. 4.5%	L. 2.6%	L. 3.8%	L. 3.0%	L. 1.1%	L. 0.5%
Percentage of Net Worth	L. 12.2	L. 9.0	L. 5.0	L. 10.0	L. 6.0	L. 4.0	L. 6.7	L. 3.5	L. 0.8	*
Rate of Stock-turn (times a year): Based on Beginning and Ending Inventories	2.0	2.5	3.2	3.5	3.4	3.6	4.0	4.3	4.5	5.7
Returns and Allowances	2.0%†	5.0%†	6.4%†	6.4%†	6.5%†	8.0%	10.7%	11.9%	13.3%	16.0%
Initial Mark-up (percentage of original retail value):										
On Net Cost Delivered	35.2	37.2	39.3	39.4	38.4	39.3	40.4	40.5	41.9	41.8
Mark-downs	*	*	*	11.2†	9.8	8.7	9.3	9.8	10.0	8.5
Discounts to Employees and Others	*	*	*	0.45†	0.4†	0.5†	0.5†	0.55	0.6	0.7
Stock Shortages (total for year)	*	*	*	1.65	1.4	1.8	1.6	1.65	1.8	1.8
Total Retail Reductions	13.5%†	15.0%†	13.0%	13.3%	11.6%	11.0%	11.4%	12.0%	12.4%	11.0%
Sales per Square Foot of Total Space	$8.00†	$9.00†	$11.00†	$12.50†	$10.50	$12.30†	$12.80	$15.50	$16.00	$20.00†
Real Estate Costs per Square Foot of Total Space	.40†	.40†	.45†	.60†	.60	.65†	.80	1.00	1.10	*
Sales/Total Employees	$5,700†	$6,000†	$5,700†	$5,500†	$5,000†	$5,300	$5,800	$6,000	$6,300	$7,100†
% Cash and C. O. D. Sales	62.0%†	55.0%†	58.0%†	49.5%†	†50.25%	46.5%†	48.4%	46.7%	48.5%	56.3%
% Charge and Installment Sales	38.0†	45.0†	42.0†	50.5†	49.75†	53.5†	51.6	53.3	51.5	43.7
% of Firms Earning Some Net Profit	6.4%	0.9%	8.9%	0.0%	0.0%	0.9%	0.0%	6.4%	0.0%	16.7%
% of Firms Earning Some Net Gain	11.5	11.4	26.7	15.2	12.5	26.2	23.4	36.2	40.0	33.3

* Data not available.
† Figures for this item were given on less than 75% of the reports used.

324A

EXHIBIT SCHACTER #2

Table 34. Operating Results of 64 Specialty Stores Reporting for 1928

Net Sales = 100%

	Net Sales less than $1,000,000			Net Sales over $1,000,000		
	Common Figure	Interquartile Range† (Middle 50% of Items) From	To	Common Figure	Interquartile Range† (Middle 50% of Items) From	To
Number of Firms	36			28		
Aggregate Sales	$14,779,030			$156,865,993		
Typical Net Sales	400,000	$185,000	$625,000	3,250,000	$2,700,000	$4,500,000
Total Merchandise Costs	67.2%	65.62%	69.88%	64.7%	63.52%	65.97%
Gross Margin	32.8	30.64	34.38	35.3	34.03	36.48
*Functional Division of Salaries and Wages:**						
Executive				1.45%	0.96%	1.65%
Other Administrative				0.6	0.43	0.67
Office				1.65	1.31	1.75
Occupancy				0.85	0.65	0.99
Publicity				0.7	0.58	0.75
Buying				3.25	2.48	3.57
Receiving, Marking, and Stock-room				0.3	0.21	0.35
Direct Selling				5.15	4.76	5.56
Managers and Assistants				0.45	0.28	0.66
Indirect Selling				1.2	0.72	1.59
Delivery				0.5	0.27	0.65
Total Salaries and Wages	15.5%	13.50%	17.78%	16.1%	14.85%	16.57%
Rentals	4.8	3.54	6.65	3.85	2.56	4.99
Advertising	3.4	2.66	4.49	3.85	2.90	4.65
Taxes	0.35	0.11	0.53	0.4	0.27	0.55
Interest	2.1	1.54	2.70	1.8	1.43	2.38
Supplies	1.0	0.73	1.36	1.5	1.32	1.59
Service Purchased	0.85	0.46	1.29	0.65	0.46	0.85
Unclassified	0.8	0.47	1.15	1.05	0.70	1.24
Travelling	0.7	0.36	0.99	0.65	0.48	0.77
Communication	0.4	0.24	0.47	0.35	0.28	0.39
Repairs	0.2	0.10	0.31	0.25	0.15	0.42
Insurance	0.5	0.31	0.64	0.4	0.21	0.52
Depreciation:						
Losses from Bad Debts	0.35	0.13	0.53	0.35	0.15	0.56
Other Depreciation	0.7	0.52	1.13	0.8	0.65	0.92
Professional Services	0.25	0.15	0.47	0.3	0.22	0.42
Total Expense	31.9%	28.93%	33.91%	32.3%	30.39%	33.70%
*Expenses by Functional Groups:**						
Total Administrative and General				7.4%	6.50%	7.88%
Total Occupancy				6.1	5.46	6.69
Total Publicity				5.7	4.72	6.57
Total Buying				4.5	3.21	5.01
Total General Selling				7.7	7.10	8.38
Total Delivery				0.9	0.63	1.14
Total Expense	31.9%	28.93%	33.91%	32.3%	30.39%	33.70%
Net Profit	0.9%	*Loss 0.73%*	2.91%	3.0%	2.08%	5.16%
Total Net Gain:						
Percentage of Net Sales	2.8%	0.93%	5.25%	5.8%	4.56%	8.08%
Percentage of Net Worth	8.9%	3.20%	20.75%	15.5%	10.64%	20.35%
Rate of Stock-turn (times a year):						
Based on beginning and ending inventories	3.9	2.63	5.52	5.9	4.65	7.15
Based on monthly inventories	4.0	3.07	5.03	4.6	3.65	6.14
Returns and Allowances	8.2%	5.74%	11.40%	14.3%	10.53%	17.31%

†Neither the high nor the low figures, of course, are all for any one firm; consequently, they cannot be totalled.

*Percentages for these items were based on 23 reports; data on the other reports were not in sufficient detail to permit their use.

Exhibit A

3248

EXHIBIT SCHACTER #3

Table 3. Typical Operating Results of Department Stores with Net Sales of $2,000,000 or More: 1929

(Net Sales = 100%)

Item No.		Common Figures	Interquartile Range[2] (Middle 50% of Items)		Grouped According to Sales Volume		
					Net Sales		
			From	To	$2,000,000–$3,999,000	$4,000,000–$9,999,000	$10,000,000 or more
	Number of Reports[1]	133			58	46	29
1	Aggregate Sales (in thousands)	$1,190,523			$197,398	$317,051	$676,074
2	Typical Net Sales (in thousands)	$5,200	$3,000	$9,000	$2,800	$6,000	$18,500
3	Index of Change in Sales	101.2	97.42	105.39	100.9	100.6	102.4
4	Size of City	300,000	140,000	632,000	130,000	360,000	900,000
5	Net Profit or Loss	0.8%	*Loss 1.47%*	3.03%	0.3%	0.9%	1.6%
6	Total Merchandise Costs	66.4%	65.11%	68.04%	67.1%	66.3%	65.6%
7	GROSS MARGIN	33.6	31.96	34.89	32.9	33.7	34.4
8	Total Pay Roll	16.8%	15.62%	17.60%	16.6%	16.7%	17.0%
9	Fixed Plant and Equipment Costs[3]	4.9	4.06	5.67	4.9	4.7	5.1
10	Advertising	3.45	2.70	4.19	3.4	3.6	3.3
11	Taxes[4]	0.3	0.23	0.48	0.35	0.35	0.3
12	Interest[4]	2.0	1.66	2.36	2.1	2.1	1.85
13	Supplies	1.65	1.33	1.91	1.5	1.75	1.7
14	Service Purchased	0.65	0.46	0.99	0.75	0.7	0.5
15	Unclassified: Losses from Bad Debts	0.3	0.15	0.41	0.3	0.3	0.25
16	Unclassified: Other[5]	0.85	0.61	1.04	0.8	0.8	0.85
17	Travelling	0.45	0.30	0.58	0.5	0.45	0.35
18	Communication	0.35	0.28	0.41	0.35	0.35	0.35
19	Repairs[4]	0.35	0.22	0.48	0.3	0.3	0.5
20	Insurance[4]	0.25	0.19	0.34	0.25	0.25	0.2
21	Depreciation[4]	0.1	0.05	0.12	0.1	0.1[6]	0.1
22	Professional Services[5]	0.4	0.22	0.57	0.4	0.35	0.45
23	TOTAL EXPENSE	32.8%	30.91%	34.76%	32.6%	32.8%	32.8%
24	NET PROFIT OR LOSS	0.8%	*Loss 1.47%*	3.03%	0.3%	0.9%	1.6%
25	Net Other Income	3.4	2.71	4.38	3.4	3.0	3.7
26	NET GAIN: Percentage of Net Sales	4.2%	1.63%	6.58%	3.7%	3.9%	5.3%
27	NET GAIN: Percentage of Net Worth	8.5%	4.23%	13.02%	7.6%	8.1%	11.3%
	Rate of Stock-turn (times a year)						
28	Based on Beginning and Ending Inventories	4.2	3.46	4.94	3.9	4.0	4.6
29	Based on Monthly Inventories	3.6	2.92	4.22	3.3	3.6	4.0
30	Returns and Allowances	10.5%	8.18%	13.40%	8.5%	10.6%	14.0%
31	Mark-downs	6.6	5.85	7.64	6.7	6.6	6.6
32	Inward Freight, Express, and Truckage	0.9[6]	0.65	1.20	1.05	0.95	0.65[6]
33	Cash Discounts Received on Purchases of Merchandise	2.7	2.39	3.11	2.5	2.8	3.1
34	Alteration and Workroom Costs	0.65	0.39	1.08	0.75[6]	0.7	0.6

[1] Where chains of stores operating branches submitted separate statements for individual units, each statement was treated here as a separate report. When a report covering more than one unit was submitted, the report was grouped according to the average sales volume per unit.

[2] Neither the high nor the low figures, of course, are all for any one report; consequently they cannot be totalled. For explanation of the Interquartile Range, see Appendix 2, page 57.

[3] Lack of comparable classification data made it impossible to include the entire 133 reports in these groups.

[4] Taxes, Interest, Insurance, and Depreciation on Real Estate and Equipment have been combined with Rental Expense under Fixed Plant and Equipment Costs. The report figure for 1929 includes the cost of repairs on real estate considered in preceding years as a part of the rental charge. In charging interest for 1929, assets rather than borrowed capital and net worth were used. In effect this included a charge typically amounting to approximately 0.3% of net sales for interest on non-interest bearing liabilities to outside creditors. In comparing these figures with those for preceding years careful attention should be paid to these changes in the definition of the items. See also pages 57–59.

[5] The item, Professional Services, has been expanded to include membership dues, and fees in buying associations and in domestic and foreign buying offices; amounts previously included under Unclassified Expense. In order to secure comparability between firms that provide their own offices and those which use the services of other agencies, tenancy charges on buying offices have been included in the professional service item.

[6] Amounts were entered for this item on less than 75% of the reports used in the division.

Exhibit B

324C

EXHIBIT SCHACTER #3 (Continued)

Table 3. — (*Continued*)

Grouped According to Sales Increase or Decrease (1928–29)[1]			Grouped According to Size of City[2]			Grouped According to Rate of Profit or Loss[3]				
Index of Change in Sales			Population			Net Loss		Net Profit		
Less than 100.0	100.0–105.0	105.0 or more	Less than 250,000	250,000–499,000	500,000 or more	2.5% or more	Less than 2.5%	Less than 2.5%	2.5% or more	Item No.
44	43	31	59	32	40	25	30	29	41	1
$292,253	$331,327	$408,638	$211,895	$251,025	$690,680	$141,891	$216,000	$258,316	$531,871	
$4,800	$5,700	$5,200	$3,000	$5,900	$11,000	$4,500	$4,000	$5,000	$6,600	2
95.7	101.6	109.0	101.2	102.0	101.2	99.3	99.5	101.7	102.9	3
300,000	250,000	350,000	100,000	310,000	800,000	300,000	250,000	225,000	350,000	4
Loss 0.3%	1.9%	0.8%	0.5%	0.8%	1.2%	*Loss 3.7%*	*Loss 1.0%*	1.4%	3.8%	5
67.0%	66.5%	65.8%	67.3%	66.0%	65.5%	67.8%	67.2%	66.8%	65.3%	6
33.0	33.5	34.2	32.7	34.0	34.5	32.2	32.8	33.2	34.7	7
17.1%	16.6%	16.9%	16.6%	16.9%	16.9%	17.8%	17.1%	16.5%	16.2%	8
4.75	4.7	5.3	4.9	4.95	4.95	5.75	5.0	4.7	4.7	9[4]
3.85	3.0	3.4	3.0	3.75	3.85	4.25	4.0	3.25	2.7	10
0.35	0.3	0.3	0.35	0.35	0.3	0.3	0.3	0.3	0.35	11[4]
2.05	2.05	2.0	2.15	1.95	1.85	2.0	2.05	2.0	1.9	12[4]
1.65	1.6	1.7	1.55	1.75	1.7	1.8	1.6	1.6	1.6	13
0.65	0.65	0.7	0.7	0.65	0.65	0.7	0.75	0.65	0.55	14
0.3	0.25	0.3	0.3	0.3	0.25	0.3	0.3	0.3	0.2	15
0.75	0.8	0.85	0.8	0.75	0.8	0.85	0.75	0.75	0.8	16[4]
0.4	0.4	0.55	0.5	0.5	0.4	0.45	0.5	0.4	0.45	17
0.35	0.35	0.35	0.3	0.35	0.35	0.4	0.35	0.3	0.3	18
0.4	0.3	0.25	0.3	0.35	0.45	0.35	0.3	0.3	0.45	19[4]
0.25	0.2	0.2	0.25	0.25	0.25	0.35	0.25	0.25	0.25	20[4]
0.1	0.05	0.1	0.1	0.05	0.1	0.1	0.1	0.05	0.1	21[4]
0.35	0.35	0.5	0.4	0.35	0.5	0.5	0.45	0.45	0.35	22[4]
33.3%	31.6%	33.4%	32.2%	33.2%	33.3%	35.9%	33.8%	31.8%	30.9%	23
Loss 0.3%	1.9%	0.8%	0.5%	0.8%	1.2%	*Loss 3.7%*	*Loss 1.0%*	1.4%	3.8%	24
3.5	3.3	3.2	3.7	2.9	3.3	2.9	3.4	3.4	3.7	25
3.2%	5.2%	4.0%	4.2%	3.7%	4.5%	*Loss 0.8%*	2.4%	4.8%	7.5%	26
5.9%	10.1%	10.7%	8.7%	6.9%	9.4%	*Loss 1.5%*	5.5%	10.5%	14.3%	27
4.0	4.0	4.5	3.8	4.3	4.7	4.2	4.1	4.3	4.3	28
3.5	3.5	3.7	3.2	3.8	4.0	3.6	3.5	3.6	3.7	29
9.7%	10.1%	11.9%	8.6%[5]	10.8%	13.7%	12.5%	10.4%	9.3%	10.5%	30
6.8	6.5	6.55	6.5	6.85	6.5	6.7	7.2	6.2	6.5	31
0.9	0.9	1.0	1.1	0.95	0.65	0.9	0.9	0.9	0.8	32
2.55	2.75	2.8	2.4	2.9	3.2	2.7	2.7	2.65	2.75	33
0.65	0.95[6]	0.45	0.75[6]	0.6[6]	0.7	0.75	0.5	0.85	0.6[6]	34

500

324D

EXHIBIT SCHACTER #4

Table 9. Typical Operating Results of Department Stores with Net Sales of from $500,000 to $1,999,000: 1929

(Net Sales = 100%)

Item No.		Common Figure[1]	Interquartile Range[2] (Middle 50% of Items)		Grouped According to Sales Volume		
					Net Sales		
			From	To	$500,000–$749,000	$750,000–$999,000	$1,000,000–$1,999,000
	Number of Reports	168			59	36	73
1	Aggregate Sales (in thousands)	$169,606			$35,825	$32,642	$101,139
2	Typical Net Sales (in thousands)	$910	$650	$1,260	$690	$850	$1,300
3	Index of Change in Sales	98.5	94.34	102.68	98.3	99.0	98.3
4	Size of City	55,000	30,000	113,000	35,000	50,000	75,000
5	Net Profit or Loss	*Loss 0.2%*	*Loss 2.26%*	1.73%	*Loss 0.4%*	*Loss 0.5%*	0.1%
6	Total Merchandise Costs	68.2%	66.38%	69.89%	68.5%	68.2%	67.9%
7	Gross Margin	31.8	30.11	33.12	31.5	31.8	32.1
8	Total Pay Roll	16.6%	15.11%	18.23%	16.9%	16.2%	16.7%
9	Fixed Plant and Equipment Costs[3]	4.5	3.66	5.48	4.5	4.5	4.5
10	Advertising	3.0	2.35	3.62	2.6	3.2	3.2
11	Taxes[4]	0.45	0.27	0.68	0.6	0.45	0.4
12	Interest[4]	2.4	1.93	2.84	2.6	2.45	2.3
13	Supplies	1.3	0.92	1.55	1.0	1.4	1.4
14	Service Purchased	0.85	0.61	1.14	0.85	0.95	0.8
15	Unclassified: Losses from Bad Debts	0.25	0.14	0.43	0.25	0.25	0.25
16	Unclassified: Other[5]	0.8	0.42	1.20	0.7	1.1	0.7
17	Travelling	0.45	0.28	0.64	0.45	0.45	0.45
18	Communication	0.35	0.25	0.44	0.35	0.3	0.35
19	Repairs[4]	0.3	0.18	0.46	0.3	0.3	0.25
20	Insurance[4]	0.4	0.27	0.51	0.45	0.4	0.35
21	Depreciation[4]	0.05[6]	0.04	0.11	0.05[6]	0.05[6]	0.05
22	Professional Services[5]	0.3	0.14	0.54	0.3	0.3	0.3
23	Total Expense	32.0%	28.96%	34.73%	31.9%	32.3%	32.0%
24	Net Profit or Loss	*Loss 0.2%*	*Loss 2.26%*	1.73%	*Loss 0.4%*	*Loss 0.5%*	0.1%
25	Net Other Income	3.3	2.46	4.28	3.6	3.5	3.0
26	Net Gain: Percentage of Net Sales	3.1%	0.71%	5.24%	3.2%	3.0%	3.1%
27	Net Gain: Percentage of Net Worth	7.5%	2.88%	12.17%	6.8%	6.6%	8.4%
	Rate of Stock-turn (times a year)						
28	Based on Beginning and Ending Inventories	3.3	2.66	4.03	2.7	3.4	3.6
29	Based on Monthly Inventories	2.8[6]	2.37	3.38	2.3[6]	3.0	3.0
30	Returns and Allowances	6.8%[6]	4.34%	9.70%	6.1%[6]	7.3%[6]	7.3%
31	Mark-downs	7.2[6]	5.69	9.27	8.8[6]	7.9[6]	6.5[6]
32	Inward Freight, Express, and Truckage	1.0	0.80	1.21	1.1	1.05	0.9
33	Cash Discounts Received on Purchases of Merchandise	2.5	2.20	2.82	2.5	2.5	2.5
34	Alteration and Workroom Costs	0.5[6]	0.20	0.96	0.4[6]	0.6[6]	0.55

[1] Where chains or stores operating branches submitted separate statements for individual units, each statement was treated here as a separate report. When a report covering more than one unit was submitted, the report was grouped according to the average sales volume per unit.

[2] Neither the high nor the low figures, of course, are all for any one report; consequently they cannot be totalled. For explanation of the Interquartile Range, see Appendix 2, page 57.

[3] Lack of comparable classification data made it impossible to include the entire 168 reports in these groups.

[4] Taxes, Interest, Insurance, and Depreciation on Real Estate and Equipment have been combined with Rental Expense under Fixed Plant and Equipment Costs. The repair figure for 1929 includes the cost of repairs on real estate considered in preceding years as a part of the rental charge. In charging interest for 1929, assets rather than borrowed capital and net worth were used. In effect this included a charge typically amounting to approximately 0.3% of net sales for interest on non-interest bearing liabilities to outside creditors. In comparing these figures with those for preceding years careful attention should be paid to these changes in the definition of the items. See also pages 57-59.

[5] The item, Professional Services, has been expanded to include membership, dues, and fees in buying associations and in domestic and foreign buying offices, amounts previously included under Unclassified Expense. In order to secure comparability between firms that provide their own offices and those which use the services of other agencies, tenancy charges on buying offices have been included in the professional service item.

[6] Amounts were entered for this item on less than 75% of the reports used in the division.

501

Exhibit e

324E

EXHIBIT SCHACTER #4 (Continued)

Table 9. — (Continued)

Grouped According to Sales Increase or Decrease (1928–29)[1]				Grouped According to Size of City[2]			Grouped According to Rate of Profit or Loss[3]				
Index of Change in Sales				Population			Net Loss		Net Profit		
Less than 95.0	95.0–99.9	100.0–104.9	105.0 or more	Less than 50,000	50,000–99,999	100,000 or more	2.5% or more	Less than 2.5%	Less than 2.5%	2.5% or more	Item No.
41	43	30	22	82	36	47	40	43	44	27	1.
$40,611	$44,653	$31,214	$22,787	$69,528	$38,426	$58,037	$40,507	$43,957	$43,005	$28,068	
$900	$940	$1,000	$900	$730	$990	$1,200	$900	$875	$940	$950	2
91.4	97.8	102.5	109.0	98.8	96.5	99.6	93.8	99.4	100.0	101.0	3
50,000	60,000	60,000	55,000	30,000	55,000	150,000	95,000	50,000	50,000	50,000	4
Loss 1.8%	*Loss 0.6%*	0.5%	1.0%	0.5%	*Loss 0.9%*	*Loss 1.0%*	*Loss 4.4%*	*Loss 0.9%*	1.1%	4.1%	5
69.0%	67.9%	68.5%	67.9%	68.5%	67.2%	68.2%	68.5%	68.3%	68.3%	68.1%	6
31.0	32.1	31.5	32.1	31.5	32.8	31.8	31.5	31.7	31.7	31.9	7
16.9%	16.9%	16.2%	16.3%	16.4%	17.8%	16.4%	17.6%	17.2%	16.3%	14.7%	8
4.35	4.6	4.3	4.7	4.25	4.5	5.1	5.55	4.55	4.25	3.85	9[4]
3.0	3.0	2.85	2.9	2.5	3.25	3.6	3.85	2.95	2.55	2.5	10
0.6	0.5	0.4	0.3	0.55	0.45	0.4	0.6	0.4	0.35	0.4	11[4]
2.6	2.45	2.3	2.2	2.5	2.45	2.25	2.7	2.4	2.3	2.1	12[4]
1.3	1.4	1.3	1.2	1.2	1.4	1.35	1.4	1.4	1.3	0.95	13
0.9	0.9	0.8	0.85	0.8	1.05	0.85	0.95	0.9	0.8	0.75	14
0.25	0.25	0.3	0.25	0.25	0.25	0.25	0.35	0.2	0.25	0.25	15
0.85	0.75	0.85	0.8	0.75	0.65	0.85	0.9	0.75	0.8	0.65	16[5]
0.55	0.5	0.35	0.35	0.45	0.5	0.45	0.55	0.45	0.4	0.4	17
0.35	0.4	0.35	0.3	0.35	0.35	0.35	0.35	0.35	0.35	0.3	18
0.3	0.3	0.3	0.25	0.3	0.3	0.25	0.3	0.35	0.25	0.25	19[4]
0.4	0.4	0.4	0.4	0.4	0.35	0.35	0.4	0.35	0.4	0.35	20[4]
0.1[4]	0.05	0.1[4]	0.1[4]	0.05[4]	0.05[4]	0.05	0.05[4]	0.05[4]	0.05[4]	0.05[4]	21[4]
0.35	0.3	0.2	0.2	0.25	0.35	0.3	0.35	0.3	0.25	0.3	22[5]
32.8%	32.7%	31.0%	31.1%	31.0%	33.7%	32.8%	35.9%	32.6%	30.6%	27.8%	23
Loss 1.8%	*Loss 0.6%*	0.5%	1.0%	0.5%	*Loss 0.9%*	*Loss 1.0%*	*Loss 4.4%*	*Loss 0.9%*	1.1%	4.1%	24
3.7	3.3	3.2	3.2	3.5	2.9	3.1	3.4	3.4	3.3	2.6	25
1.9%	2.7%	3.7%	4.2%	4.0%	2.0%	2.1%	*Loss 1.0%*	2.5%	4.4%	6.7%	26
5.2%	6.3%	8.8%	10.2%	8.6%	6.1%	6.8%	*Loss 2.0%*	5.9%	10.4%	18.0%	27
3.0	3.4	3.5	3.5	3.2	3.1	3.6	3.0	3.0	3.5	4.1	28
2.6[4]	2.9	2.8[4]	3.25	2.8[4]	2.7	3.0	2.6	2.6	2.9	3.5[4]	29
Data Insufficient				7.2%[4]	7.5%[4]	5.5%[4]	Data Insufficient				30
Data Insufficient				7.6[4]	7.1[4]	6.7[4]	Data Insufficient				31
0.95%[4]	0.95%	1.0%	1.05%	1.1	1.0	0.85	1.0%[4]	1.0%	1.0%	1.1%	32
2.5	2.65	2.4	2.3	2.5	2.55	2.55	2.5	2.45	2.6	2.5	33
0.4[4]	0.55[4]	0.65[4]	0.5[4]	0.5[4]	0.5[4]	0.5[4]	0.4	0.8[4]	0.6[4]	0.4[4]	34

EXHIBIT SCHACTER #5

Table 14. Typical Operating Results of Department Stores with Net Sales of less than $500,000: 1929

(Net Sales = 100%)

Item No.		Common Figures	Interquartile Range[1] (Middle 50% of Items)		Grouped According to Sales Volume		
					Net Sales		
			From	To	Less than $150,000	$150,000-$299,000	$300,000-$499,000
	Number of Reports[2]	226			59	83	84
1	Aggregate Sales (in thousands)	$59,137			$7,916	$18,640	$32,581
2	Typical Net Sales (in thousands)	$230	$150	$350	$94	$200	$380
3	Index of Change in Sales	99.1	93.89	103.49	98.3	99.3	99.4
4	Size of City	15,000	6,000	25,000	5,000	10,000	25,000
5	Net Profit or Loss	*Loss 1.0%*	*Loss 3.14%*	1.46%	*Loss 0.9%*	*Loss 1.1%*	*Loss 0.8%*
6	Total Merchandise Costs	70.7%	68.24%	73.16%	71.1%	71.3%	69.8%
7	Gross Margin	29.3	26.82	31.76	28.9	28.7	30.2
8	Total Pay Roll	16.1%	13.76%	18.03%	15.6%	16.0%	16.6%
9	Fixed Plant and Equipment Costs[4]	3.9	2.80	4.85	3.8	3.6	4.1
10	Advertising	2.4	1.42	3.11	2.0	2.4	2.65
11	Taxes[4]	0.6	0.34	0.88	0.65	0.6	0.6
12	Interest[4]	2.9	2.25	3.39	3.4	2.9	2.6
13	Supplies	0.85	0.54	1.18	0.75	0.85	0.9
14	Service Purchased	0.9	0.61	1.18	0.9	0.9	0.9
15	Unclassified: Losses from Bad Debts	0.3	0.13	0.52	0.4[5]	0.3	0.3
16	Unclassified: Other[4]	0.55	0.25	0.93	0.5	0.55	0.55
17	Travelling	0.4	0.19	0.57	0.3[5]	0.45	0.4
18	Communication	0.35	0.20	0.43	0.35	0.3	0.35
19	Repairs[4]	0.25[5]	0.12	0.40	0.2[5]	0.2[5]	0.25
20	Insurance[4]	0.55	0.36	0.71	0.65	0.5	0.5
21	Depreciation[4]	0.1[5]	0.00	0.14	0.1[5]	0.1[5]	0.1[5]
22	Professional Services[3]	0.15[5]	0.09	0.37	0.2[5]	0.15[5]	0.2[5]
23	Total Expense	30.3%	26.71%	32.97%	29.8%	29.8%	31.0%
24	Net Profit or Loss	*Loss 1.0%*	*Loss 3.14%*	1.46%	*Loss 0.9%*	*Loss 1.1%*	*Loss 0.8%*
25	Net Other Income	3.3	2.40	4.22	3.9	3.1	3.0
26	Net Gain: Percentage of Net Sales	2.3%	0.56%	4.65%	3.0%	2.0%	2.2%
27	Net Gain: Percentage of Net Worth	5.7%	0.84%	11.17%	6.3%	5.0%	6.0%
	Rate of Stock-turn (times a year)						
28	Based on Beginning and Ending Inventories	2.4	1.92	3.00	1.9	2.4	2.8
29	Based on Monthly Inventories	2.0[6]	1.63	2.53	1.8[6]	1.9[6]	2.3[6]
30	Returns and Allowances	2.4%[6]	1.09%	4.24%	1.7%[6]	1.7%[6]	3.5%[6]
31	Mark-downs	7.2[6]	5.09	9.71	Data Insufficient		
32	Inward Freight, Express, and Truckage	1.2	0.91	1.49	1.15%	1.2%	1.15%
33	Cash Discounts Received on Purchases of Merchandise	2.4	1.87	2.89	2.1	2.5	2.4
34	Alteration and Workroom Costs	0.45[6]	0.33	0.71	0.2[6]	0.5[6]	0.5[6]

[1] Where chains or stores operating branches submitted separate statements for individual units, each statement was treated here as a separate report. Where a report covering more than one unit was submitted, the report was grouped according to the average sales volume per unit.

[2] Neither the high nor the low figures, of course, are all for any one report; consequently they cannot be totalled. For explanation of the Interquartile Range, see Appendix 2, page 57.

[3] Lack of comparable classification data made it impossible to include the entire 226 reports in these groups.

[4] Taxes, Interest, Insurance, and Depreciation on Real Estate and Equipment have been combined with Rental Expense under Fixed Plant and Equipment Costs. The repair figure for 1929 includes the cost of repairs on real estate considered in preceding years as a part of the rental charge. In charging interest for 1929, assets rather than borrowed capital and net worth were used. In effect this included a charge typically amounting to approximately 0.3% of net sales for interest on non-interest bearing liabilities to outside creditors. In comparing these figures with those for preceding years careful attention should be paid to these changes in the definition of the items. See also pages 57-59.

[5] The item, Professional Services, has been expanded to include memberships, dues, and fees in buying associations and in domestic and foreign buying offices, amounts previously included under Unclassified Expense. In order to secure comparability between firms that provide their own offices and those which use the services of other agencies, tenancy charges on buying offices have been included in the professional service item.

[6] Amounts were entered for this item on less than 75% of the reports used in the division.

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EXHIBIT SCHACTER #5 (Continued)

Table 14. — (Continued)

Grouped According to Sales Increase or Decrease (1928–29)[a]				Grouped According to Size of City[a]			Grouped According to Rate of Profit or Loss[a]				Item No.
Index of Change in Sales				Population			Net Loss		Net Profit		
Less than 95.0	95.0–99.0	100.0–104.9	105.0 or more	Less than 10,000	10,000–24,999	25,000 or more	2.5% or more	Less than 2.5%	Less than 2.5%	2.5% or more	
49	50	52	29	89	67	54	77	57	50	36	1
$12,005	$12,531	$12,214	$8,577	$16,110	$18,639	$17,303	$20,092	$14,579	$14,144	$8,736	
$220	$225	$210	$285	$160	$270	$330	$220	$230	$260	$200	2
90.3	97.7	102.4	110.2	99.2	99.4	98.6	96.0	100.4	99.8	102.2	3
10,000	15,000	15,000	15,000	5,000	15,000	40,000	15,000	15,000	15,000	10,000	4
Loss 2.4%	*Loss 0.5%*	*Loss 0.2%*	1.0%	*Loss 0.7%*	*Loss 0.6%*	*Loss 1.5%*	*Loss 4.5%*	*Loss 0.9%*	1.2%	4.2%	5
70.0%	71.2%	70.8%	71.4%	71.8%	70.2%	69.5%	71.3%	70.2%	70.5%	70.0%	6
30.0	28.8	29.2	28.6	28.2	29.8	30.5	28.7	29.8	29.5	30.0	7
17.0%	15.9%	16.1%	14.7%	15.8%	16.1%	17.0%	17.4%	16.8%	14.9%	14.0%	8
4.3	3.65	3.6	3.6	3.45	3.9	4.4	4.1	3.8	3.8	3.2	9[d]
2.5	2.25	2.0	2.1	1.7	2.45	3.25	2.75	2.35	2.1	2.05	10
0.75	0.6	0.65	0.45	0.7	0.6	0.5	0.7	0.65	0.55	0.5	11[d]
3.2	2.8	2.8	2.55	3.2	2.75	2.45	3.35	2.75	2.75	2.4	12[d]
1.0	0.8	0.8	0.8	0.8	0.95	0.9	1.05	0.9	0.75	0.75	13
1.0	0.9	0.85	0.75	0.85	0.95	0.9	1.05	0.9	0.85	0.75	14
0.25	0.35	0.3	0.3	0.35	0.35	0.2	0.3	0.3	0.35	0.25	15
0.6	0.35	0.6	0.8	0.5	0.6	0.6	0.6	0.55	0.6	0.4	16[b]
0.4	0.35	0.4	0.35	0.3	0.45	0.4	0.45	0.45	0.35	0.3	17
0.35	0.3	0.3	0.3	0.3	0.35	0.3	0.35	0.35	0.3	0.3	18
0.2	0.25	0.2	0.3[b]	0.2[b]	0.2[b]	0.3	0.25	0.15[b]	0.25[b]	0.2	19[b]
0.6	0.5	0.55	0.4	0.55	0.5	0.5	0.6	0.5	0.5	0.45	20[b]
0.1[b]	0.05[b]	0.1[b]	0.05[b]	0.05[b]	0.05[b]	0.1[b]	0.05[b]	0.1[b]	0.1[b]	0.05[b]	21[b]
0.15[b]	0.25[b]	0.15[b]	0.15[b]	0.15[b]	0.2[b]	0.2[b]	0.2[b]	0.15[b]	0.15[b]	0.2[b]	22[b]
32.4%	29.3%	29.4%	27.6%	28.9%	30.4%	32.0%	33.2%	30.7%	28.3%	25.8%	23
Loss 2.4%	*Loss 0.5%*	*Loss 0.2%*	1.0%	*Loss 0.7%*	*Loss 0.6%*	*Loss 1.5%*	*Loss 4.5%*	*Loss 0.9%*	1.2%	4.2%	24
3.6	2.9	3.3	2.8	3.7	2.9	3.1	3.6	3.1	2.8	2.8	25
1.2%	2.4%	3.1%	3.8%	3.0%	2.3%	1.6%	*Loss 0.9%*	2.2%	4.0%	7.0%	26
1.7%	5.8%	6.3%	11.7%	5.6%	5.7%	5.7%	*Loss 2.0%*	4.8%	10.5%	16.5%	27
2.0	2.5	2.5	2.8	2.2	2.4	2.8	2.1	2.4	2.5	3.1	28
1.7[b]	2.3[b]	2.1[b]	2.3[b]	1.8[b]	2.0[b]	2.3[b]	1.8[b]	2.1[b]	2.0[b]	2.5[b]	29
Data Insufficient				2.0%[b]	2.6%[b]	3.0%[b]	Data Insufficient				30
Data Insufficient				Data Insufficient			Data Insufficient				31
1.3%	1.15%	1.05%	1.2%	1.2%	1.2%	1.2%	1.2%	1.2%	1.05%	1.25%	32
2.5	2.4	2.45	2.2	2.2	2.6	2.55	2.25	2.4	2.4	2.5	33
0.45[b]	0.35[b]	0.5[b]	0.45[b]	0.35[b]	0.6[b]	0.5[b]	0.4[b]	0.35[b]	0.45[b]	0.6[b]	34

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[fol. 505] Jerry King

JERRY KING, called for the defendants, testified as follows:

He was bookkeeper in the Treasurer's office of the Commonwealth of Kentucky and as such had charge of the books in that office. The records showed the following receipts in the general expenditure fund for the fiscal year ending June 30 as follows:

1926	$ 7,706,538.28
1927	8,059,517.85
1928	8,041,609.73
1929	9,970,769.20
1930	11,068,942.30
1931	11,573,065.01
1932	9,560,305.16
1933	9,502,871.52

Refunds for taxes erroneously paid are always paid in cash. Recent payments of refunds have been on inheritance taxes and beer licenses. These amounted to approximately $125,000.00 and are paid in cash without regard to outstanding warrants.

Cross-examination:

The witness has been connected with the Treasurer's office since January, 1932, and he knew nothing about the administration of affairs of the office except through previous records. He had no personal knowledge as to how refunds were handled prior to that time but he has never run across any case where refund was made other than by cash. He did not think that any warrants were ever issued in such cases and he had never run across any. Money is not paid out without a warrant, which is drawn and presented to the Treasurer. In some cases warrants are simply interest bearing. The figures the witness had given in his direct examination did not give account of the liability outstanding against the general fund through 1926 to 1932. Actually, on June 30, 1933, there were outstanding against the general expenditure fund interest bearing warrants to the amount of $15,197,005.42. There were other outstanding warrants against the school fund and road fund. Beer

tax refund has been paid. Before it was paid it was kept [fol. 506] in the general sinking fund and was set up as a beer license tax fund, having been set apart particularly, so much money being kept in the particular account. Witness considered this a minor fund coming under the general head "general expenditure fund." The refund was paid from one fund, the general expenditure fund, except there was a different set up for each account and it was paid out of the general account. Payment was made on warrants which they presented from the Auditor, which the Treasurer honored. The warrants showed that it was drawn against the account for beer license fund.

Witness thereupon exhibited a warrant drawn by the Auditor of Public Accounts upon the State Treasurer of Kentucky, dated June 27, 1933, stamped "Paid July 13, 1933." The warrant was for $7,125.00 and was payable to G. J. Sheehan and others, $75.00 being due to each of the persons named. The witness stated that payment was made to the people named on the warrant. These persons had not brought any suit and had not recovered any judgment on the fund. At the time the payment was made there were over Fifteen Million Dollars worth of warrants outstanding. The oldest warrant had been outstanding since July, 1927.

Warrants drawn by the Auditor are all separately numbered. The one exhibited was designated No. F-12104. The witness stated that this warrant showed on its face that it was to be paid and charged to the beer license tax fund. The Treasurer, Mr. Huddleston, directed that payment should be made in cash for this particular warrant. He determined whether they should be paid out of order or not. The practice it to pay a warrant when it is presented if it is possible to pay it. If the money is low the Treasurer declines to pay it and turns it back to the holder, stamping it "interest bearing." To the knowledge of the witness the Treasurer pays warrants according to priority, either paying cash or stamping the warrant "interest bear- [fol. 507] ing." There has been no time since January, 1932, when the State Treasurer was able to pay out of the general expenditure fund all of the outstanding warrants against that fund. The Treasurer has made two calls for interest paying warrants during the year preceding the time of the giving of the testimony. He called

a couple of hundred thousand of outstanding warrants dated 1927. Calls for presentation of outstanding warrants apply to the oldest warrants. The two calls made by the State Treasurer did not embrace any warrants that were issued later than July, 1927. All warrants since July, 1927, remained unpaid and they are not paid by the State Treasurer except in order of their issuance when funds are available for that purpose. The only warrants which the State Treasurer has assumed to pay out of order are those which are not stamped interest bearing. In the case of those warrants the owner has to take a chance of getting his money when the State Treasurer has the money to pay. The latter cannot pay all the warrants outstanding which are not marked interest bearing and for this reason he must select some for payment.

Re-examination:

A warrant is merely an order of the Auditor of Public Accounts to the Treasurer of the State of Kentucky to issue a check to the designated payee for a given amount of money. Since the witness has been bookkeeper it has been the practice and custom to pay refunds of taxes in cash. Warrants are divided into two general classes. Those stamped "interest bearing" and those that are not stamped "interest bearing." There are approximately Fifteen Million Dollars worth of outstanding interest bearing warrants. Those warrants are not called ahead of claims against the general expenditure fund. A warrant issued in payment of a judgment or a claim for refund of taxes would be given a preference over the other outstanding warrants even though the latter were older. This has been the practice in refunding inheritance taxes, beer taxes [fol. 508] and other taxes that the court decided were improperly paid. The income into the State Treasurer's office runs from Seven Million to Eleven Million Dollars a year. Some money comes in every day. If a warrant for a sum as large as $200,000.00 should be presented sufficient money would be accumulated in the fund to pay the warrant in cash within a week or ten days, provided no other claims were paid out of the fund during that period. The witness went on to say, however, that he did not know whether such a large warrant would be paid in the event other claims such as salary for State employees were presented.

If the warrant presented was marked interest bearing it would not be paid and might not be paid for a period of five or six years. Since the witness had been in the State Treasurer's office payments had not been made on interest bearing warrants except when there was a call and they were then paid in the order of their issuance.

James W. Martin

JAMES W. MARTIN, called for the defendants, testified as follows:

He was the same James W. Martin who testified by affidavit in the case in 1930. Since that time he has continued his work with the University of Kentucky as Director of business research. He has followed the general line that he had been in at the time the affidavit was made. He had emphasized specially on tax research rather than on general business research. He has been continuously engaged in the study of taxation since that time and has issued several reports and at the request of the Attorney General's office the Bureau of Business Research had made some further investigation in connection with the gross sales tax and also in connection with the Kentucky oleomargarine tax enacted by the Legislature of Kentucky. At the request of the Attorney General the witness had prepared [fol. 509] certain exhibits designed to supplement the information already in the record respecting the effective tax rates of Kentucky as compared with those in other states and countries. The witness thereupon produced the exhibit which was introduced as Martin Exhibit No. 17 and stated that this showed the maximum gross sales tax rate imposed on retailers in the various states and foreign countries. Witness then produced an exhibit in the form of a table showing the effective tax rate on gross sales in Kentucky as compared with other states. This was introduced as Martin Exhibit No. 18.

The witness then introduced the chart introduced as Exhibit 19, showing the net gain of department stores in 1929 to percentage of net worth. Witness then stated that Exhibit 17 was a tabulation of the rates imposed on gross sales in seventeen states and in seventeen foreign or extra continental possessions of the United States. This table included all of the states on which the bureau with which he was connected had any authentic information and pur-

ported to include New Mexico and North Carolina in addition. The statutes of the last two states had been examined and the data given in the table was accurate. The left-hand part of the table indicates the states having the maximum gross sales tax applicable ranging from one-tenth of one per cent to five per cent in the State of Utah. The right-hand part of the table shows that various foreign countries and extra continental possessions of the United States have gross sales taxes ranging from less than one per cent to a maximum of over ten per cent. All of these taxes are placed directly in volume of sales.

Exhibit 18, the witness stated, showed the effective tax rate on gross sales in Kentucky and compared it with those in other states having graduated retail sales taxes. Computations had been made for various amounts ranging up to Twelve Million Dollars and the figures were shown in the right-hand column in such a way as to indicate exactly the effect of the tax rate on the total amount of sales as indicated in the left-hand column of figures. The chart [fol. 510] attached to and made a part of the exhibit showed exactly the same kind of data in graphic form as the rates for Kentucky, being shown in the bottom line; the rates for Minnesota in the next highest line and the rates for New Mexico and Vermont still higher. The chart, the witness stated, was accurate at the various points indicated in the totals and the lines were conventional between those points. The witness was thereupon asked the significance of Exhibit 19 and replied that in his affidavit filed in 1931 the data given in the line marked "Average" were incorporated as part of the affidavit. The evidence presented by Mr. Schacter made a good deal of comment on the fact that there was omitted from the witness's original testimony the data respecting the interquartile range. Witness thought it would be convenient for the court to put the testimony of Mr. Schacter in graphic form. The exhibit means, the witness stated, that the average percentage, that is, the average net gain as a percentage of net worth is indicated in the middle line. The solid line in the chart and the middle fifty percent of the cases arrayed according to the rate of earnings on net worth are shown between the dotted lines, the middle fifty per cent being the interquartile range that Mr. Schacter referred to. This graph showed, the witness stated, that the middle fifty per cent

of the cases arrayed with respect to earnings of the department stores moved very much as the average moved. In other words, the earnings on the invested capital in the case of the smaller enterprises is relatively lower and that on enterprises of intermediate size considerably higher, and that on enterprises of very large size in the department store business it is even larger than the earnings on the intermediate class. The witness stated that it did not seem worthwhile to prepare an exhibit to show the earnings on net sales but from his general investigation it would be about the same in general character. The witness also stated that in preparing his chart he did not [fol. 511] use the data used by Mr. Schacter but he drew it from the original source. When Exhibits 18 and 19 are compared the most important figures are the figures giving the average as far as Exhibit 19 is concerned. The witness did not mean to suggest by his testimony that every department store behaves according to the picture that he presented, but the general average in department store business did behave that way. Consequently, the average was the more satisfactory figure.

The data respecting Kentucky was the most important figure in Exhibit 18 and the comparison of effective tax rate for Kentucky as shown by the chart of Exhibit 18 shows a remarkable resemblance to the curve of the average earnings on net worth of department stores as shown in Exhibit 19.

In imposing progressive business taxes, it is customary that the levy apply against the entire business as a unit rather than against the individual operating divisions. This is true with respect to general business taxes. This has been the case with respect to excess profit taxes of the Federal Government. With respect to Mississippi and Wisconsin, it is true of the graduated income tax. In Maine it is true of the tax on gross receipts from public utilities. The sources of information are shown on the exhibit itself with the exception of an occasional instance in which the witness verified the data by a later examination of more authentic sources.

The witness stated that students of taxation generally believe that a gross sales tax is divided, some of it being passed on to the consumer and some being borne by the original seller. The witness thereupon introduced Exhibits 20, 21,

22 and 23 which were designed to sustain this point. The introduction of these exhibits was objected to.

[fol. 512] Witness stated that Exhibit 20 was based on a survey of the average prices of commodities sold by the chain stores in Lexington, Kentucky, in the Spring of 1930 and in the Spring of 1933. The prices charged by the various chains were indicated in the form of ratio of the average price charged by the individual chain to the average price charged by all chains.

In 1930 there were five chains recorded as doing business in Lexington, and in 1933 there were three chains. The figures in the second column in each half of the table indicated that in actual practice at the present time the chain stores are selling at prices differing by as much as nearly 10% and differing in each instance by some amount. The same general showing is found by an examination of the right-hand figures except that the differences appearing in 1932 with three chains appeared to be not so large as in 1930 when there were five chains operating.

Asked to explain why there were only three chains in 1932 and five in 1930, the witness stated that the Piggly Wiggly stores had been acquired by The Kroger Grocery & Baking Company. Actually, they were acquired prior to 1930 but at the time the data was collected they appeared to be operating separately and the prices were not the same as between Kroger and Piggly Wiggly stores.

Lexington, according to the United States Census, is a city having a population of 46,000 to 47,000 persons but having something like 15,000 outlying population which was not included in the corporate limits. There was a variation shown in the prices charged by chain stores there.

Exhibit 21 was based on a study of retail prices in Chicago and New York similar to the one conducted in Lexington and the Chicago study conforms in point of time in a considerable part to the Lexington study. The one respecting the situation in New York was made a little bit earlier. Witness stated that the significance that he was attaching to this exhibit was the same as the other exhibit except that it might [fol. 513] be important to observe that even in the highly organized markets, such as Chicago and New York, the same situation existed as in Lexington.

Witness stated that other studies had been made in other parts of the country and he had incorporated the data in

Exhibit 22, which shows that even within the same chain and in the same section of the city the prices vary considerably in higher organized markets such as New York.

The witness then stated that the purpose of the Exhibits 20, 21 and 22 was to show that there are price differentials in actual practice among chain stores engaged in the grocery business. The purpose of Exhibit 23 was to show that chain store official organization believed that the tax would be shifted to the consumer if it was imposed. The exhibit was extracted from an article which was published with editorial comment presumably prepared by the Secretary of the Chain Store Association in approval of the general implications of the article. The author of the article was Robert S. Marx, Cincinnati, Ohio.

Counsel for the plaintiff here noted an objection to the exhibits and particularly to Exhibit 23.

Witness was then asked whether he had anything to add to his other testimony relative to the competitive condition of chain stores as compared with the so-called unit stores or voluntary chain. He replied that he had nothing to add except that the test made in 1933 in the City of Lexington, Kentucky, indicated that the implication from the 1930 survey that voluntary chains were properly considered along with unit stores rather than chain stores was still a proper view to take of the situation. The data in the record showed that the differential in 1930 between the chain charging the highest price and the unit stores charging the lowest price was between 3% and 4%. That appeared to be borne out by the as yet incomplete tabulation of 1933. The voluntary chain or cooperative unit stores came into existence in [fol. 514] comparatively recent years. In Lexington some of the members who formerly operated with the voluntary chains now operate independently and have eliminated their connection with the I. G. A. chain. The witness did not know what has happened over the country generally.

The witness thereupon introduced Exhibit- 1-a, 2-a, 2-b, 4-a and 5-a, supplementing previous Exhibits 1, 2, 4 and 5 which he had introduced at the time his affidavit was drawn. Counsel objected to the introduction of these exhibits as being incompetent and irrelevant.

Witness was asked whether these exhibits tended to sustain the figures given in his former testimony. This was

objected to. The witness replied that the exhibits named referred to the operating expense of certain classes of retail enterprises. Exhibit Martin 1-a refers to the ratio of net gain to net sales from the operation of specialty stores 1930 to 1931 and it is shown in the third column that from 1931 the small stores lost 1.6% and stores of an intermediate size lost on an average of 1.5% and large stores having sales in excess of Two Million Dollars enjoyed a net gain of .9%. Witness stated that the general character of the data presented in Exhibit 1 was similar to the general character of the data presented in Exhibit 1-a, with the exception that the majority of the enterprises lost money in 1931, whereas the majority of them gained in the earlier years, that is, the years 1927-1928 and 1929 reported in Martin Exhibit 1-a.

An examination of the data of 1930 indicates that on the average each of the three classes enjoyed net profits or net gains as the Bureau designated it, the larger the size in general the larger the net gain.

In Exhibit 2-a the data for department stores is given and in 1930 all of them except the smallest group enjoyed net profits, the largest of all enjoying the largest net profit. [fol. 515] In 1931 the smaller stores suffered net losses, the average net loss in the smallest being generally greater than the average net loss of those in the intermediate size and the average of the larger stores enjoyed a net gain for that year.

Witness then stated that the data presented in Exhibit 2-b had become available through the Harvard Bureau of Business Research since Exhibit 2 was prepared and it was presented bodily. Witness stated that an examination two-thirds of the way down the page on Exhibit 2-b under the column headed "percentage of net gain to percentage of net sales" one would discover that all classes lost money in 1932, the group having aggregate sales of less than $150,000 which included 78 concerns, lost 6.7% and those in the next class 5.4% and so on across with for the most part a gradual downward tendency until the group having Twenty Million Dollars or more of sales was reached, in which case the net losses were the lowest to be found in any group reported. Exhibit 4-a contains similar data respecting the ratio of net gain to net worth or the earnings on capital from the operation of specialty stores. It is comparable with the data shown in Exhibit 1-a. This Exhibit indicates

that in 1930 the smaller stores had made profits and the stores of intermediate size have made larger profits and those of the larger size had made larger profits than any group. Whereas, in 1931 stores having sales of less than $500,000.00 suffered losses of 4½%; those from $500,000.00 to $2,000,000.00 of sales suffered losses of 6% and the largest group of all enjoyed profits on invested capital of 1.6%.

The figures in Exhibit 5-a are comparable with those in Exhibit 2-a and show the data for department stores ratio of net gain to net worth. This table shows that the lowest sales group having sales of less than $150,000 suffered losses in 1930 of 3.3% and the other classes enjoyed gains ranging up to 6.4% in cases of stores having sales in excess [fol. 516] of $10,000,000.00. The data in the middle column shows that the losses in 1931 of stores having sales of less than $150,000.00 amounted to an average of 7% and that all of the groups up to the $2,000,000.00 group suffered losses, whereas those having sales in excess of $2,000,000.00 had gains, the larger the enterprise on an average the higher the gain, reaching a maximum of 3.7% on enterprises having sales in excess of $10,000,000.

Exhibit 5-a is supplemented also by Exhibit 2-b. An examination of the column headed "Net Gain Percentage of Net Worth" indicated that in the year 1932 all classes of department stores on an average lost money, the smaller sized stores lost 12.2% and the average ranging down to .8% with those stores having $10,000,000 to $20,000,000 in sales.

[fol. 517] Witness thereupon identified the chart showing relative net profits to sales of variety chain stores for the four year period ending 1932. This was marked Exhibit 24. The introduction of this exhibit was objected to. Witness testified that the exhibit took all of the enterprises reported in Fairchild's Financial Monthly and showed the aggregate net sales for the period of four years as compared with the average net profit for a similar period. The table, the witness stated, showed the exact figures which appeared in the chart which is a part of the exhibit. The data was presented in graphic form with the trend line drawn across the middle of the chart. This trend line is an attempt to show the general relationship in mathematical terms existing between net profits on sales and the volume of sales. It is computed by the so-called method of semi-

averages which involves taking the upper half of the cases, in this case chain of stores, and the lower half, excepting the middle, and drawing the line through the averages thus found. That line is a mathematically constructed trend line and shows that the variety stores selected by Fairchild for reporting in their Financial Monthly indicates that the larger concerns like Woolworth have an average rate of earning higher than the average return of earnings for the smaller enterprises shown at the bottom of the exhibits.

Witness thereupon identified a table which was introduced as Exhibit 25. This exhibit was objected to. He testified: "In Exhibit 25 the data represented in the census of retail distribution with respect to food stores have been copied, certain irrelevant matter being omitted. The statistics representing grocery chains which do not do a meat business are shown in the middle table and the indication is that those having aggregate sales in excess of ten million dollars have an average operating expense of 13.62 to the one hundred dollars of net sales and that the chains having [fol. 518] smaller aggregate sales have a higher operating expense in general. Those with sales of $100,000 have 16.7% of operating expenses or $16.70 per $100.00. The last column shows similar data for those grocery stores also doing a meat business and this column also indicates that the range of 13.6 to 16.88 for the exact percentage. The statistics at the bottom of the page tend to verify the statistics that are introduced at the top of the page and are included for whatever they are worth.

The most interesting thing about the figures respecting the larger stores and the meat sales is the fact that they have in general a substantially lower operating expense than any of the others. Each of them have sales well in excess of ten million dollars and the five million to ten million dollar bracket is exclusive of the three largest.

Witness thereupon introduced a table purporting to show the index of earnings from operations in Kentucky for the year 1929. This table was marked Exhibit 26 and the introduction was objected to.

Witness whereupon testified: The statistics presented in this table as shown by the evidence already in the record have to do with the factors of earning capacity which are important in a retailing business. First, the number of employees necessary to do a given volume of business,

secondly, the inventory turnover which is obviously a factor in the earning capacity of different classes of stores. This exhibit is based on the retail expenses for Kentucky and includes all of the retailers enumerated by the census bureau in Kentucky. It compares with experience of independent retailers with the experience of chain and local branch retailers. The two columns at the end of the table are the significant columns being made to show how these two were computed. These columns show that independent retailers would average or require 14.61 employees to secure annual sales of one hundred thousand dollars, whereas, chain and local branch retailers require 10.01 employees to secure the same volume of trade on an average.

[fol. 519] The last column shows the best index of turnover that is available from the census. It indicates that independent retailers have an average turnover index of 5.67 relative to sales inventory rather than sales to average inventory for the entire year. For the chain and local branch retailers the turnover is 9.48 per year.

Witness was then asked what information he had relative to wages paid by chain stores. This question was objected to as not being relevant to the question in controversy. Witness replied that the information he had was that in retail circles the belief was widespread that chain stores pay relatively lower wages than the independent merchants. Counsel for the plaintiffs moved that the answer be stricken. Witness stated that he received his information from discussion with retailers and partly from "Retailing," which is a trade publication generally recognized in retailing circles as reporting the facts on retailing fairly. Witness thereupon identified and marked as Exhibit 27 an excerpt from an editorial publication in June, 1933. Witness stated that he did not have a copy of the report made by a Federal Bureau on this subject and he only knew of the contents of this report from newspaper comments. Witness thereupon filed a chart or table, which was introduced as Exhibit 28, the introduction of which was objected to and testified that the exhibit was an extract from a page in Bradstreet's publication on chain store earnings dated January, 1933. The publication, witness stated, was a reputable trade publication in the financial field and "Chain Store Earnings" was a reputable publication in the chain store field. There were two separate publications, the witness stated, that had been pasted

together on the same sheet, one being from Bradstreet and the other from "Chain Store Earnings." Witness [fol. 520] thereupon identified a table which was introduced as Exhibit 29 and objected to by counsel for the plaintiff which he stated showed the earnings of The Kroger Grocery & Baking Company on its investment assuming the accuracy of the figures testified to by Mr. Morrill and also assuming the accuracy of the figures in the verified bill of complaint. Witness testified that the first several columns on the table enumerated the factors involved in order to arrive at the net tax shown in the fourth column. The next column showed the net income according to Mr. Morrill's deposition before the sales tax and the following column the income after the sales tax. The next column indicated the investment in Kentucky as shown in the sworn statement submitted to the State Tax Commission in connection with the corporation license tax. The following column indicated the earnings of The Kroger Grocery & Baking Company on that volume of net profit according to the testimony of Mr. Morrill and the second last column indicated the investment in Kentucky adjusted to take care of the reduction in investment which Mr. Morrill indicated in his deposition ought to be made, with the assumption, however, that those adjustments should be allocated to Kentucky in proportion to the sales, which might or might not be a good basis for them as the witness did not know the conditions of the various other Kroger stores. The last column indicates the rate of earnings on investments with that adjustment projected back to 1931 and 1930. The average shown according to the first method of computation is 1.54 and according to the second method is 1.82% for the three years involved in this case.

[fol. 521] Witness thereupon identified and filed Exhibits 8-A, 10-A and 11-A. The introduction of these exhibits was objected to because the exhibits were based upon records and not available to counsel for plaintiff. Witness stated Exhibit 8-A is in the nature of a bringing up to date of Exhibit 8, submitted in 1931. The significant part of the exhibit is shown in the last two columns. It might be assumed in the absence of investigation that the decline in sales which has occurred recently would result in making the operation of these corporations' sales in Kentucky as

compared with their total sales lower than the proportion of property in Kentucky as compared with the total property of the same corporations invested throughout the country. As a matter of fact, the exhibit shows that in every instance these corporations enjoyed a larger proportion of sales in Kentucky than they had of property located in that state. The source for the figures on sales was Moody's Manual of Industrials. Data respecting property invested within and without Kentucky is based on reports filed under the corporation license tax law of the State of Kentucky with the Kentucky State Tax Commission. The reports were prepared and filed by the merchants themselves, these merchants being party to the litigation so far as the witness knew.

Exhibit 10-A, witness testified, showed the ratio of the tax paid by department stores by sales volume. The proportion of gross sales, that is, the ration of sales paid to gross sales for merchants having sales of $150,000 or less and those from $150,000 to $299,000 and those from $300,000 to $499,000 and so on up, including those having sales of over $10,000,000. This is shown for 1930 and 1931. Martin Exhibit 2-B, shows the data for the year 1932 and the general implication of the data is apparent on the face of the exhibit, namely, that the merchants having the smallest volume of sales on the average had the highest ratio of taxes to sales, under the present tax laws. This is true not only for Kentucky but wherever department [fol. 522] stores are located in the United States.

Exhibit 11-A showed that such differences as existed between the department stores operated as a chain and those operated as so-called voluntary chains from those operated independently are minor in character and such differences as do exist are in the group having sales volume of less than $500,000. The exhibit shows that those in ownership group have tax payments equal to .65 of 1% of the net sales, whereas, those not being in a group but being entirely independent have .75 of 1%. Group stores having sales volume of less than $500,000 enjoy an advantage in amount of taxes based on sales over those not in the group. No particular difference is shown for the larger merchants.

Witness then stated that he had made some further investigations of the operations of the Kentucky Gross Sales

Tax Law in order to determine whether or not the actual effect would be to drive merchants out of the business in the event they were unable to shift the tax to their customers. He thereupon filed Martin Exhibit 12-B, which was a table showing the statistics of large retailers doing business throughout the United States, including everyone listed by Mr. Nystrom and also those reported in Moody's Manual of Investments.

Witness was then asked as to whether he had any correction to offer to former exhibits 12, 12-B and 30 and stated he had none except as to Exhibit 12, on which there was a typographical error due to the insertion of a number of businesses reported in the original Exhibit 12. The typographical error showed up as a misnaming of the number of the columns. The correction offered was simply to make Exhibit 12 read as it was prepared to read. The correction was thereupon introduced and marked correction of exhibit 12. Witness then stated that Exhibit 12-B shows for all those merchants included in Mr. Nystrom's list, [fol. 523] whose records are available in Moody's, the operating experience in terms of the volume of net sales, the net profit after taxes, the net profits which would have been made after the deduction of 1% flat sales tax, the net worth, the ratio of the net profit to the net worth and the ratio of net profit that would have been made after the deduction of such tax to the net worth, assuming all along that the tax would not have effected the sales and that the sales volume would have continued. The right hand side of the table shows the situation which would have existed if those merchants had operated in Kentucky to the extent of 5% of their total business. That 5% is an arbitrary figure and was suggested by the fact that that is roughly the proportion of business which the Kroger Company does in Kentucky as compared with its total business. The essentials of the table are shown in the summary at the bottom of the page and the most essential parts are shown in columns 10 and 12. Column 10 shows the rate of earnings which those merchants would have enjoyed in Kentucky under the circumstances described without the gross sales tax or any gross sales tax, and Column 12 shows the net earnings on the net worth of the corporation which these merchants would have enjoyed after the application of the sales tax. The range of the new volume of busi-

ness done by each of these corporations is shown by the first column of this summary, and in brief, the two columns designated indicate that the largest class of merchants would have enjoyed in 1932 9.4% on their investments as evidenced by net worth and that that would have dropped in the next largest sales group to 2.53% and in the third largest or the next to the smallest 1.61% and in the lowest group to a loss of 5.73%. The last column shows that after the application of the sales tax as to Kentucky business the range of profit would have been from 6.54% for the largest group down to a loss of 5.79%. The greatest alteration would have been in the group having the highest sales but [fol. 524] that group would still enjoy a substantial profit making differential over the other merchants.

Counsel for plaintiff thereupon objected and moved that the answer be stricken for the reason that it was incompetent and irrelevant and for the further reason that it was not responsive to anything set forth in Mr. Nystrom's affidavit or in any exhibit therein referred to because Mr. Nystrom's affidavit does not deal with sales for the year 1932 at all. Counsel further objected because the answer was predicated upon statistics purported to have been made from Moody's Manual of Industrials for the year 1932 and the sources from which these figures are taken are not made available to counsel in order that they might cross-examine on the exhibit or the correctness of his report as to the digest as to what is contained in Moody's Manual of Industrials. Counsel objected for the further reason that the statement was entirely hearsay even if based upon Moody's Manual of Industrials.

Witness stated that Moody's Manual of Industrials was available in any reputable library and in most investment offices and stock brokers' offices.

Counsel for plaintiff further objected because Exhibit Martin 12-B was predicated upon the assumption that 5% of Kroger's sales are made in the State of Kentucky and upon the further assumption that all of the other companies referred to in Exhibit 12-B do the same proportion of their business in the State of Kentucky, which assumption is wholly without foundation in the evidence or in any document which is exhibited or referred to by the witness.

Witness was of the opinion that the situation in Kentucky would not be materially different as regards taxation, operating conditions, such as rent, costs of labor, etc., stability of business conditions, competition, which would render it a better or worse market in those communities in which large scale merchandising is carried on than the markets in similar communities to be found on the average in the other states. There would be minor advantages in Kentucky and minor disadvantages in that State which would practically offset each other.

[fol. 525] Witness thereupon produced and filed Exhibit 18 which he stated was a table showing or comparing Kroger's taxes in Kentucky with those that the company would pay if it operated in other states with the same gross sales. Witness stated that the table applied to the following states: Minnesota, Vermont, New Mexico and other states having gross sales taxes somewhat similar to those in Kentucky. The table did not apply to Louisiana.

Witness thereupon filed Exhibit 31, the introduction of which was objected to as was the introduction of Exhibit 18. This exhibit, the witness stated, summarized evidence he had offered and included data which had been omitted. The witness stated that this part of the report was based on the implication that the taxes were wholly taken out of earnings but the witness was of the opinion that taxes would not be taken wholly out of earnings. The exhibit was also based on the supposition that the tax would be paid wholly by the company and would not be passed on to the consumer. Witness thereupon continued his explanation of Exhibit 31 by stating that it was made up of a table showing the method of computing the data given with the exception of the tax data. The exhibit also consists of a chart which shows in graphic form the relationship of the effective tax rates described in the gross sales tax act on the one hand and the earnings of the three classes of merchants on the other. The first part of the graph is a large scale chart to show completely the grocery chains, which have in some instances large volumes of sales, so that other information may be compared with data effecting the Kroger Grocery & Baking Company which are also shown on the chart. The lower part of the chart shows the effective tax rate without taking account of the credits in any instances on the earnings of grocery chains as compared by the Harvard Bureau of Business Research and on the

average earnings of department stores from 1927 to 1932, inclusive, being all the years for which the Harvard Bureau has reported complete data. It also shows the same [fol. 526] thing on the earnings of variety stores as reported by the Harvard Bureau. Since the Harvard Statistics do not give a class which included all of the larger grocery chains, a computation outlined at the top of the page was made in order to get other chains comparable with Kroger. This computation includes all of the chain grocery stores reported in Moody's Manual of Industrials. The number of those chains is much smaller than the number reported to the Harvard Bureau.

The interesting thing about the chart is the similarity between the graph indicating the effective tax rate without taking account of credit for other taxes and the graph reporting the earnings of those corporations.

The five chief grocery chains, The Great Atlantic & Pacific Tea Company, The First National Stores, the American Stores, The National Tea Company and Safeway Stores, Inc., had average earnings for 1930 of 2.85%; for 1931 it was 2.92% and for 1932 it was 2.66%, as reported by Moody's Manual of Industrials. Mr. Morrill in his testimony listed these five, apparently as an after thought three others. If the entire eight corporations were included the earnings on sales for 1930 would have been 2.82%; for 1931, 2.92%, and for 1932, 2.67%. That is weighted average, the weighting being based on volume of sales in each case. That is compared with the data for grocery chains as is shown in Exhibit Martin 31, which gives almost exactly the same result. The main reason for that is that Mr. Morrill included very largely the same group stores we included in getting up the data for this chart. The exact comparison may be had by relating the figures just given from Mr. Morrill's group and the figures shown at the upper right hand corner of the table which was filed.

[fol. 527] Cross-examination of Professor Martin

Witness is a professor of economics and director of the Bureau of Business Research of the University of Kentucky, having held that position since September, 1928. Prior to that time he was professor in Emory University. Immediately prior to that he was a summer school teacher at Peabody College for Teachers and before that he was a

graduate student and student instructor in the University of Chicago. He taught at Peabody in the summer of 1924.

He had no practical experience, conducting any retail business either in Kentucky or elsewhere. He had been engaged in teaching since he took his graduate course at the University of Chicago in 1924 and had never conducted any merchandising business, either wholesale or retail. He had also been engaged in research work. This is particularly so since the time he came to the University of Kentucky. The research dealt chiefly with particular problem on which he is now working. The Bureau of Business Research in the University of Kentucky was founded by administrative action in February, 1928. The witness had been connected with it throughout its history. He had associated with him at various times different members of the teaching staff of the University of Kentucky and also students working for their doctors' degree at the University. These numbered from two to four in the course of years. Any work done in the Bureau was done under the personal supervision of the witness, and generally in accordance with plans laid down by him for the conduct of research. He specified the objects to be examined and the extent of the research. The Bureau undertakes problems at the request of the University administration.

Witness stated that he was head of the Bureau but it was not correct to say that in effect he was the Bureau of Business Research because he had associated with him several others who also took part, as for example, the tabulating work was done by others. He personally worked the [fol. 528] matter up. Witness stated that other than matter taken from other people's survey, he was in effect and substance quoting himself as authority. This was done solely for convenience to prevent cluttering up of the records, with all the reports of the bureau, foreign and domestic statutes, etc. Witness was of the opinion that he had referred to these reports in every instance in his exhibit.

Witness testified on behalf of the State in other tax cases, among these being the so-called "Oleomargarine Tax Case". He testified in this case at the request of Assistant Attorney General Brown. The first case he testified in was a rate case brought by the Interstate Commerce Commission. This took place in 1928 or 1929. The style of the

case was the Commonwealth of Kentucky vs. Ahnepee and Western Railroad Company and others. He also testified in connection with the condemnation of Mammoth Cave, the so-called new entrance to Mammoth Cave and the Great Onyx Cave. In that case he testified as a valuation witness and appraiser. He also prepared himself to testify as a witness for the attorney general in the condemnation suit to acquire Cumberland Falls. In this case the question involved was to ascertain the amount of flow of water over Cumberland Falls in the area that would be inundated by the dam, and also the value of the water rights required for the development of the water power. The evidence which he contemplated giving in that case was of an economic nature and not of an engineering nature. It would have related to the valuation of the area and rights involved.

The witness did not appear before any committee of the legislature at the time the gross sales tax law prepared for the 1930 session was under consideration, nor did he present any ideas or any of the information which he has developed for the purpose of this suit to the legislature. He did not know whether such information was submitted or not. No member of the Bureau of Business Research appeared before any committee, nor were they called before the legislature to testify regarding the law which was afterwards passed.

Witness stated that he had made a personal investigation of the tax situation in Kentucky and had made a general investigation of the tax situation in other States on this question, and that he was testifying from the data which he had gathered in such investigation.

[fol. 529] Witness stated that he confined his consideration of the act largely to an analysis of chain stores and department stores. He also considered other stores doing a large scale of retailing and he also considered individually owned stores. In connection with the data respecting average prices of retail stores in Lexington, Ky., a survey was made under his own general supervision and under the more direct supervision of his colleague, Professor Palmer. The results of a similar survey by Professor Palmer, made in 1933, are not yet completely tabulated. The information was secured directly from the merchants. This survey was local for Lexington.

Witness stated that he had obtained this data representing those stores which do business in Kentucky from the returns made by the stores themselves to the State Tax Commission under the Corporation License Tax and that the data was therefore accurate.

The witness' attention was then called to Bulletin 78 of the Bureau of Business Research of Harvard University and particularly to page one of that bulletin, which showed the location of cooperating firms. Witness examined this table and stated that of the eighty concerns only one firm from Kentucky having sales over a million dollars made reports and only four firms with sales under one million dollars from Kentucky reported to the Bureau. All of these concerns were department stores. Witness stated that these were the figures for 1928, but in various years the number varied. The bulletin listed 251 department stores having net sales of less than one million dollars of which only four were located in Kentucky. It listed 162 department stores with net sales of over one million dollars of which only one is located in Kentucky. With regard to specialty stores, there is no reference to any doing business in Kentucky. Harvard Bulletin No. 83 issued by the Bureau of Business Research of that University contains 527 department stores, of which only 6 are located in Kentucky. It also contains 85 specialty stores, of which only one is located in that State. Report No. 85 of the Bureau indicates that the material came from firms located in all parts of the United States, Hawaii and Canada. The same was true with regard to Bulletin 88 for the year 1931. Witness stated that he had investigated the tax situation as it existed in other states and countries and he makes a tabulation of the facts regarding taxation in [fol. 530] each of the various states that comes under his observation.

Witness went on to testify that the tax rate is found only after credits are taken into consideration. In order to determine what tax any merchant pays under this act, the credits to which that merchant is entitled must be determined. The best way of finding out the distribution of the tax insofar as those who have paid is concerned, would be to examine the returns of the State Tax Commission and the best way of determining just how the law works and exactly the burden it imposes upon the taxpayers

under its provisions, would be by examination of the tax returns of those who have made returns. Such an examination would be better than any theory.

The laws of Minnesota, New Mexico and Vermont became effective during the current calendar year and the witness had no access to any reports showing the exact workings of those laws. As far as witness knows, litigation concerning the validity of these laws had been instituted in New Mexico.

A store in a given town having gross sales of $50,000 to $400,000, paying a tax and coming into competition with a store owned by another individual who does not have to pay a tax, can shift the tax to consumer in large part. The reason for it is that price is not the sole advantage. People trade with stores from habit and for other reasons. A great deal depends upon the accommodations extended by the manager of any store in order that customers may be held. The impression of affability that customers get from the employees also enters as a factor in keeping business. Where all competitors pay the same tax on a similar volume of business it is much easier to shift the tax.

The fifteenth census of the United States as to retail operations referred to in Martin Exhibit No. 25, has only recently been published. It deals with the calendar year 1929. That year was abnormal in some respects insofar as business is concerned.

[fol. 531] Exhibit 12-A was prepared to show what various corporations would do if they had a business which was proportionately as large in Kentucky as that of Kroger's. Some of these businesses however did not do any business in the State.

Witness stated that Exhibit 26 entitled Some Indexes of the Relative Earning Power of Retailers in Kentucky by Types of Operation in 1929, which purports to be computed from the 15th census of the United States, had just recently been published, and that exhibit dealt with Kentucky cases. That in preparing the exhibit the witness had allocated to the store owner and members of his family wages for the purpose of determining the earning power of the store.

[fol. 532] MARTIN EXHIBIT XVII

Maximum Gross Sales Tax Rates Imposed on Retailers in Various States and Foreign Countries*

Jurisdiction	Rate	Jurisdiction	Rate
Connecticut	0.1%	Australia	2.5%
Delaware	0.1	Austria	10.0
Indiana	1.0	Belgium	10.0
Kentucky	1.0	Bolivia	0.5
Minnesota	1.0	Brazil	2.0
Mississippi	2.0	Cuba	10.0
New Mexico	2.5	Czecho-Slovakia	12.0
New York	1.0	Equador	1.0
North Carolina	3.0	France	13.0
North Dakota	2.0	Germany	.75
Oregon	2.0	Italy	3.0
Pennsylvania	0.1	Poland	2.25
South Dakota	1.0	Phillipine Islands	1.5
Utah	5.0	Porto Rico	2.0
Vermont	4.0	Roumania	10.0
Washington	3.0	Russia	6.0
West Virginia	1.0	Turkey	6.0

* Based on statutes so far as commonwealths of the United States are concerned except New Mexico (Commerce Clearing House Tax Service) and North Carolina (newspaper comment). The data for foreign countries and U. S. territories were gathered under my supervision a year ago and reflect the situation as of the winter of 1931–32. The sources are cited in "The Gross Sales Tax in Kentucky," published by the Bureau of Business Research, University of Kentucky.

[fol. 533] MARTIN EXHIBIT XVIII

Effective Tax Rates on Gross Sales in Kentucky Compared with Those in Other States Having Graduated Retail Sales Taxes *a*

	Total gross sales	Amount of tax	Effective tax rate
Kentucky *b*	$50,000	$25.00	.0500%
	100,000	50.00	.0500
	200,000	100.00	.0500
	400,000	200.00	.0500
	600,000	550.00	.0917
	800,000	1,500.00	.1875
	1,000,000	3,050.00	.3050
	2,000,000	13,050.00	.6525
	3,000,000	23,050.00	.7683
	4,000,000	33,050.00	.8263
	5,000,000	43,050.00	.8610
	6,000,000	53,050.00	.8842
	7,000,000	63,050.00	.9007
	8,000,000	73,050.00	.9131
	9,000,000	83,050.00	.9228
	10,000,000	93,050.00	.9305

a In these computations deductions, credits, and offsets provided in Kentucky and other states are ignored. The data for Minnesota reflect total taxes levied under both schedules provided in the Act. It is assumed that average annual sales are $50,000 a store and the maximum $100,000.

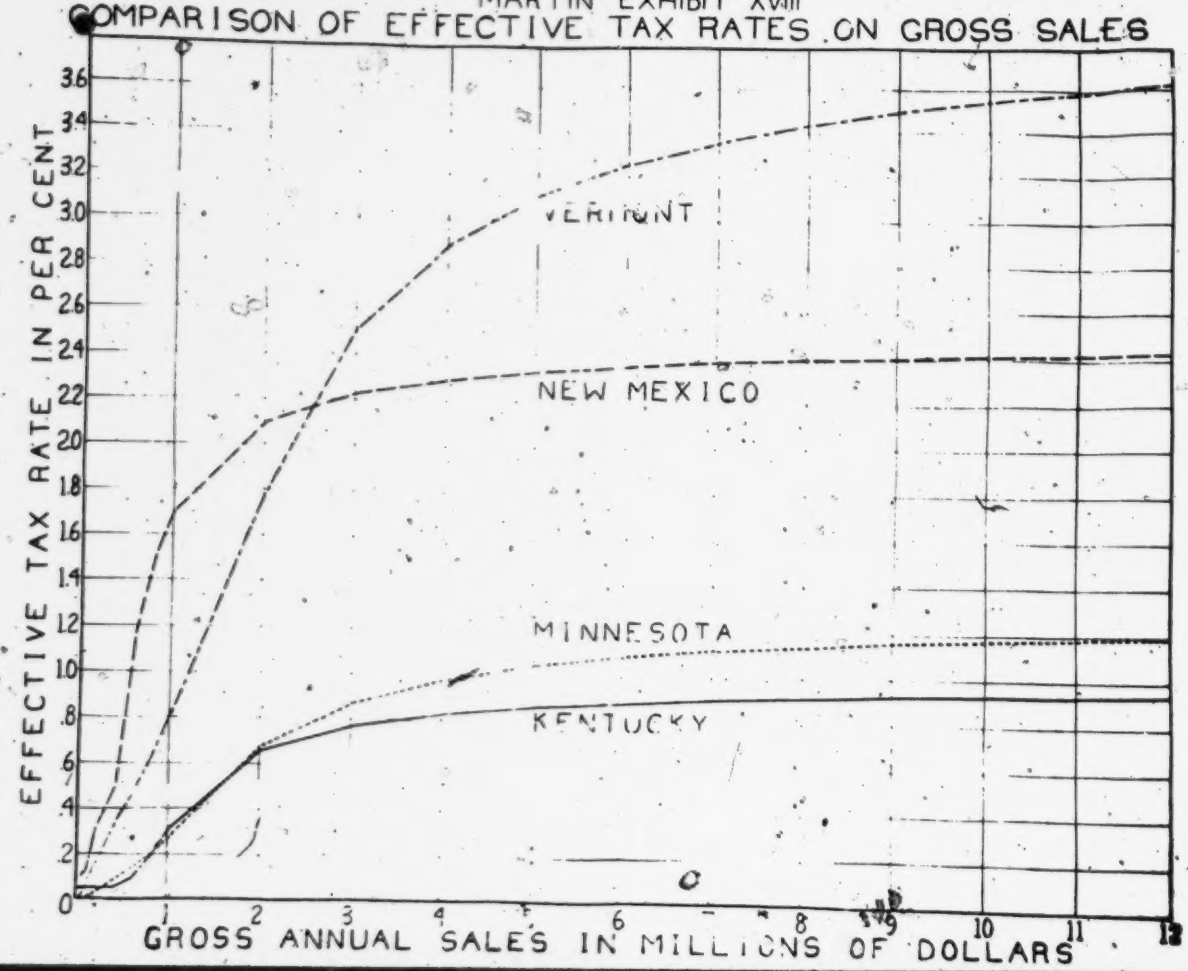
b Ky. Acts, 1930, chap. 149.

	Total gross sales	Amount of tax	Effective tax rate
	11,000,000	103,050.00	.9368
	12,000,000	113,050.00	.9421
Minnesota *c*	50,000	0	0
	100,000	0	0
	200,000	60.00	.0300
	400,000	330.00	.0825
	600,000	810.00	.1350
	800,000	1,570.00	.1963
	1,000,000	2,730.00	.2730
	2,000,000	13,430.00	.6715
	3,000,000	25,940.00	.8647
	4,000,000	39,040.00	.9760
	5,000,000	52,140.00	1.0428
	6,000,000	65,240.00	1.0873
	7,000,000	78,340.00	1.1191
	8,000,000	91,440.00	1.1430
	9,000,000	104,540.00	1.1616
	10,000,000	117,640.00	1.1764
	11,000,000	130,740.00	1.1885
	12,000,000	143,840.00	1.1987
New Mexico *d*	50,000	50.00	.1000
	100,000	125.00	.1250
	200,000	650.00	.3250
	400,000	1,950.00	.4875
	600,000	6,950.00	1.1583
	800,000	11,950.00	1.4938
	1,000,000	16,950.00	1.6950
	2,000,000	41,950.00	2.0975
	3,000,000	66,950.00	2.2317
	4,000,000	91,950.00	2.2988
	5,000,000	116,950.00	2.3390
	6,000,000	141,950.00	2.3658
	7,000,000	166,950.00	2.3850
	8,000,000	191,950.00	2.3994
	9,000,000	216,950.00	2.4106
	10,000,000	241,950.00	2.4195
	11,000,000	266,950.00	2.4268
	12,000,000	291,950.00	2.4329
Vermont *e*	50,000	0	0
	100,000	62.50	.0625
	200,000	312.50	.1563
	400,000	1,312.50	.3281
	600,000	2,812.50	.4688
	800,000	5,062.50	.6328
	1,000,000	8,062.50	.8063
	2,000,000	35,562.50	1.7781
	3,000,000	75,562.50	2.5188
	4,000,000	115,562.50	2.8891
	5,000,000	155,562.50	3.1113
	6,000,000	195,562.50	3.2594
	7,000,000	235,562.50	3.3652
	8,000,000	275,562.50	3.4445
	9,000,000	315,562.50	3.5063
	10,000,000	355,562.50	3.5556
	11,000,000	395,562.50	3.5960
	12,000,000	435,562.50	3.6297

c Session Laws, 1933, chap. 213.
d Laws, 1933, chap. 73.
e Act approved March 25, 1933.

(Here follow photolithographs of Martin Exhibit XVIII, side folios 534 and 535)

MARTIN EXHIBIT XVIII



534

348A

NET GAIN: PERCENTAGE OF NET WORTH
0
2
4
6
8
10
12
SALES: MILLIONS OF DOLLARS
1
2
3
4
5
6
THIRD QUARTILE
AVERAGE
FIRST QUARTILE

[fol. 536] MARTIN EXHIBIT XX

Average Prices in Chain Stores in Lexington, Kentucky, Spring 1930 and Spring 1933 *a*

Chain store system	Ratio of average prices to average of all chains, 1930	Chain store system	Ratio of average prices to average of all chains, 1933
A	95.1%	F	98.5%
B	97.1	G	99.3
C	99.9	H	102.2
D	103.0		
E	104.6		

a Based on surveys of chain and independent store prices made in the College of Commerce, University of Kentucky. The 1933 figures will be checked again before final publication, though each computation has already been made twice.

[fol. 537] MARTIN EXHIBIT XXI

Comparison of Chain Store Prices in Chicago and New York to Ascertain Degree of Variation Between Chains

	Price variations	
	Chain	Ratio of average price to lowest chain average in city
New York *a*	A	100.7
	B	101.4
	C	102.5
	D	101.9
	E	100.0
	F	103.9
	G	106.9
	H	103.2
	I	102.5
Chicago *b*	J	100.0
	K	100.0
	L	103.0
	M	101.6

a Computed from R. S. Alexander, "A Study in Retail Grocery Prices," Journal of Commerce (reprint).

b Computed from E. Bjorklund and J. L. Palmer, "A Study of Prices of Chain and Independent Grocers in Chicago," Studies in Business Administration, University of Chicago.

[fol. 538]

MARTIN EXHIBIT XXII

Price Variations Between Different Units of Same Chain a

Columns A—Number of products on which different prices were quoted.
Columns B—Average price difference as percentage of average price of products.

	Chain No. 1		Chain No. 2		Chain No. 3		Chain No. 4		Chain No. 5		Chain No. 6		Chain No. 7	
	A	B	A	B	A	B	A	B	A	B	A	B	A	B
Westchester	19	13.69	7	12.98	..	.....	..	.....	..	.....	..	.....	..	.....
Madison Avenue	24	12.03	13	13.68	20	12.38	21	16.89	..	.....	..	.....	..	.....
Broadway	19	9.84	16	15.29	..	.....	..	.....	11	17.12	..	.....	..	.....
Hempstead	..	.....	16	11.87	..	.....	..	.....	..	.....	..	.....	..	.....
Leonia	..	.....	..	.....	..	.....	..	.....	..	.....	12	15.90	..	.....
Bergenfield-Dumont	..	.....	..	.....	..	.....	16	12.17	..	.....	..	.....	10	10.42

a Dorothy Dowe, "A Comparison of Independent and Chain Store Prices," The Journal of Business, University of Chicago, April, 1932.

[fol. 539] MARTIN EXHIBIT XXIII

Chain Taxes Will React on Consumers *

* * * * * * *

"Let us expand the illustration. Assume that the legislature steps in, and for the purpose of punishing the chain store for its efficiency, and for having reduced the cost of living to the consumer, levies a tax on the chain store—what is the net result? The obvious answer is that the tax must be added to costs, and costs and interest must be paid by the consumer. Who is the consumer?

"The consumer who patronizes the chain store is ordinarily a customer who is required to measure expenditures carefully, and to buy where he or she gets the best goods for the least money. In the final analysis, when the legislature taxes a chain store, it is taxing the consumer, i. e., the working men and women of the state—the men and women who can least afford to pay the tax. It is levying a tax upon the necessities of life—food, clothing and drugs—and increasing indirectly the cost of living to the American people. Instead of chain store taxation, it is food taxation. The levying of taxes on food and clothing is repugnant to the whole principle upon which taxation has been based in the United States."

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* Chain Store Progress, August 1931, p. 3.

[fol. 540] MARTIN EXHIBIT No. 1-A

Ration of Net Gain to Net Sales from Operation of Specialty Stores, 1930–31 *

Net sales	1931		1930	
	Number of stores	Ratio	Number of stores	Ratio
$500,000 or less	30	L 1.6%	37	0.5%
500,000–2,000,000	22	L 1.5	29	1.8
2,000,000 or over	18	0.8	19	2.2

* As reported in Bulletin 88, Bureau of Business Research, Harvard University.

[fol. 541] MARTIN EXHIBIT 2-A

Ratio of Net Gain to Sales, Department Stores, 1930–31*

Net Sales	1931 Number Stores	1931 Ratio	1930 Number Stores	1930 Ratio
Less than $150,000.....	65	L 4.7%	76	L 2.0%
150,000– 300,000..	64	L 3.4	88	0.2
300,000– 500,000..	58	L 1.8	81	0.5
500,000– 750,000..	51	L 1.5	58	1.3
750,000– 1,000,000..	27	L 2.3	35	0.1
1,000,000– 2,000,000..	65	L 0.4	75	1.2
2,000,000– 4,000,000..	50	0.4	67	2.7
4,000,000–10,000,000..	44	1.2	54	2.5
10,000,000 and over....	27	1.9	30	3.3

* As reported in Bulletins 85 and 88, Bureau of Business Research, Harvard University.

(Here follows table, side folio 542.)

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Table 2. Operating Results o

(Common Figures;

Items	Less than $150	$150–300
Number of Reports	78	70
Aggregate Sales (in millions)	$7	$17
Typical Net Sales (in thousands)	$80	$210
Index of Change in Sales (1932/1931)	74.8	74.5
Population of City (in thousands)	10	25
Total Merchandise Costs (Net)	73.9%	72.8%
Gross Margin	26.1	27.2
Total Pay Roll	19.3%	18.4%
Real Estate Costs	4.6	4.6
Newspaper Advertising	*	2.1
Direct Advertising	*	0.2†
Other Advertising	*	0.3†
Total Advertising (subtotal)	2.5	(2.6)
Taxes (except on real estate and income)	0.8	0.75
Interest (except on real estate)	3.4	3.1
Supplies	0.85	1.05
Service Purchased	1.15	1.25
Unclassified: Losses from Bad Debts	0.4	0.55
Other	0.75	0.6
Travelling	0.3	0.35
Communication	0.45	0.55
Repairs	0.15†	0.2
Insurance (except on real estate)	0.7	0.6
Depreciation (except on real estate)	0.9	1.0
Professional Services (See Appendix, page 56)	0.15†	0.3†
Total Expense	36.4%	35.9%
Net Profit or Loss	L.10.3%	L. 8.7%
Net Other Income (including interest on capital owned)	3.6	3.3
Net Gain:		
Percentage of Net Sales	L. 6.7%	L. 5.4%
Percentage of Net Worth	L.12.2	L. 9.0
Rate of stock-turn (times a year):		
Based on Beginning and Ending Inventories	2.0	2.5
Returns and Allowances	2.0%†	5.0%†
Initial Mark-up (percentage of original retail value):		
On Net Cost Delivered	35.2	37.2
Mark-downs	*	*
Discounts to Employees and Others	*	*
Stock Shortages (total for year)	*	*
Total Retail Reductions	13.5%†	15.0%†
Sales per Square Foot of Total Space	$8.00†	$9.00†
Real Estate Costs per Square Foot of Total Space	.40†	.40†
Sales/Total Employees	$5,700†	$6,000†
% Cash and C. O. D. Sales	62.0%†	55.0%†
% Charge and Instalment	38.0†	45.0†
% of Firms Earning Some Net Profit	6.4%	0.0%
% of Firms Earning Some Net Gain	11.5	11.4

* Data not available.

† Figures for this item were given on less than 75% of the reports used.

MARTIN EXHIBIT 2-B

Table 2. Operating Results of Department Stores by Sales Volume Groups: 1932

(Common Figures; Net Sales = 100%; except where noted)

Items	Sales volume groups (000 omitted)									
	Less than $150	$150–300	$300–500	$500–750	$750–1,000	$1,000–2,000	$2,000–4,000	$4,000–10,000	$10,000–20,000	$20,000 or more
Reports	78	70	45	33	24	65	45	47	15	6
ales (in millions)	$7	$17	$18	$21	$21	$96	$165	$287	$213	$223
Sales (in thousands)	$80	$210	$395	$610	$890	$1,375	$2,650	$5,750	$14,000	$32,000
ange in Sales (1932/1931)	74.8	74.5	75.5	77.0	76.5	77.0	77.7	77.2	76.1	77.50
f City (in thousands)	10	25	40	70	95	125	350	500	1,700	2,50
andise Costs (Net)	73.9%	72.8%	69.0%	69.1%	69.7%	68.0%	67.3%	67.4%	65.8%	65.1%
n	26.1	27.2	31.0	30.9	30.3	32.0	32.7	32.6	34.2	34.9
oll	19.3%	18.4%	19.5%	19.9%	19.9%	19.1%	18.5%	18.7%	18.6%	18.2%
Costs	4.6	4.6	4.2	4.9	5.9	5.3	6.3	6.45	5.8	7.7
Advertising	*	2.1	2.5	3.35	*	3.3	4.0	4.0	3.45	*
rtising	*	0.2†	0.25†	0.15†	*	0.1	0.3	0.3	0.15	*
tising	*	0.3†	0.35†	0.25†	*	0.3	0.3	0.2	0.2	*
tising (subtotal)	2.5	(2.6)	(3.1)	(3.75)	3.75	(3.7)	(4.6)	(4.5)	(3.8)	3.3
t on real estate and income)	0.8	0.75	0.7	0.65	0.55	0.55	0.5	0.4	0.35	0.4
ept on real estate)	3.4	3.1	2.6	2.55	2.5	2.6	2.6	2.4	2.2	2.2
	0.85	1.05	1.25	1.4	1.5	1.6	1.8	1.8	1.7	1.8
hased	1.15	1.25	1.3	1.4	1.2	1.1	1.15	1.05	0.8	0.8
Losses from Bad Debts	0.4	0.55	0.45	0.5	0.6	0.65	0.7	0.65	0.7	0.85
Other	0.75	0.6	0.7	0.9	0.85	0.65	0.95	0.75	0.85	1.0
	0.3	0.35	0.45	0.35	0.35	0.45	0.5	0.45	0.3	0.3
tion	0.45	0.55	0.6	0.6	0.6	0.6	0.6	0.6	0.55	0.5
	0.15†	0.2	0.25	0.3	0.3	0.3	0.3	0.3	0.3	0.35
xcept on real estate)	0.7	0.6	0.6	0.45	0.4	0.4	0.4	0.3	0.3	0.3
n (except on real estate)	0.9	1.0	0.9	0.9	0.9	1.15	1.0	1.05	1.25	1.35
Services (See Appendix, page 56)	0.15†	0.3†	0.6	0.55	0.5	0.65	0.6	0.6	0.6	0.55
se	36.4%	35.9%	37.2%	39.1%	39.8%	38.8%	40.5%	40.0%	39.1%	39.6%
or Loss	L.10.3%	L. 8.7%	L. 6.2%	L. 8.2%	L. 9.5%	L. 6.8%	L. 7.8%	L. 7.4%	L. 4.9%	L. 4.7%
Income (including interest on capital owned)	3.6	3.3	3.6	3.2	5.0	4.2	4.0	4.4	3.8	4.2
e of Net Sales	L. 6.7%	L. 5.4%	L. 2.6%	L. 5.0%	L. 4.5%	L. 2.6%	L. 3.8%	L. 3.0%	L. 1.1%	L. 0.5%
e of Net Worth	L.12.2	L. 9.0	L. 5.0	L.10.0	L. 6.0	L. 4.0	L. 6.7	L. 3.5	L. 0.8	
k-turn (times a year):										
Beginning and Ending Inventories	2.0	2.5	3.2	3.5	3.4	3.6	4.0	4.3	4.5	5.7
Allowances	2.0%†	5.0%†	6.4%†	6.4%†	6.5%†	8.0%	10.7%	11.9%	13.3%	16.0%
-up (percentage of original retail value):										
ost Delivered	35.2	37.2	39.3	39.4	38.4	39.3	40.4	40.5	41.9	41.8
	*	*	*	11.2†	9.8	8.7	9.3	9.8	10.0	8.5
Employees and Others	*	*	*	0.45†	0.4†	0.5†	0.5†	0.55	0.6	0.7
ages (total for year)	*	*	*	1.65	1.4	1.8	1.6	1.65	1.8	1.8
Reductions	13.5%†	15.0%†	13.0%	13.3%	11.6%	11.0%	11.4%	12.0%	12.4%	11.0%
uare Foot of Total Space	$8.00†	$9.00†	$11.00†	$12.50†	$10.50	$12.30†	$12.80	$15.50	$16.00	$20.00†
Costs per Square Foot of Total Space	.40†	.40†	.45†	.60†	.60	.65†	.80	1.00	1.10	*
Employees	$5,700†	$6,000†	$5,700†	$5,500†	$5,000†	$5,300	$5,800	$6,000	$6,300	$7,100†
C. O. D. Sales	62.0%†	55.0%†	58.0%†	49.5%†	50.25%†	46.5%†	48.4%	46.7%	48.5%	56.3%
nd Instalment	38.0†	45.0†	42.0†	50.5†	49.75†	53.5†	51.6	53.3	51.5	43.7
Earning Some Net Profit	6.4%	0.0%	8.9%	0.0%	0.0%	0.9%	0.0%	6.4%	0.0%	16.7%
Earning Some Net Gain	11.5	11.4	26.7	15.2	12.5	26.2	23.4	36.2	40.0	33.3

st available.
es for this item were given on less than 75% of the reports used.

[fol. 543] MARTIN EXHIBIT No. 4-A

Ratio of Net Gain to Net Worth from Operation of Specialty Stores, 1930–31*

Net sales	1931 Number of stores	1931 Ratio	1930 Number of stores	1930 Ratio
Less than $500,000	30	L 4.5	37	3.1%
500,000–2,000,000	22	L 6.0	29	6.3
2,000,000 and over	18	1.6	19	7.4

* As reported in Bulletin 88, Bureau of Business Research, Harvard University.

[fol. 544] MARTIN EXHIBIT No. 5-A

Ratio of Net Gain to Net Worth in Department Stores—Chain and Independent —1930–31*

Net sales	1931 Number of stores	1931 Ratio	1930 Number of stores	1930 Ratio
Less than $150,000	65	L 7.0%	76	L 3.3%
150,000– 299,000	64	L 8.0	88	0.1
300,000– 499,000	58	L 3.0	81	1.5
500,000– 749,000	51	L 3.5	58	2.3
750,000– 999,000	27	L 4.0	35	0.6
1,000,000–1,999,000	65	L 0.9	75	3.2
2,000,000–3,999,000	50	0.7	67	4.5
4,000,000–9,999,000	44	2.5	54	4.6
10,000,000 and over	27	3.7	30	6.4

* As reported in Bulletins 85 and 88, Bureau of Business Research, Harvard University.

[fol. 545] MARTIN EXHIBIT XXIV

Relation of Net Profit to Net Sales of Variety Chain Stores for Four-Year Period Ending 1932 *a*

Variety chain	Aggregate net sales (4 years)	Aggregate net profit (4 years)	Rate of profit on sales	Semi-averages, middle case omitted
Woolworth (F. W.) Co.	$1,124,898,214	$133,850,302 *b*	11.90%	
Penny (J. C.) Co.	731,611,257	34,700,237	4.74	
Kresge (S. S.) Co.	567,339,516	40,691,779	7.17	8.05%
Grant (W. T.) Co.	286,044,965	11,101,320	3.88	
Kress (S. H.) & Co.	269,576,969	19,621,635	7.28	
McCrory Stores Corp.	170,893,923	5,384,771	3.15	
Newberry (J. J.) Co.	122,245,233	5,796,182	4.74	
McLellan Stores Co. *c*	89,646,579	2,910,283	3.25	
Murphy (G. C.) Co.	70,995,049	3,070,023	4.32	3.81
Neisner Brothers, Inc.	61,987,192	1,308,143	2.11	
Fishman (M. H.) Co., Inc.	9,588,987	435,582	4.54	

a Computed from data reported in Fairchild's Financial Manual, sixth edition. All cases reported are included in this analysis except Rose's 5, 10 & 25¢ Stores, Inc., which has been omitted because data were incomplete. All figures are for calendar years except those for W. T. Grant Co. which are for the four-year period ending January 31, 1933.

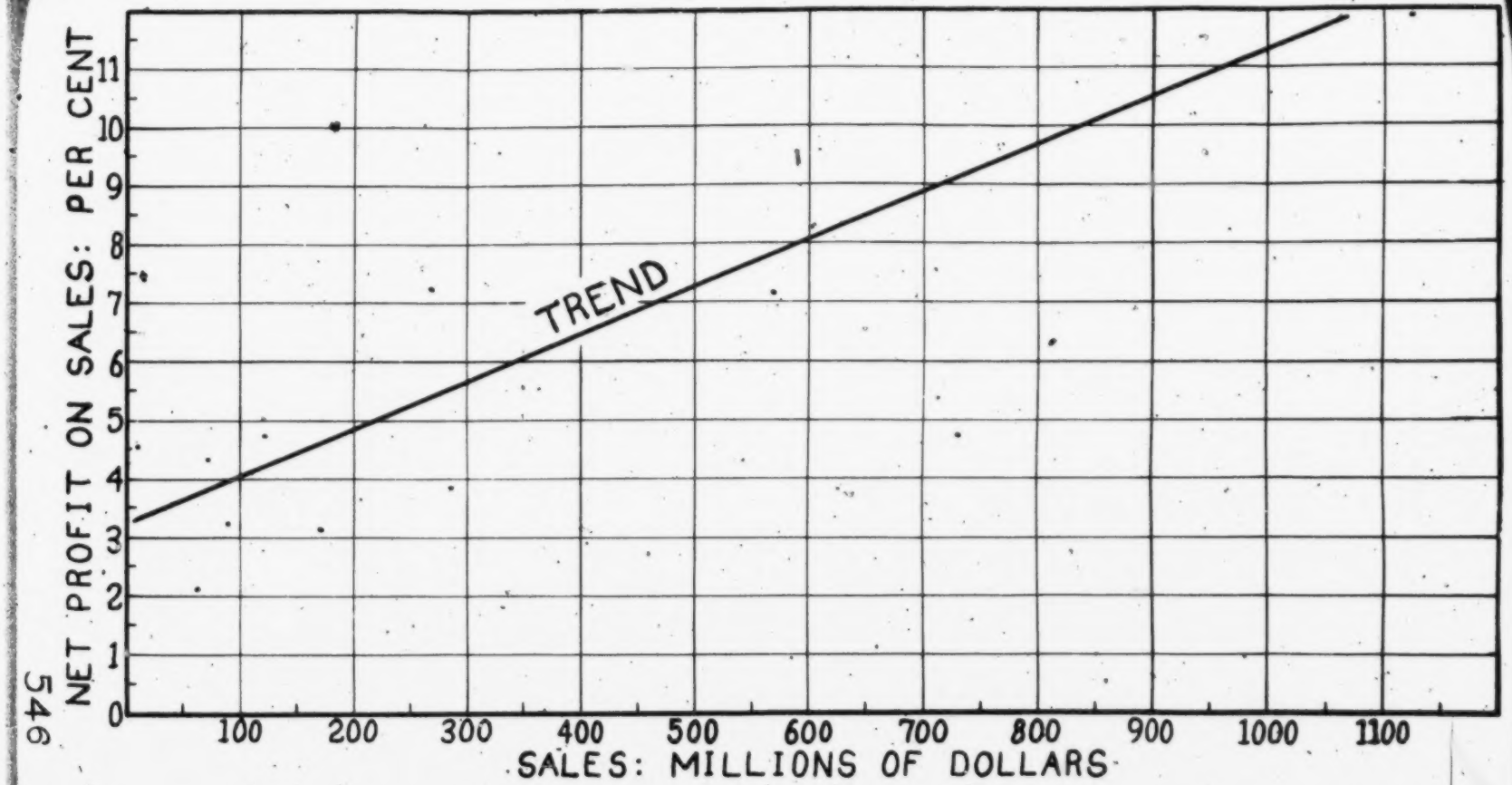
b Includes $9,977,452 profit on sale of securities in 1931.

c Figures for four years ending 1931 last reported.

(Here follows photolithograph of Martin Exhibit XXIV, side folio 546.)

MARTIN EXHIBIT XXIV

RELATION OF NET PROFITS TO NET SALES OF VARIETY STORES FOR FOUR-YEAR PERIOD ENDING 1932



[fol. 547] MARTIN EXHIBIT XXV

Store Operating Expenses of Food Chains Classified by Sizes *a*

Sales	Grocery		Grocery and meat	
	No. of chains	Expense per $100 of sales	No. of chains	Expense per $100 of sales
Three largest	..	.....	3	$13.60
Others with more than $10,000,000	11	$13.62	13	15.07
$5,000,000–$10,000,000	4	13.42	17	16.41
2,500,000– 5,000,000	13	14.82	15	17.14
1,000,000– 2,500,000	30	15.03	57	15.46
500,000– 1,000,000	61	13.40	88	14.62
250,000– 500,000	70	13.34	144	15.37
100,000– 250,000	83	14.28	110	15.59
Less than 100,000	41	16.70	28	16.88
Number of units				
Three largest *b*	..	.....	3	13.60
Others with over 1,000 units	20	13.70	4	14.69
101 to 1,000 units	..	.....	25	14.99
26 to 100 units	39	14.13	28	17.40
Less than 26 units	254	14.16	415	16.42

a Fifteenth Census of the United States, Retail Distribution; Retail Chains.
b The store operating expense of the three largest food chains, averaging $13.60 a $100 of sales, may be compared with $15.46 for all other chains.

[fol. 548] MARTIN EXHIBIT XXVI

Some Indexes of Relative Earning Power of Retailers in Kentucky by Types of Operation, 1929*a*

	Number of stores	Number of employees *b*	Total sales	Number of employees per $100,000 of sales	Sales inventory at end of year
Independent retailers	19,767	59,660	$408,226,139	14.61	5.67
Chain and local branch retailers	1,677	8,739	87,316,987	10.01	9.48

a Computed from Fifteenth Census of the United States, Retail Distribution: Kentucky, Table 5–A.
b Includes proprietors and assumes part time = half time.

[fol. 549] MARTIN EXHIBIT XXVII

Chain Store Wages [a]

* * * * * * *

"It is no secret that one of the great advantages of the chains was due to the fact that they paid lower wages than

---

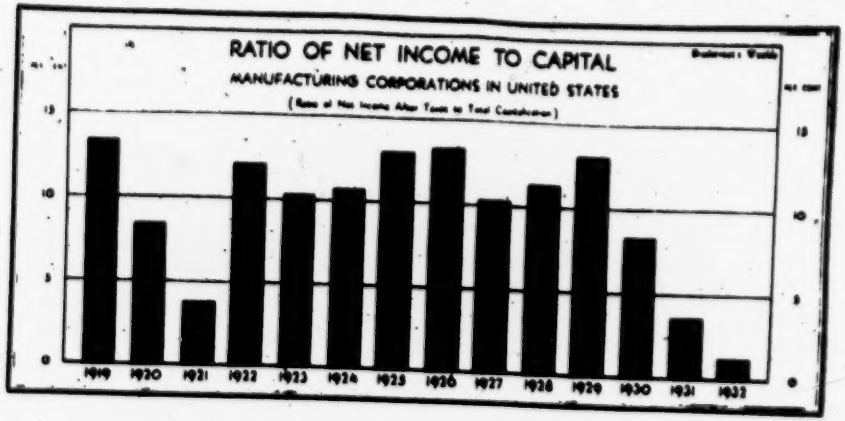
[a] Editorial, *Retailing*, June 19, 1933.

the bigger independents, especially the department stores. Selling behind the counter of a chain store was simpler, it is true, and more mechanical. But the fact remains that the wages are generally below the average for other kinds of stores."

(Here follows photolithograph of Martin Exhibit XXVIII, side folio 550.)

MARTIN EXHIBIT
XXVIII

POST-WAR RECORD OF CORPORATE EARNING



January, 1933

CHAIN STORE AGE

Chain Earnings Stand Up Despite Sales Drop

By VICTOR J. OLEARO

CHAIN store reports of operations for 1932, which will shortly begin to make their appearance, are expected to furnish

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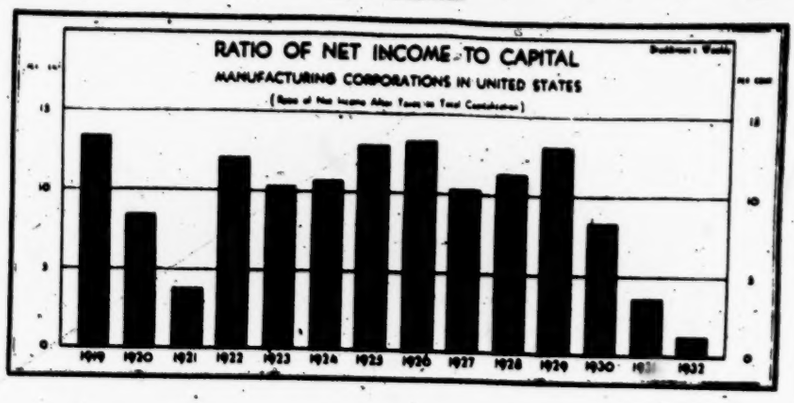


January, 1933

CHAIN STORE AGE

Chain Earnings Stand Up Despite Sales Drop

By VICTOR J. OLEARO

CHAIN store reports of operations for 1932, which will shortly begin to make their appearance, are expected to furnish pleasant reading. Despite the further drop in retail prices and contraction of public buying power which contributed greatly to restrict dollar sales, the chain store business as a whole will record a highly satisfactory earnings mark, quite unlike the showing of most other major branches of industry.

From present indications, it appears that among the companies covered by the Chain Store Act sales index the grocery chains as a group again will make relatively the best showing from the standpoint of total earnings and ratio of net to sales. This showing, furthermore, will be accomplished in the face of heavy expenditures made during the year in remodeling and consolidating a large percentage of stores. The five and ten and drug groups are expected to make a close bid for second place, while the shoe and apparel groups will probably compete in the order named.

The accompanying table presents the aggregate estimated sales and profits for 1932 for each group, together with comparative figures for 1931. The estimated results are based on the assumption that December sales will at least maintain the rate of comparison with 1931 as was shown by volume for the first 11 months.

On the basis of these estimates, aggregate net profits in 1932 for the group of 18 grocery chains will be about 24% less than 1931. The ratio of net to sales, however, will remain unchanged at 2.7%, a truly remarkable achievement considering the conditions which existed.

Total estimated profits for the five and ten group will be roughly 27% under the 1931 total, while the profit ratio will show a decline from 7.4% to about 6.0% for all six companies taken as a unit.

Two drug chains will probably fare better than the five and ten group, though the smaller number of units in the drug group does not afford as weighty an index as is the case with the five and ten chains. At any rate, the combined earnings of the drug chains are estimated roughly at 21% under the 1931 results. The profit ratio, however, will witness only a slight decline, or from 3.7% to about 3.3% on sales.

Estimated earnings for two shoe chains in 1932 indicate a decline of about 35% under the 1931 total on this basis, the profit margin will be about 2.8% on sales, as against 3.6% in the preceding year.

Data on the apparel groups is sufficient to permit even an estimate of probable results, but it is doubtful whether any sizable profit will be shown for the year. More likely, the combined showing will show a net loss. In 1931, on a total business of nearly $80,000,000, the four chains in this classification obtained a combined net profit of only $678,000.

Aside from this satisfactory display of earning power, nearly all of the chain store companies above covered, regardless of type, are expected to present a financial standing at the close of the year which will compare favorably with previous years. Preliminary information at hand indicates, in most instances, the maintenance of a continued healthy cash position and either complete freedom from bank debt, or a substantial reduction of such obligations.

All in all, it may be stated with a fair degree of accuracy that the chain stores, for the most part, will commence business in 1933 in practically the same strong financial shape as a year ago, a condition which carries an encouraging augury for operations in the new year.

Whenever a business consistently shows a large and relatively well sustained earning power year after year it is only natural to attribute the success to capable management. It cannot be denied that this factor was largely responsible for the continued progress of the retail organizations.

But, without intending to minimize the important part played by good management, the satisfactory results of the chains last year was due in no small part to the excellent cooperation obtained from landlords who instead of attempting to hold successful companies to rent obligations contracted for on bases patently made burdensome by existing conditions have regarded the chains in their true light of steady and well-paying tenants.

Instead of adopting an obstinate attitude on the matter of rent relief these property owners have seen the benefits which would ultimately accrue to all concerned from a satisfactory adjustment of rentals. The chains have cut every controllable item of expense, in some instances rather drastically. It remains for all landlords to contribute their share and aid in preserving intact an industry which, in the final analyses, has brought and will continue to bring them abundant returns.

Safeway Earnings Estimated

IN connection with the recent reduction in the quarterly dividend on Safeway stores, Inc., common stock, it has been learned that, although final results for 1932 will not be known for another month or two, the company should show net earnings for the year in the neighborhood of $5,000,000. This would compare with $5,415,941 earned in the year 1931.

The company is reported to be entirely free of bank debt. Current working conditions remain sound, with cash probably in excess of the $9,611,656 on hand at the end of last

[fol. 551]

MARTIN EXHIBIT XXIX

Kroger Earnings on Investment in Kentucky Assuming Accuracy of Morrill Figures for Sales and Earnings

	Sales[a]	Computed tax	Credits[b]	Net tax	Income before[c] sales tax	Income after sales tax	Investment in Kentucky[d]	Rate of earnings on investment	Investment in Kentucky adjusted	Rate of earnings on investment adjusted[e]
1930....	$14,653,448	$139,584.48	$15,369.00	$124,215.48	$172,892.93	$48,677.45	$1,756,000	2.8%	$1,438,721.46	3.4%
1931....	15,496,915	148,469.15	15,643.84	132,825.31	151,734.19	18,908.88	1,353,000	1.4	1,035,721.46	1.8
1932....	11,447,611	107,526.11	12,271.75	95,254.36	86,230.98	9,023.38*	1,076,000	0.8*	1,076,000.00	0.8*

[a] Morrill Deposition, p. 26.
[b] Sworn amendment to Bill of Complaint.
[c] Morrill Deposition, p. 27.
[d] Sworn statement to Kentucky Tax Commission quoted in Martin Exhibit VIII-A.
[e] The capital adjustment necessary as shown in Morrill No. 3, p. 5, is here reflected in data for 1930 and 1931, as well as in the figures for 1930. The adjustment was assumed to have taken place in Kentucky ratably with Kentucky sales, that is, 5.5 of the total for the company. The assumption is presumably only approximately accurate, but figures for 1932 indicate the substantial validity of the assignment.
*Loss

[fol. 552] MARTIN EXHIBIT No. VIII-A

Comparison of Investment with Sales in Kentucky by Retailers Doing Business Both Within and Without the State

(In Thousands of Dollars)

Name	Year	Sales		Property invested		Per cent of sales in Kentucky	Per cent of property in Kentucky
		Total	In Kentucky	Total	In Kentucky		
Great A. & P. Tea Co.	1930	916,265	13,710	135,598	919	1.50	0.68
	1931	869,482	14,498	149,243	836	1.67	0.56
	1932	753,013	11,026	161,016	854	1.46	0.53
Kroger Grocery and Baking Co.	1930	267,664	14,653	60,781	1,756	5.49	2.89
	1931	244,371	13,497	58,260	1,353	5.52	2.32
	1932	213,160	11,448	53,002	1,076	5.37	2.03
S. S. Kresge Co.	1930	146,836	2,576	108,071	590	1.75	0.55
	1931	140,859	2,424	104,280	560	1.72	0.54
	1932	119,237	1,990	99,084	491	1.67	0.50
F. Q. Woolworth Co.	1930	289,289	2,276	145,646	452	0.79	0.31
	1931	282,670	2,230	145,123	452	0.79	0.31
	1932	249,893	1,934	139,559	419	0.77	0.30
J. C. Penny Co.	1930	192,944	2,236	69,126	561	1.16	0.81
	1931	173,705	2,170	71,443	585	1.25	0.82
	1932	155,272	1,961	64,752	421	1.26	0.65
Sears Roebuck & Co.	1930	395,133	1,119	296,071	133	0.28	0.04
	1931	363,453	1,282	300,636	140	0.35	0.05
	1932	299,341	1,890	297,069	135	0.40	0.05
Montgomery Ward & Co.	1930	75,353	1,086	34,740	431	1.44	1.24
	1931	60,497	808	26,564	287	1.34	1.08
	1932	54,916	713	19,596	213	1.30	1.09
W. T. Grant & Co.	1930	71,050	437	14,425	55	0.61	0.38
	1931	69,149	424	17,110	50	0.61	0.29
	1932	73,309	560	17,081	65	0.76	0.38
J. J. Newberry & Co.	1930	30,187	726	21,814	278	2.40	1.27
	1931	31,147	954	22,044	312	3.06	1.41
	1932	33,122	1,012	21,304	299	3.06	1.40
Walgreen Co.	1930	.....	.....	.....	.....	.....	.....
	1931	5,969	538	1,668	83	9.02	4.98
	1932	4,816	460	1,359	74	9.56	5.43
McCrory Stores Corporation	1930	43,224	330	36,457	196	0.76	0.54
	1931	43,296	320	34,408	186	0.74	0.54
	1932	.....	.....	.....	.....	.....	.....

[fol. 553] MARTIN EXHIBIT No. VIII-A

Comparison of Investment with Sales in Kentucky by Retailers Doing Business Both Within and Without the State a
(In Thousands of Dollars)

Name	Year	Sales		Property invested		Per cent of sales in Kentucky	Per cent of property in Kentucky
		Total	In Kentucky	Total	In Kentucky		
Mangels, Inc.	1930	9,987	371	2,747	34	3.72	1.23
	1931	9,357	326	2,258	31	3.48	1.38
	1932c	.....	.....	.....	.....	....	....
Melville Shoe Corp.	1930	28,654	353	7,776	87	1.23	1.12
	1931	26,287	339	9,144	61	1.29	0.67
	1932c	.....	.....	.....	.....	.....	....
S. H. Kress Co.	1930	19,206	327	15,229	53	1.70	0.35
	1931	20,972	261	16,214	124	1.24	0.76
	1932	19,084	220	15,736	122	1.15	0.77
G. C. Murphy Co.	1930	17,498	246	4,519	48	1.40	1.05
	1931	19,182	221	4,477	51	1.15	1.14
	1932	18,497	188	4,553	44	1.02	0.97
American News (Louisville News Co.)	1930	35,095	241	4,708	18	0.69	0.38
	1931	32,488	220	4,503	15	0.68	0.34
	1932c	.....	.....	.....	.....	....	....
Reliable Stores Corp.	1930	8,692	387	260	0	4.45	0
	1931	8,541	354	228	0	4.15	0
	1932	5,631	316	142	0	5.61	0
Jewel Tea Co.	1930	15,522	201	8,231	13	1.30	0.16
	1931	13,743	162	8,129	34	1.18	0.42
	1932	11,091	132	7,476	32	1.19	0.43
Edison Brothers Stores, Inc.	1930	4,912	256	1,591	52	5.22	3.26
	1931	6,423	286	1,825	41	4.46	2.23
	1932	8,018	243	2,000	22	3.03	1.09
Western Auto Supply Co.	1930b	.....	.....	.....	.....	....	....
	1931	12,433	90	5,414	15	0.72	0.28
	1932	11,798	84	5,670	12	0.72	0.22
Sterchi Brothers Stores, Inc.	1930	5,671	189	6,311	77	3.34	1.23
	1931	4,215	145	4,323	63	3.45	1.45
	1932	2,951	102	3,250	45	3.45	1.38
Childs Co.	1930	23,127	166	11,840	3	0.72	0.02
	1931	21,123	143	11,640	2	0.68	0.02
	1932	15,681	108	23,288	4	0.69	0.02
Lerner Stores Corp.	1930	25,293	129	7,129	5	0.51	0.08
	1931	26,077	101	6,190	5	0.39	0.08
	1932c	.....	.....	.....	.....	....	....
G. R. Kenny Co.	1930	17,852	71	9,148	30	0.40	0.33
	1931	14,024	65	5,935	27	0.47	0.46
	1932	11,869	52	5,402	18	0.44	0.32

a Source: Records of Kentucky State Tax Commission.
b Report Lost.
c Report in hands of Field Agent.

[fol. 554] MARTIN EXHIBIT No. VIII-A

Comparison of Investment with Sales in Kentucky by Retailers Doing Business Both Within and Without the State a
(In Thousands of Dollars)

Name	Year	Sales		Property invested		Per cent of sales in Kentucky	Per cent of property in Kentucky
		Total	In Kentucky	Total	In Kentucky		
D. A. Schulte, Inc.	1930	19,898	68	22,021	5	0.34	0.02
	1931	17,968	55	22,693	5	0.31	0.02
	1932c	.....	.....	.....	.....	....	....
United Cigar Stores Co. of America	1930	74,486	78	22,087	10	0.10	0.04
	1931	63,163	55	20,310	10	0.09	0.05
	1932d	186	18	73	6	9.52	8.56
Feltman & Curme Shoe Store Co.	1930	6,161	74	2,019	11	1.20	0.54
	1931	5,349	88	1,070	8	1.64	0.76
	1932	4,379	77	1,009	9	1.76	0.93
Schiff Co.	1930	9,933	200	3,196	63	2.01	1.96
	1931	10,180	208	2,849	48	2.04	1.68
	1932	8,910	166	2,743	32	1.86	1.15
B. & G. Sandwich Shops, Inc.	1930	3,451	57	1,440	71	1.66	0.49
	1931	2,883	39	1,214	66	1.36	0.55
	1932c	.....	.....	.....	.....	....	....
G. F. Adams Co.	1930	2,708	41	415	6	1.53	1.43
	1931	1,856	23	1,498	18	1.22	1.22
	1932c	.....	.....	.....	.....	....	....
National Bellas Hess Co.	1930	29,646	153	11,849	56	0.52	0.47
	1931	27,431	160	8,694	54	0.58	0.63
	1932c	.....	.....	.....	.....	....	....
Federal Bake Shops of Missouri, Inc.	1930	402	34	45	5	8.45	11.55
	1931	323	28	38	5	8.76	12.02
	1932	213	22	31	4	10.18	14.39
Ground Gripper Shoes, Inc.	1930	1,228	24	748	10	1.94	1.34
	1931	1,179	17	446	8	1.46	1.78
	1932c	.....	.....	.....	.....	....	....
Nunn Bush Shoe Co., Inc.	1930	2,954	28	1,063	6	0.96	0.57
	1931	2,503	26	820	4	1.03	0.54
	1932	1,197	23	578	3	1.92	0.50
Metropolitan Chain Stores	1930	9,073	None	5,892	26	0	0.45
	1931e	.....	.....	.....	.....	....	....
	1932c	.....	.....	.....	.....	....	....

a Source: Records of Kentucky State Tax Commission.
b Report lost.
c Report in hands of Field Agent.
d Incorporated in Tennessee in 1932.
e No report field.

[fol. 555] MARTIN EXHIBIT No. X-A

Ratio of Taxes to Net Sales of Department Stores—Chain and Independent—1930-31*

Net sales	1931 Number of stores	1931 Ratio	1930 Number of stores	1930 Ratio
Less than $150,000	65	.75%	76	.7%
150,000– 299,000	64	.6	88	.6
300,000– 499,000	58	.6	81	.6
500,000– 749,000	51	.65	58	.6
750,000– 999,000	27	.5	35	.55
1,000,000–1,999,000	65	.4	75	.45
2,000,000–3,999,000	50	.4	67	.4
4,000,000–9,999,000	44	.4	54	.35
10,000,000 and over	27	.25	30	.3

* As reported in Bulletins 85 and 88, Bureau of Business Research, Harvard University.

[fol. 556]

MARTIN EXHIBIT No. XI-A

Ratio of Taxes to Net Sales, Department Stores Independently and Centrally Owned, 1930*

Net sales	Doing no group buying		Doing some group buying		In ownership group	
	Number of stores	Per cent	Number of stores	Per cent	Number of stores	Per cent
Less than $500,000	85	.75	50	.65	35	.65
500,000–2,000,000	42	.55	54	.55	38	.55
2,000,000 or more	33	.35	40	.35	61	.35

* As reported in Bulletin 85, Bureau of Business Research, Harvard University, pp. 38–40.

(Here follow tables, side folios 557, 558 and 559)

[fol. 557]

Correction of Summary of Martin Exhibit XII.

SUMMA

Total busines

Sales group	I Number of merchants included	II Net worth	III Net profit before gross sales tax	IV Net profit after gross sales tax at 1% flat rate
$1,053,693–$33,767.....	30	$1,420,982	$220,214	$174,937
32,817– 15,543.....	30	276,720	34,553	28,144
15,176– 5,030.....	30	133,679	13,308	10,319
5,019– 1,140.....	29	44,147	3,615	1,589

557]
ection of Summary of Martin Exhibit XII.

SUMMARY SHOWING DATA IN AGGREGATE
(-000 omitted)

		Total business					Kentucky data assuming 5% of total in state					
Sales group	I Number of merchants included	II Net worth	III Net profit before gross sales tax	IV Net profit after gross sales tax at 1% flat rate	V Ratio III/II	VI Ratio IV/II	VII Kentucky net worth	VIII Net profit before gross sales tax	IX Net profit after Kentucky gross sales tax at rates provided in statute	X Ratio VIII/VII	XI Ratio net profit after 1% sales tax to net worth in Kentucky	XII Ratio IX/VII
53,693-$33,767.....	30	$1,420,982	$220,214	$174,937	15.50%	12.31%	$71,049	$11,011	$8,873	15.50%	12.31%	12.49%
32,817- 15,543.....	30	276,720	34,553	28,144	12.49	10.17	13,836	1,728	1,606	12.49	10.17	11.61
15,176- 5,030.....	30	133,679	13,308	10,319	9.96	7.72	6,684	665	651	9.95	7.72	9.74
5,019- 1,140.....	29	44,147	3,615	1,589	8.19	3.60	2,207	181	172	8.20	3.60	7.79

[fol. 560] MARTIN EXHIBIT XXX

Comparison of Kroger Taxes in Kentucky with Those to Which the Company Would be Liable if It Operated in Other States Having Similar Gross Sales Taxes *a*

	Gross tax	Offsets	Total taxes under sales tax Act	Sales tax per store
Kentucky *b*	$107,526.11	$12,271.75	$95,254.36	$382.55
Minnesota *c*	140,463.00	.....	140,463.00	564.11
Vermont *d*	413,466.94	182,253.34	231,223.60	928.61
New Mexico *e*			279,150.00	1,121.08

a The assumption is that the corporation sell the same amount and through the same number of stores as it did sell in Kentucky in 1932, as set out in the depositions of Albert H. Morrill, namely, $11,447,611 of sales in 249 stores, the credits for other taxes being $12,271.75 and property taxes paid, $169,971.59.

b Ky. Acts, 1930, chap. 149.

c Session Laws, 1933, chap. 213.

d Act approved March 25, 1933.

e Laws, 1933, chap. 73.

[fol. 561] MARTIN EXHIBIT XXXI

Comparison of Effective Tax Rates (Under Chap. 149, Ky. Acts, 1930) with Rate of Net Gain on Sales of Grocery and Variety Chains and of Department Stores

(Amounts in thousands of dollars)

	Range of sales	Number of enterprises	Average sales per enterprise	Average gain
Grocery Chains as computed *a*	Over 225,000	5	304,744	2.8%
	50,000–225,000	6	27,942	2.7
	Under 50,000	6	11,672	2.1
Grocery Chains (Harvard) *b*	Over 5,000	21	91,437	2.8
	750–5,000	30	1,724	2.2
	Under 500	31	404	0.9
Variety Chains *c*	Over 2,000	13	31,065	6.2
	500–2,000	7	1,267	3.0
	Under 500	13	205	0.4*
Department Stores *d*	Over 2,000	121	8,502	3.5
	500–2,000	143	1,096	1.9
	Under 500	187	253	0.9

* Loss.

a All grocery chains listed by Nystrom or in Martin Exhibit XII and reported in Moody are included and shown in three groups as nearly equal in number of chains as possible. The figures shown are thre-year averages, 1930–1932 inclusive, except in the case of U. S. Stores Corporation (1928–1930), the last reported, are used).

b Figures for 1929 as reported in Harvard Bureau of Business Research Bulletin No. 84.

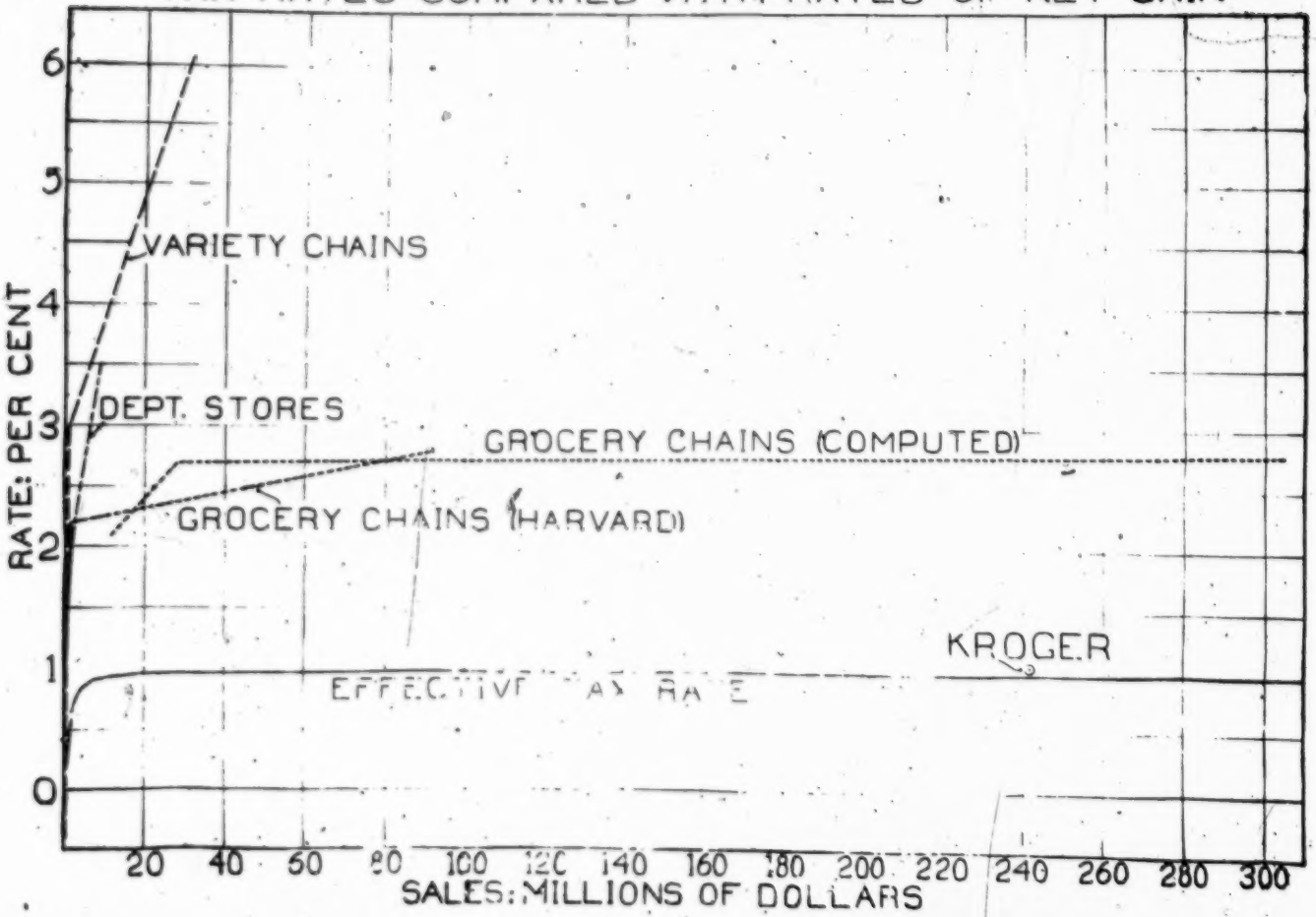
c Figures for 1929 and 1931 averaged on basis of data in Harvard Bureau of Business Research Bulletin No. 89.

d Figures for 1927–1931 inclusive averaged on basis of data reported in Harvard Bureau of Business Research Bulletin 85 and Bulletin 88.

(Here follow photolithographs of Martin Exhibit XXXI, side folios 562 and 563)

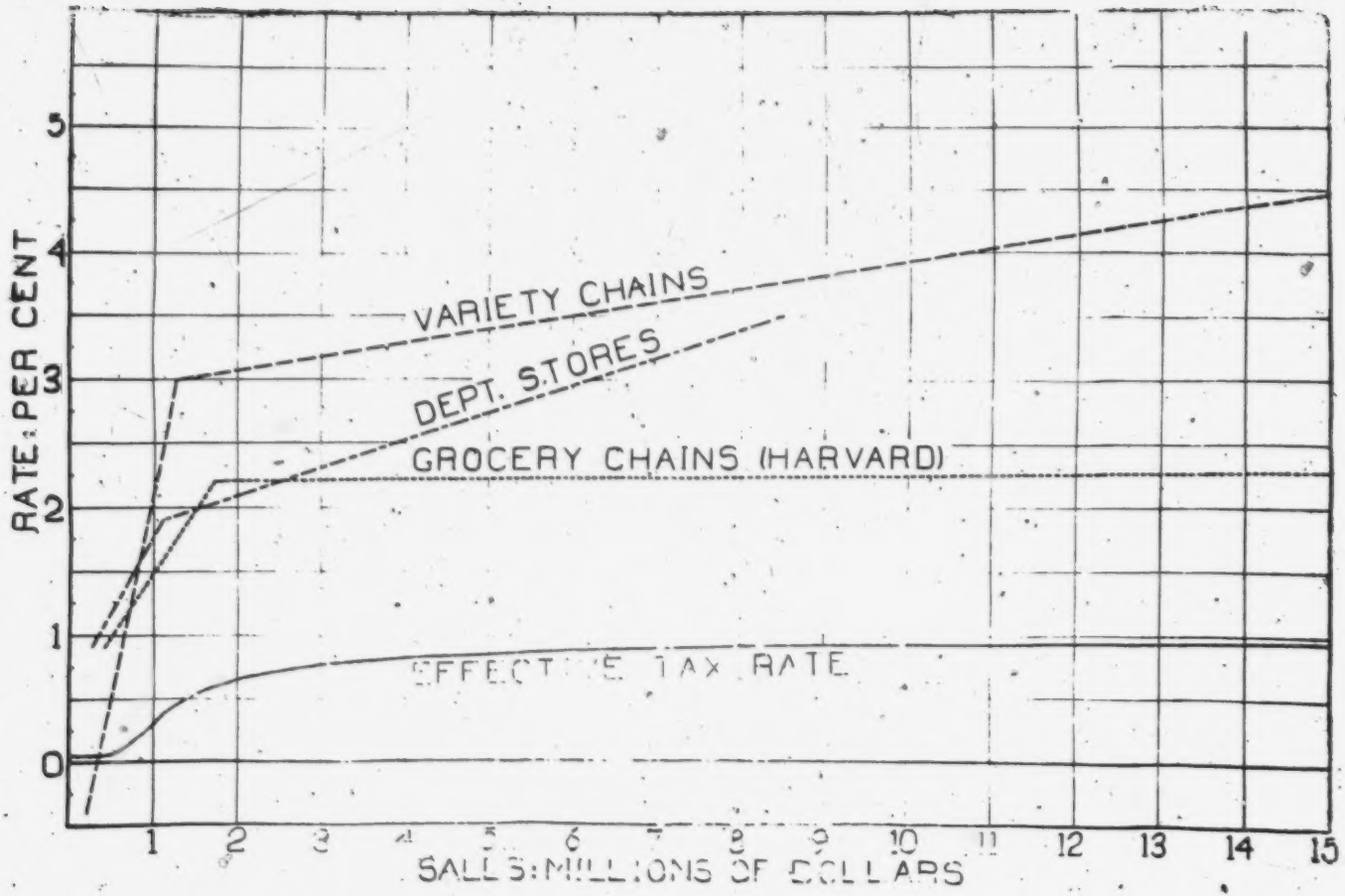
MARTIN EXHIBIT XXXI

TAX RATES COMPARED WITH RATES OF NET GAIN



562

3641A


RATE: PER CENT
0
1
2
3
4
5
VARIETY CHAINS
DEPT. STORES
GROCERY CHAINS (HARVARD)
EFFECTIVE TAX RATE
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
SALES: MILLIONS OF DOLLARS

563

3643

[fol. 564]. CLYDE WILLIAM PHELPS, called for defendant:

Witness stated that he was the same Clyde William Phelps who testified by affidavit in this case in 1931. He was a graduate of Harvard University, having received his Bachelor of Arts degree there. He also received the degree of Docteur of Laws at Toulouse University in France. He studied at Heidelberg and in Vienna. Since 1925 he had been head of the Department of Economics at the University of Chattanooga with the exception that in 1931 and 1932, for a period of little over one year, he served as economist on the Federal Trade Commission. He was familiar with the Harvard Bureau of Business Research studies and knew that they were authoritative publications. He was also acquainted with the United States Census Bureau of Retail Distribution reports. He was also familiar with publications on retail chains, with Bradstreet's Weekly, "Chain Stores," "Bjorklund and Palmer's Study of Prices of Chain and Independent Grocers in Chicago," and Alexander's "Study of Retail Grocery Prices"; Dowe's "Comparison of Independent and Chain Store Prices," which appeared in Journal of Business; "Chain Store Progress Magazine"; "Fairchild's Financial Manual" and "Retailing Magazine," all of which publications he regarded as authoritative in their fields. Chain Store Industry he thought contained propaganda, since it advertised the prices of large chains and compared them with independents for the purpose of indicating how the chain stores sell goods at a cheaper price. It is the outstanding organ of the industry.

Witness thought that it was pretty generally recognized that there was a relationship between the size of the establishment as measured by volume of sales and efficiency as indicated by its percentage of expenses and its net profit, etc. He thought the theory was pretty well established regarding this point. One could find it substantiated throughout the text books and economic literature. Inves- [fol. 565] tigations made by other government organizations have supported the theory that as the establishment grows in size, measured by volume of sales, it tends to show more and more advantages over the smaller establishment. That is the result of certain economic principles, certain principles of law in physiology, chemistry and biology, which prevail in the natural and physical world.

Among economic principles, there is the principle of indirect cost and the principle of division of labor, which tends to bring about that result that as establishments grow in size as measured by volume of sales, it tends to increase their advantage over smaller firms. The United States Censor's Report shows that among chain store businesses the smaller chain is less effective as measured by volume of sales. They have higher expenses and pay out a higher proportion of their total income from sales for wages and etc. than do the larger ones. The law does not work out perfectly with mathematical precision but it is rare that one finds any theory working out perfectly specially over a short period of time like twelve months or two or three years. However, the tendency is there. This is widely supported by economic theorists. One can go to a multitude of economic text writers and recognized teachers in the United States and one will find the theory supported and the fact has been discussed and published by impartial organizations like those operated by the United States government. The witness stated that he would say offhand, that big undertakings appear at an advantage compared with small ones. Big chains as measured by volume of sales appear at an advantage as compared with establishments having smaller sales. Big department stores appear at an advantage as compared with small department stores. The tendency is there.

Witness thought that it follows from this that the large scale retailer had greater tax paying capacity than the smaller retailer in the same line. This was so for two reasons. First of all, the rate of profit tends to increase as the establishment increases in size. That gives increased [fol. 566] tax paying capacity and more than a proportional increase. Consequently, the very fact that the large establishment has a large income, as compared with the smaller establishment would give it an increased taxpaying ability.

Witness stated that it had always seemed to him in theory that the independent cooperative in the so-called voluntary chain had a pretty good chance to rival the chain stores. In other words, by theorizing one can assume that the independents would get together and do this and that, etc., and working it out to the end of the theory it would seem as if they could accomplish all the things and that they will make a pretty close approximation to the efficiency of the real chain, that would be the result, but in practice, the volun-

tary group do not appear to equal the efficiency of the chain, the main reason for that being the lack of centralized ownership and control. The one great advantage that the real chain has is that it owns every one of the units. Ownership is centralized, each of the units does what it is told to do. On the other hand, in the voluntary group of independents, each one owns his own store. He can buy through the central organization if he wants to, but witness did not know of any case where the merchant bought everything through the centralized office. The member of the voluntary group can follow the advice of headquarters but does not have to do so. The real chain system is a more or less military organization. Every unit operates in the most efficient manner as determined by the central headquarters, which is able to employ the highest skill. On the other hand, the voluntary group instead of having a military organization, so to speak, at central headquarters, must coax the independent to carry out the scheme. That is not a simple democratic from of organization but it is not as efficient as an autocratic system.

Witness had experience in working closely with wholesalers starting a voluntary chain and he knew from them, as well as from literature on the subject, the difficulty in- [fol. 567] volved in persuading the various independents to carry out the policy made by headquarters, such as keeping their stores clean, keeping their shelves covered with brass tacks, and carrying out sales policies announced by headquarters. Witness further stated that he might refer to the Federal Trade Commission studies on Cooperative Grocery Chains. In that study it was pointed out that the voluntary groups of independents were not able to achieve the efficiency of the regular chain, that they could not distribute merchandise as efficiently.

Other studies had been made, some of them appear in the Chain Store Progress, which bore out that point. Professor Martin had made a study several years ago in Lexington. All of the studies bear out the fact that the voluntary groups do not achieve the efficiency in marketing their goods that the regularly centrally owned and controlled chain stores do.

Insofar as an independent retailer not operating as a voluntary member of a group is concerned, he cannot secure the efficiency of a centrally owned and managed chain. A few exceptions may be discovered where there is an extra-

ordinary genius among independent merchants who is able to compete satisfactorily with the centrally owned and controlled chain and even undersell them, but in general the independent retailer who is operating alone is worse off than the voluntary groups in trying to meet the competition of the centrally owned and organized chains. This is because the large scale establishment tends to have certain advantages in buying and selling, production, financing, and general management which can only be achieved by a large selling firm.

The small retailer usually fails to find himself with a managing genius to run his store. He cannot have the services of a $25,000 or a $50,000 or a $100,000 a year specialist. Yet that same specialist can be hired by a great store or establishment with a tremendous volume of sales and pay the $25,000 or $100,000 and make a tremendous profit out of his employment.

[fol. 568] As an example from another field, the International Harvester Company installed years ago a certain specialized machine to do nothing except to round off the four corners of a wagon tongue. That machine, it was reported, saved them a penny a tongue. The only way by which its use was possible at a profit was by turning out a tremendous volume of tongues. A small plant might have bought that machine and lost money because that small plant did not have enough business to utilize this very efficient machine. So in big retailing establishments, the volume of business makes it possible to hire the very highest type of managing ability and to get such results out of that ability as to make it relatively cheap.

Management plays a large part in the success of a retail establishment. The smaller plant cannot afford the high-class management which the larger establishment secures.

Those operating large retailing establishments are able to buy in large quantities and secure extra discounts because they buy in those large quantities. This is reflected in profits. There are also other advantages. A large establishment has other methods of capitalizing upon its buying of supplies. It gets all of the discounts which the smaller establishment can get and in addition to that another discount, and sometimes it is large enough to be able to secure special deals for itself.

Witness stated that he was one of the economists who helped write the Federal Trade Commission reports, and

besides his work in Washington upon schedules on information involving chain store organizations and independents, he visited the headquarters of the largest chain in the country in a number of lines of business and in some cases arrangements were made with officials for him to go around with the supervisor or superintendent and he was permitted to spend an entire day accompanying them in their visits to stores and asking questions as to how they supervised and how the stores were running. He secured a great deal of interesting information directly that way, from actual [fol. 569] contact with the chains and with the officials. Witness did not know of any reason why the economic principles about which he had testified would not be effective in Kentucky the same as elsewhere. Economic laws, he stated, did not stop at State lines.

Cross-examination:

Witness had made no examination of the actual operation of the Kentucky Gross Sales Tax Law as it applied to the various taxpayers to whom the law presumptively applied.

SELDON R. GLENN, called for defendant:

Witness is collector of internal revenue for the District of Kentucky and has held that position for ten days prior to July 20, 1933 the date on which testimony was taken. Prior to that time he had been State Tax Commissioner for about ten years. As such, it was his duty to become familiar with the income and expenditures of the State Government. He was also familiar with the taxing laws of the State.

All taxes on personal property, all license taxes of every description make up the general expenditure fund. Between $6,000,000 and $8,000,000 of tax money was due the Commonwealth of Kentucky, which funds would go to the credit of that general expenditure fund when collected. These funds were in the process of collection at the time the testimony was given and witness stated there were no preferred claims against the fund. While the witness was State Tax Commissioner there were some refunds of taxes collected. It was the duty of the State Tax Commissioner to approve or reject refunds for inheritance taxes, license

taxes, and whiskey taxes. A refund was made on whiskey of about $300,000 and the refund of more than that amount was made on inheritance taxes. The month preceding the time the testimony was given a refund of $140,000 on license taxes on beer was made.

[fol. 570] All of the refunds were made by check. It would be possible for the State Treasurer to refund any amount up to $5,000,000 to any person who improperly paid taxes within a reasonable time after such refund was ordered if the refund was made a preferred claim against the general expense fund. This statement of the witness was objected to by counsel for the plaintiff.

Refunds have always been treated as preferred claims. The question which led to this reply was objected to by counsel for complainant on the ground that it was a question of law whether the refund was entitled to preference.

Money comes into the general expenditure fund gradually.

Cross-examination:

Witness recalled testifying in the Franklin Circuit Court in the case of Lebus vs. Ruby Laffoon, Governor, et al., on May 23, 1932, which involved the validity of the $14,000,000 proposed bond issue. In that case he was called upon to estimate the amount of taxes that might accrue to the State under the gross sales tax law which was the subject matter of the instant case. Witness' recollection was that he estimated that the State would realize about $500,000 a year from the gross sales tax law. Witness' recollection was refreshed by reference to the answer which he gave which read as follows:

"There is the litigation which is known as the gross sales tax, which has been won in the district federal court and the circuit court of appeals and is now before the Supreme Court of the United States, which involves $400,000 of past due taxes and about $400,000 more which will be due during the next biennial period and the amount of that tax would lessen, etc."

Witness recalled making this statement.

The last call for interest bearing state warrants was issued by the State Treasurer in February, 1933. Witness did not know whether any warrants issued since July, 1927, had been called for payment. During the year 1932 the range in

price of interest bearing state warrants drawn against the general expenditure fund ran from eighty-three to ninety-three. During 1932 it was around ninety.

[fol. 571] Tax refunds during the past few years have been made when presented.

R. C. ILG, called for defendant.

He is manager of Ernst and Ernst, public accountants and is — charge of the Louisville branch. As such he was consulted by the State Tax Commission of the State of Kentucky with reference to making a survey of the books of the Kroger Grocery & Baking Company. On June 20, 1933, his firm was employed to make a survey of the Kroger Grocery & Baking Company to determine the amount of work necessary to arrive at the various figures testified to by Mr. Morrill. The survey was not made. Representatives of his office discussed the matter with the Tax Commission and spent two days in Cincinnati for the purpose of making the survey. On June 22, in connection with Mr. MacArthur, manager of the Cincinnati office, representatives of his firm called on Mr. Ginter of the firm of Nichols Morrill Wood Marx & Ginter, counsel for the Kroger Company who took them over to the general office of the company and introduced them to Mr. Clark, the chief accountant. They discussed the purpose of their visit with Mr. Clark and he furnished them with all the information that they thought was necessory and after looking at the records by four week periods, and various details of the operation of the various Kroger Grocery and Baking Company stores, particularly those branches controlling the operation of Kentucky stores, the examination disclosed that Kroger had five branches doing business in Kentucky. These were located at Carbondale, Ill.; Charleston, W. Va.; Cincinnati, Ohio; Louisville, Ky.; and Nashville, Tenn.

The records that they examined of the general office reflected only the operation of these various stores that were handled at the branches mentioned. For example, the Cincinnati branch office controlled the stores operated in Cincinnati, Hamilton, Covington and Newport and nearby districts. From their examination of the records that were submitted, they could not determine just what the Ken-

tucky stores as a whole were doing in the way of operation. This was one of the purposes of their visit, to determine [fol. 572] what break-down was necessary. By break-down witness meant analysis of sales and various expenses for the purpose of showing gross profits, net profits, etc. They did not go into detail of stores operated 1930, 1931, and 1932, but at the close of 1933 Kroger was operating 249 stores out of the various branch offices, 165 of which had meat departments. The operations in the meat departments were detailed just the same as the store operation. That meant that the witness had 414 store operations to analyze. Out of all the stores over which the Cincinnati branch had supervision, there were 75 located in Kentucky over which the branch had jurisdiction. The same thing applied to Louisville. That branch had charge of stores located in Indiana. It supervised 152 stores doing business in Kentucky, 101 of which had meat departments.

Operating statements made up by Kroger would show grocery sales, cost of sales, gross profit, and the meat department would contain the same information. The statement would also show total sales of both departments and gross profits of both departments. The classification covering grocery expenses then follows and there was deducted the grocery expenses from grocery profits. To the grocery and meat departments are applied certain general expenses under the classifications, fixed expenses, total store expenses, and other expenses. The stores are charged with branch operating expenses and branch overhead expenses. Branch overhead includes general expenses, supervisory expenses, transportation expenses, warehouse expenses, sales promotion, advertising, purchasing expense, and administrative expense. They estimated 128 accounts represented in every store operation and his firm further estimated that it would take five men at the Cincinnati branch, five at Louisville, two in Carbondale, and possibly one at Memphis approximately forty days to gather up the detailed information and possibly ten or twelve days to compile the data. The cost would run approximately $8,000 to $10,000. When the State Tax Commission was advised of the expense they determined to hold the matter in abeyance.

[fol. 573] ELAM HUDDLESTON, called for defendant:

He is the Treasurer of the State of Kentucky, having taken office January 4, 1933. His term will expire, January, 1936. As Treasurer he is the disbursing officer of the Commonwealth. All checks given for the State government are written in his office under his directions. Since he has been Treasurer there have been refunds made to persons who pay taxes, when in fact no taxes were due. These refunds were made in cash.

Witness thought that the $1,000,000 which was the approximate amount of the claims from the State which the plaintiffs would be entitled to in the event they paid and prevailed in a later action, could be refunded immediately. He has impounded or places in escrow all funds of appreciable amount so that he can refund them when the court decides that the payment was wrongfully exacted. This is what he did with the beer money. He impounded it when it was paid and paid it back immediately. So far as he has observed, the general custom of the State with reference to paying refunds has been cash. Recently he had made refunds in the neighborhood of $200,000. Other refunds have been made from time to time and they are being constantly made.

Seen and approved.

S. H. Brown, Ass't Att'y Gen'l.

[fol. 574] IN UNITED STATES DISTRICT COURT

Before Hicks, Circuit Judge, and Cochran and Dawson, District Judges.

OPINION—Filed December 20, 1933

DAWSON, District Judge:

These three cases are before us on final submission and each of them involves the validity of Chapter 149 of the 1930 Acts of the General Assembly of the Commonwealth of Kentucky, commonly known as the Retail Merchants Gross Sales Tax Act. The case of Kroger Grocery & Baking Company v. John B. Lewis, et al., in the Eastern District of Kentucky,

and involving the same questions, was heard and considered by us at the same time. On a former hearing of these cases we dismissed the petitions on the ground that the plaintiffs had an adequate remedy at law. An appeal was taken to the Supreme Court, and that court held that, in view of the allegations of the bills as to the condition of the General Expenditure Fund of the State, it could not be said, in the absence of proof controverting the allegations of the bills, that Section 10 of the Act upon its face afforded an adequate remedy at law. In reversing the case, the Court said:

[fol. 575] "The decrees are reversed and the causes remanded to the District Courts, of three judges, for final hearing upon the merits, without prejudice to a determination upon evidence with respect to the questions of the status of outstanding warrants upon the General Fund in the State Treasury and whether warrants of the sort contemplated by Section 10 of the Act in question are accorded preference in payment over other warrants, and the basis, if any, for the assurance that such preference will be continued so that in the event of actions by the plaintiffs at law under Section 10 they would be afforded a certain, reasonably prompt and efficacious remedy."

We have interpreted this language of the Court to authorize us to again consider the question of the adequacy of the remedy at law under Section 10 of the Act in the light of such proof as might be offered by the parties on this subject.

Proof has been taken on this question which establishes the fact that the uniform practice of the Treasurer of the Commonwealth of Kentucky has been to pay warrants issued by the Auditor for the refund of taxes when presented, and in advance of outstanding interest-bearing warrants, and that such has been the practice of the present Treasurer of the Commonwealth of Kentucky, whose term of office does not expire until January, 1936. It is further established by the evidence that the present State Treasurer has followed the practice of keeping himself in financial position to refund all taxes which are paid under legal protest, and that he will be in a position to and will do so with reference to the taxes involved in these actions in event it shall be finally determined that such taxes were illegally collected, notwithstanding the fact that there were

outstanding as of June 30, 1933, approximately fifteen million dollars of interest-bearing warrants against the General Expenditure Fund, out of which fund Section 10 of the Act directs refunds under the Act to be made. We know of no opinion of the Court of Appeals of Kentucky giving its sanction to this practice, nor does the record disclose that the Attorney General of the State has ever ruled that the practice was authorized by any statute of the State. Certainly the practice is consonant with common justice; but in view of the doubt expressed by the Supreme Court as [fol. 576] to whether Section 10 of the Act authorizes such preferential treatment, and in view of the further fact that if refunds under the Act are not given preference it is uncertain when they would be paid, we feel constrained to hold that the remedy at law given by Section 10 of the Act does not afford that certainty necessary to repel equity jurisdiction.

We therefore come to a consideration of the merits of the cases.

The pertinent provisions of the Act are:

"Section 1. The words 'retail merchant', as used in this act, shall mean and include every person, firm, association, co-partnership or corporation opening, establishing, operating or maintaining any 'store', as defined herein, for the purpose of and selling goods, wares or merchandise at retail in this State, except those actually engaged in gardening or farming and selling garden or farm products raised by them in this State. The term 'store', as used in this act, shall be construed to mean and include any store or stores or any mercantile establishment or establishments in this State which are owned, operated, maintained or controlled by the same 'retail merchant', as defined herein, either domestic or foreign, in which goods, wares or merchandise of any kind are sold at retail. The provisions of this act shall be construed to apply to every 'retail merchant' and 'store', as defined herein, which is controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management.

Section 2. Every retail merchant, as defined herein, shall pay an annual license tax for the opening, establishing, operating or maintaining, of any store or stores, as defined

herein, determined by computing the tax on the amount of gross sales as follows:

One-twentieth of one per cent of the gross sales of Four Hundred thousand ($400,000.00) Dollars or less; two-twentieths of one per cent on the excess of the gross sales over Four hundred thousand ($400,000.00) Dollars and not exceeding Five Hundred thousand ($500,000.00) Dollars; five-twentieths of one per cent on the excess of the gross sales over Five hundred thousand ($500,000.00) Dollars and not exceeding Six hundred thousand ($600,000.00) Dollars; eight-twentieths of one per cent on the excess of the gross sales over Six hundred thousand ($600,000.00) Dollars and not exceeding Seven hundred thousand ($700,000.00) Dollars; eleven-twentieths of one per cent on the excess of the gross sales over Seven hundred thousand ($700,000.00) [fol. 577] Dollars and not exceeding Eight hundred thousand ($800,000.00) Dollars; fourteen-twentieths of one per cent on the excess of the gross sales over Eight hundred thousand ($800,000.00) — and not exceeding Nine hundred thousand ($900,000.00) Dollars; seventeen-twentieths of one per cent on the excess of the gross sales over Nine hundred thousand ($900,000.00) Dollars and not exceeding One million ($1,000,000.00) Dollars; one per cent on the excess of the gross sales over One million ($1,000,000.00) Dollars.

Section 3. Every retail merchant, as defined herein, in order to ascertain the amount of taxes due and payable under the next preceding section, shall file with the State Tax Commission on or before the first day of February each year a written report verified by the affidavit of the owner or chief officer on such forms as it may prescribe, giving the number and location of its store or stores, as defined herein, the name and post office address of its owner or principal officer, the name and address of its officer or agent in charge of its business at each separate store, the nature and kind of business, the total gross sales during the preceding year ending the thirty-first day of December, and such other facts bearing on the proper taxation as the Tax Commission may require.

The State Tax Commission may, in any case, require such additional information as it may deem necessary to enable it to perform its duties herein. It shall be the duty of the State Tax Commission from such reports, and from

such additional information as it may obtain, to ascertain the amount of taxes due, and to certify to every such retail merchant the amount of taxes due for the preceding year, based upon such reports and information as it may ascertain. Upon final action by the State Tax Commission, it shall certify to the Auditor of Public Accounts and to the retail merchant the amount of such tax due by each retail merchant, as defined herein, and it shall be the duty of each retail merchant to pay the amount of such tax to the Auditor of Public Accounts not later than thirty days thereafter.

In reporting the gross sales for the year, 1930, retail merchants shall include only those sales made between the date that this act becomes effective and December 31, 1930, and the license tax due for the year 1930 shall be based on the amount of those sales only.

SECTION 4. The license or excise tax levied herein, shall not be in lieu of any special state license, excise, occupational or corporation license tax due under the provisions of any law now in force, or that may hereafter be enacted. Should any retail merchant, as defined herein, be liable for and pay any special state license, excise, occupational or corporation license tax under the laws now in force, or that may hereafter be enacted, credit may be taken on the tax [fol. 578] levied in this act for the amount of such special license, excise, occupational or corporation license tax so paid not to exceed the amount of the license or excise tax levied herein."

Plaintiffs contend that the Act violates the Fourteenth Amendment to the Federal Constitution in that it denies them the equal protection of the law and deprives them of their property without due process of law; that it violates the Federal Constitution in that it discriminates against and burdens interstate commerce, and that it violates the Bill of Rights of the State Constitution, which prohibits the exercise of arbitrary power over the lives, liberty and property of citizens and secures to all the inalienable right of acquiring and protecting property, and is so arbitrary and confiscatory as to be unauthorized as an excise or license tax under Section 181 of the Constitution. Some claim is also made that it violates other provisions of the Constitution of Kentucky, but these contentions apparently are not seriously urged, and we shall not notice them.

Does the Act Deny to the Plaintiffs the Equal Protection of the Law?

It is the contention of the plaintiffs that equal protection of the law under the Fourteenth Amendment is denied by the Act because:

(1) The classification of the persons taxed into eight different groups, according to the amount of gross sales, and a corresponding stepping up of the rate, is not justified by any conceivably substantial distinction between the classes, but is wholly arbitrary and discriminatory.

(2) The credits allowed by Section 4 of the Act operate, in most cases, to exempt from the tax those falling in the class having annual gross sales of less than $400,000,000, and that this section also operates to give a preference [fol. 579] to those entitled to such credits over those taxpayers who have no special license or excise taxes upon which to claim the credits authorized by Section 4.

It should always be remembered that the power of the State to tax for public purposes within its constitutional sphere is as unlimited as is the power of the National Government within its sphere, except for the equality clause of the Fourteenth Amendment.

It has often been written that the equal protection provision of the Fourteenth Amendment is not a guarantee of equality of the operation or application of State legislation upon all the citizens of a State. All that it intends to secure to citizens is that the laws of a State shall have equality of operation and application on persons according to their relations. That is to say, it is a guarantee to every citizen that he shall be accorded the same treatment by the laws of his State as is accorded to other citizens in his class and similarly circumstanced. As applied to taxation, it has been repeatedly declared by the Supreme Court that this provision of the Constitution does not prohibit classification further than that the classification must be rested upon some ground of difference having a fair and substantial relation to the object of the legislation. The exemption of certain classes of property from taxation, or the imposition of different rates of taxation upon different classes of property, or persons, is not prohibited by the equal protection provision of the Fourteenth Amendment,

provided the classification is not unreasonable or arbitrary; and this is true as to excise, license and occupational taxation as well as property taxation: It is not necessary that the classification shall be one that appeals to the judgment or sense of fairness of courts. It is enough if the classification is reasonably founded on the "purposes and poli- [fol. 580] cies of taxation." Generally speaking, the judgment of the legislative body is conclusive as to classification unless it is based upon so unsubstantial a difference in the classes affected, or is so arbitrary and unreasonable as to preclude the assumption that the classification was made in the good faith exercise of legislative judgment and discretion. These principles are so well settled that citation of authority is hardly necessary, but among the cases sustaining the principles above enunciated are: Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S. 232; Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283; Campbell v. California, 200 U. S. 87; Royster-Guano Co. v. Virginia, 253 U. S. 412; Watson v. Comptroller, 254 U. S. 122; Stebbins v. Riley, 268 U. S. 137; Quong Wing v. Kirkendall, 223 U. S. 59; McLean v. Arkansas, 211 U. S. 539; Armour Packing Co. v. Lacy, 200 U. S. 226; Connolly v. Union Sewer Pipe Co., 184 U. S. 540; Alaska Fish Co. v. Smith, 255 U. S. 44.

The decisions are equally clear that in order to sustain classified taxation of things or persons the difference between the classes need not be great. We think it safe to say that slight differences, such as inability to pay, in character of property or circumstances of persons taxed, will sustain State tax classification against attack under the equal protection clause of the Fourteenth Amendment. Further, we think it may be laid down as a sound rule that even though the Court may doubt or question the existence of the distinction or difference forming the basis of classification for State Taxation, yet if the matter is one about which reasonable men may disagree, the judgment and discretion of the legislative body should not be interfered with.

Measured by these rules, we are unable to say that the Act in question violates the equal protection clause of the Fourteenth Amendment. It is well settled, and the plaintiffs concede, that classification for taxation based upon [fol. 581] mere volume is not open to attack under the Fourteenth Amendment. Plaintiffs contend, however, that

it is a long cry from classification upon volume, by the application of the same rate to all classes, to a classification which steps up the rate on the respective classes determined according to volume. Conceivably there might be some merit in this contention, if the law under attack here imposed increasing rates upon the entire volume of business done by those in the higher classes. But such is not the case here. All those who fall exclusively within the $400,000.00 class have applied to them exactly the same rate, and each taxpayer in each higher classification gets the benefit of exactly the same rate, not only of other taxpayers in his particular classification, but he and all others in his class likewise get the same rate applied to that portion of their sales which falls within the lower classifications as is exacted of those taxpayers who fall exclusively within such lower classifications.

Therefore, it seems quite clear to us that the rates applied in this Act apply equally to all in the same class. Hence, the claim of the plaintiffs that classification of taxpayers according to volume and the application of different rates to different classes, amounts to a denial of equal protection of the law, comes at last to the proposition that such classification is so unreasonable and arbitrary as to preclude the assumption that the classification was made in the good faith exercise of the taxing power of the State.

Having in mind the principles heretofore adverted to, we can not agree to this proposition. The Court judicially knows that there is in the public mind a quite widely accepted theory that taxation may properly be based upon ability to pay, and this theory has often been translated into legislative action. There is a widely accepted theory of economics that, as a general proposition, ability to pay increases with volume of business, because, generally speak- [fol. 582] ing, increased volume of business means increased profits. We recognize, of course, that this theory of economics is not universally accepted, but, on the contrary, is vigorously oppoesd by another school of economic thought. These opposing theories were vigorously advanced in these cases by business men and economists in their testimony. If economists and business men disagree on these propositions, how can it be said that legislative classification in harmony with one of these schools of thought to the

exclusion of the other is not reasonably founded in the "purposes and policies of taxation," or that such classification precludes the assumption that it was in the good faith exercise of legislative judgment and discretion.

It is vigorously urged upon us that the provision of Section 4 of the Act which allows a credit to the extent of special license, excise, occupational or corporation license taxes paid by the retail merchant operates to deny equal protection to those taxpayers who are required to pay no such taxes, and as an illegal discrimination in favor of those taxpayers in the lower brackets whose special taxes paid under other laws of the State are sufficient in amount to almost or entirely liquidate the tax here involved. This view is an entirely superficial one. No individual taxpayer under this law has any vested right in the continuation of a corporation license tax imposed by State law on his corporate competitor, nor in the continuation of any other special license tax any of his competitors has heretofore been required to pay. Certainly the Legislature, in the imposition of the tax here involved, could have repealed all special license taxes which were imposed by law upon those coming within the ambit of the Act under consideration. If there are any retail merchants affected by this Act who, prior to its enactment, were not required to pay any special [283] license taxes, they had the advantage over their competitors from whom such taxes were exacted. Section 4, to the extent that it allows the payment of such taxes as a credit, simply eliminates a discrimination, though not an illegal one, which theretofore existed. The fact that these credits will substantially liquidate the tax of many of the taxpayers whose sales amount to less than $400,000.00 is simply an incident in the operation of the law. Taxpayers in the higher brackets, where they pay such special taxes, get exactly the same credits. Those who complain of these credits because they are not entitled to like credits put themselves in the anomalous position of complaining because they have not heretofore been subject to special license or other special taxes.

It seems to us that the claim of the department stores, that the law in requiring them to treat the operation of all their departments as one unit, and of the chain stores, that the law in requiring them to similarly treat the operation of all of their stores, amounts to a discrimination against

them and in favor of the retail merchant operating a single non-department store, is equally wanting in merit. This unitary classification of department stores and chain stores undoubtedly conduces to simplification in the collection of the tax. The taxation is not based upon the number of stores the taxpayer owns, but upon his gross sales. It is in the nature of a license or excise tax, and we know of no constitutional inhibition which would prohibit the State from requiring each taxpayer to report the result of all of his business in the State and pay taxes on the aggregate result. The seeming inequality urged because of this feature of the law arises from the taxpayer's method of doing business, and not from any inherent inequality in the law itself.

[fol. 584] Does the Act Deny Due Process under the Fourteenth Amendment?

Oftentimes it is difficult to test State legislation, particularly tax legislation, by the due process clause of the Fourteenth Amendment. As pointed out by Mr. Chief Justice Taft in Truax v. Corrigan, 257 U. S. 312, it is more or less customary to treat the due process and the equal protection clauses of the Fourteenth Amendment together; but, as he observed in that case, "while they overlap, and a violation of one may oftentimes involve a violation of the other, the spheres of the protection they offer are not coterminous." It is conceivable that a State taxing statute may be based on a proper classification and give absolute equality between persons in the same class, so as to make it immune from attack under the equal protection clause, and yet amount to a denial of due process.

In considering the question whether a State taxing law denies due process under the Fourteenth Amendment, a consideration of what amounts to a denial of due process of Congress under the Fifth Amendment is most helpful, because it is well settled that the restraint imposed upon State Legislatures by the due process clause of the Fourteenth Amendment is exactly the same as that imposed upon Congress by the due process clause of the Fifth Amendment. Coolidge v. Long, 282 U. S. 582; Heiner v. Donnan, 285 U. S. 312.

In the case of Brushaber v. Union Pacific Co., 240 U. S. page 1, the Supreme Court, in discussing the limitation

of the due process clause of the Fifth Amendment on the taxing power of Congress, said:

"So far as the due process clause of the Fifth Amendment is relied upon, it suffices to say that there is no basis for such reliance since it is equally well settled that such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring upon the one hand a taxing power and taking the same away on the other by the limitations of the due process clause. * * * And no change in the situation here would arise even if it be conceded, as we think it must be, [fol. 585] that this doctrine would have no application in a case where although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment, or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion."

From this language it seems clear that if congressional legislation, under the guise of taxation, amounts to confiscation of property, or is so foreign to the practices of government in taxation as to shock the sense of justice, it would violate the due process clause of the Fifth Amendment, and this principle is re-affirmed in Heiner v. Donnan, supra, and in Nichols v. Coolidge, 274 U. S. 531. This rule, therefore, furnishes a safe guide for determining if State tax legislation trangresses the due process clause of the Fourteenth Amendment.

In thinking of valid taxation, State or National, we instinctively exclude legislation which, either because of the rate imposed or because of other features, amounts to confiscation of the taxpayer's property, whether that property is tangible effects or his business.

Under the Act here involved the effective tax rate, without allowing for deductions of the special taxes referred to in Section 4 of the Act, applicable to taxpayers with gross sales of $1,300,000.00 is in excess of one-half of one per cent; to taxpayers with sales of $5,000,000.00, in excess of 86/100 of one per cent; to taxpayers with $7,000,000.00

of gross sales, 9/10 of one per cent; and to taxpayers with $11,000,000.00 of sales, in excess of 93/100 of one per cent; and as the volume of sales increases beyond this figure, the effective rate gradually approaches, although it can never quite reach, one per cent, due to the fact that [fol. 586] the taxpayer in the higher brackets gets the benefit of the application of the lower rates to that part of his gross sales which falls within the lower classifications. Therefore, if the proof satisfactorily showed that one per cent of gross sales represents the net profit normally realized by any branch or subdivision of the retail mercantile industry, we would have no hesitation in holding the tax confiscatory—at least as to that branch or subdivision of the industry. The burden is upon the plaintiffs who are attacking the law to show that it is confiscatory; but this burden is not sustained merely by showing that it is confiscatory when applied to the business of the least efficient members of the industry taxed. The test is: What is its effect generally upon the class taxed, or what is the effect generally upon any branch or subdivision of that class? We think the proof falls far short of showing that one per cent of gross sales represents the net profit normally realized by retail merchants as an entire class, or normally realized by any branch or subdivision of the industry. On the contrary, we think the preponderance of the proof is to the effect that the profit is normally from two to two and one-half per cent of gross sales, after deduction of taxes, and that in many lines of retailing the profit is even higher.

Quite a good deal of proof has been introduced which shows that the tax would have been substantially confiscatory as applied to the business of the Kroger Grocery & Baking Company during the three years of 1930, 1931 and 1932; but the proof further strongly tends to show that there was lack of efficiency in the operation of the business of this concern during those years. The testimony of Mr. Morrill, the new President of that concern, shows that under his administration the efficiency of the operations of that company have been so improved that for the first six months of the year 1933 the net profits amounted [fol. 587] to $2,294,000, as compared to substantially $1,475,000 for the entire year 1930; to $2,199,000 for the entire year 1931, and to $2,441,000 for the entire year 1932;

and that the net profits, after deduction of taxes for the first six months of 1933 amounted to 2.49 per cent of gross sales, as compared to a net profit of slightly in excess of one-half of one per cent for 1930, slightly less than one per cent for 1931, and slightly in excess of one per cent for 1932. There is nothing in the record to show that the experience of this company on its business in Kentucky is substantially different from that in its business as a whole.

We feel constrained, therefore, to hold that the proof fails to establish that in its application to those in the higher brackets the tax amounts to confiscation. We must confess that it appears to us that the tax falls very heavily on those in the higher brackets; but inasmuch as it falls short of confiscation, relief must be secured at the hands of the Legislature—not from the court.

Does the Tax Discriminate Against Interstate Commerce, or Constitute a Burden on Interstate Commerce?

We think this question is conclusively decided against the contention of the plaintiffs by the opinion of the Court of Appeals of Kentucky in the case of Moore v. State Board of Charities & Corrections, 239 Ky. 729. The plaintiffs vigorously assail the authority of this case, upon the ground that a legal fraud was practiced upon the State Courts, in that there was no real controversy between the parties to that litigation. We can not escape the fact, however, that the validity of the Act was squarely presented to the Court of Appeals in that case. That court had jurisdiction of the subject matter and of the parties, and while the action which led to the opinion in that case originated after these actions had been filed in this court, that fact [fol. 588] can have no effect upon the binding force of the opinion of the State Court, in so far as it deals with the meaning and interpretation of the Act. The opinion of that court as to the meaning and scope of the Act is binding upon all State officials, and is binding upon us. Truax v. Corrigan, 257 U. S. 312. But of course the opinion of that court as to the practical results of the application of the Act so construed involves a finding of fact and is not binding upon us. That court in the opinion referred to specifically held that the Act does not apply to sales made

in interstate commerce, and further held that, properly interpreted, Section 1 does not and was not intended to discriminate against farm and garden products raised in other States and sold in this State.

Does the Act Violate the Bill of Rights of the State Constitution, or is it Unauthorized by Section 181 of That Instrument?

The tax involved here must find its justification in Section 181 of the State Constitution, the pertinent part of which provides:

"The General Assembly may, by general laws only, provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations and professions, or a special or excise tax; and may, by general laws, delegate the power to counties, towns, cities and other municipal corporations to impose and collect license fees on stock used for breeding purposes, on franchises, trades, occupations and professions."

This section has been frequently considered by the Court of Appeals of the State, and it is now well settled that it must be read in connection with the Bill of Rights contained in the State Constitution, which forbids the exercise of arbitrary power over the lines, liberty and property of citizens, and secures to all the inalienable right of acquiring and protecting property, and that, when so read, Section 181 confers no power to prohibit, or substantially prohibit by taxation, a legitimate business or to resort to unreasonable classification in taxation. Fiscal Court of [fol. 589] Owen County v. Cox, 132 Ky. 738; City of Louisville v. Pooley, 136 Ky. 286; Sperry & Hutchinson v. Owensboro, 151 Ky. 389. Thus, we have presented under the Bill of Rights contained in the State Constitution and under Section 181 of that instrument exactly the same questions we have disposed of in our consideration of the due process and equal protection clauses of the Fourteenth Amendment, and it necessarily follows that the claim of the plaintiffs that the Act violates the State Constitution in the particulars referred to must be denied.

The temporary injunction heretofore issued will be dissolved, and the permanent injunction prayed for denied. Inasmuch as we feel confident the plaintiffs will desire to

appeal these cases to the Supreme Court, the temporary injunction will be continued in force for thirty days following the entry of the decree herein directed to be prepared, and if before the expiration of that period steps have been taken to appeal the cases, such temporary injunction will be continued until final disposition of the cases by the Supreme Court.

In view of the unsettled economic condition of the country, and in view of the possibility that after a reasonable trial the law may prove confiscatory as to some branches or subdivisions of the retail mercantile business, we feel constrained to leave these cases on the docket, without prejudice to the right of the plaintiffs, after such reasonable trial, to apply to this Court to reopen and rehear the causes on the single question of confiscation. See: Opinion of the Supreme Court of December 4, 1933, in Glenn et al. v. Field Packing Company.

Counsel may prepare and present for entry a decree conforming to the views herein expressed.

Xen. Hicks, U. S. Circuit Judge. Chas I. Dawson, U. S. District Judge.

Judge Cochran dissents.

December 20, 1933.

[fol. 590] Trabue, Doolan, Helm & Helm, Louisville, Ky.; Nichols, Morrill, Wood, Marx & Ginter, Cincinnati, Ohio, Attorneys for Plaintiffs.

Bailey P. Wootton, Attorney General, Frankfort, Ky.; S. H. Brown, Assistant Attorney General, Frankfort, Ky.; Batson, Cary & Welch, Louisville, Ky.; Leslie W. Morris, Frankfort, Ky., Attorneys for Defendants.

[fol. 591] IN UNITED STATES DISTRICT COURT

DISSENTING OPINION—Filed May 22, 1934

COCHRAN, J.:

I feel constrained to dissent from the majority opinion of the court.

Certainly the step up in rate of tax as compared with that in volume of sales may be so great as to be arbitrary and unreasonable. It seems to me that such is the case

here. The tax imposed for sales amounting to $400,000.00 is $200 and for those amounting to $1,000,000.00 plus is $10,000.00. The percentage of step-up in volume was 250—in tax imposed 5,000 per cent, or twenty times as much.

In the case of City of Newport v. Frankel, 192 Ky. 408, it was held that a city ordinance providing that a moving picture theatre charging an admission fee of fifteen cents should pay an annual tax of $450 and one charging twenty cents $5,000 was arbitrary and unreasonable. The step up in volume was 33⅓ per cent and in tax 1,000 per cent or [fol. 592] thirty times as much. I am unable to make out that legislation providing a step up in tax twenty times as much as the step up in volume is so much less than that providing thirty times as to remove it from being arbitrary and unreasonable. Difference in business may make this decision inapt.

The classification which the Act makes seems to me arbitrary and unreasonable on another ground. There are four distinct classes of retailers, singly operated units, department stores, chain stores and mail order houses. Their points of difference are many. The chain store has many features and advantages which definitely distinguish it from the singly operated unit. The same is true as to a department store. That such is the case was recognized and held in State Board of Tax Comm'rs vs. Jackson, 283 U. S. 527. It was emphasized in Liggett vs. Lee, 288 U. S. 517. It may be added that a department store has features and advantages definitely distinguishing it from the singly operated unit. The Act ignores this natural and inevitable classification. It classes all retailers of whatever nature together and then reclassifies them according to their volume of sales. Each retailer has to pay the same tax as every other retailer having the same volume of sales. The singly operated unit has to pay the same rate of tax as the chain store or department store having the same volume of sales notwithstanding both have advantages, greater in case of the chain store, which makes for greater profits, over it. Likewise the department store has to pay the same rate as the chain store with the same volume of sales notwithstanding the chain store has advantages, which make for greater profits, over it.

In the Titusville case retailers and wholesalers were treated by the municipality differently in the tax imposed per volume of sales. So here is seems to me that it was

arbitrary and unreasonable not to treat singly operated units, department stores and chain stores differently in the [fol. 593] rate of tax imposed per volume. If the rate of tax was to be determined per volume it should have been different as to each class of retailers.

The arbitrary and unreasonable character of the Act seems to me to be demonstrated by the operation of the Act. The returns for the year 1930, 1931, and 1932 are in the record. Mention will be made only of the returns for 1930, as they are the most complete. 24,163 retail merchants made returns for that year. Their gross sales amounted to $362,848,264 and the tax paid by them to $106,342.94. It is reasonable to assume that these returns cover all retail merchants in the state except plaintiffs and those not plaintiffs but protected by the temporary injunction, twenty five in number. The gross sales of the plaintiff, Stewart Dry Goods Company, a corporation operating a department store containing seventy-seven departments in Louisville amounted to $3,000,000, the tax upon which is a little over $23,000.00. Those of the plaintiffs, Levy Brothers, a partnership operating a department store in Louisville, amounted to $1,250,000, the tax upon which is almost $5,500.00. The gross sales of the plaintiff, J. C. Penney Co., in this state, a corporation, a chain store operating department stores in and out of this state, twenty-one of which are located in this state, are not before me. The tax thereon seems to be about $10,000.00. And the gross sales in this state of the plaintiff, The Kroger Grocery & Baking Company, a corporation, a chain store operating retail groceries in and out of this state, 263 of which are located in this state, amounted to $14,500,000.00 in round numbers, the tax upon which is approximately $124,000.00. The tax of the Great Atlantic & Pacific Tea Company, one of the twenty-five protected by the injunction, is estimated at approximately $120,000.00 and the taxes of the other merchants so protected is placed at about $50,000.00. This makes the whole tax not over $450,000.00. Of this tax the Kroger Grocery & Baking [fol. 594] Company and the Great Atlantic & Pacific Tea Company pay more than one half though their aggregate gross sales are only 8% of the gross sales in the state. The tax of the Kroger Grocery & Baking Company on $14,500,000.00 gross sales is more than $18,000.00 in excess of that paid by 24,163 merchants on $362,000,000.00 gross

sales. The Stewart Dry Goods Company operating a single department store in Louisville pays $23,000.00 taxes on $3,000,000.00 of gross sales, nearly one fourth as much as the 24,163 merchants making returns upon gross sales amounting to $362,000,000.00. Of these 24,163 merchants only 35 of them made gross sales in excess of $400,000.00. The sum yielded by the tax is a measly sum as compared with the needs of the state and twenty-nine merchants out of over 24,000 pay three-fourths of this sum. In the case of the plaintiff, The Kroger Grocery & Baking Company, its profit in this State was in round numbers $172,000.00. Deducting from this the tax leaves $48,000.00 as net profit, or 1/3 of 1% of the gross sales. The net profit in 1931 would have been less than $40,000.00 and in 1932 there would have been a loss of $9,000.00. The same tax applied to its entire system would turn a profit of $1,400,000.00 into a loss of $700,000.00.

Apparently the sum yielded by the tax is contributed to generally by the retail merchants throughout the state. As a matter of fact, by reason of the credits against the tax, which the act authorizes, and which possibly of itself may render it unconstitutional, more than two-thirds of the retail merchants of the state make no contribution whatever to that sum. The statute is both vindictive and deceptive.

Another particular in which it seems to me that the Act is unconstitutional is that it discriminates against garden and farm products raised in other states, in that it excepts from its provision retail merchants selling garden and farm products raised by them in this state. A retail merchant who sells such products raised elsewhere is subject to the [fol. 595] tax. The plaintiff, The Kroger Grocery & Baking Company, comes within that category. It operates a farm of 360 acres in Ohio named "Country Club Farm" after the "Country Club" brand, one of its best known brands. On that farm it produces cattle, sheep, hogs, poultry, milk and garden and other farm products which are sold at retail in this state. The language of the exception is "those actually engaged in gardening or farming and selling garden or farm products raised by them in this state." The Court of Appeals of Kentucky in the case of Moore vs. State Board, 239 Ky. 729, construed this exception as follows:

"However, we are of the opinion that the phrase 'in this State' was meant to modify the word 'selling' and not 'raised'. The whole import of the Act is the levy of a tax measured by sales made in this state. It is the sales which count, not the place where the goods sold are produced. It was plainly the purpose of the act to exempt from its operation those engaged in gardening and farming and selling their own products, such sales the Legislature intended to be without the operation of the act and it was of no moment to that body where the produce sold was raised."

The construction placed on the exception is as if it read "those actually engaged in gardening and farming and selling in this state garden or farm products raised by them." It seems to me that construing it to mean as if it so read is taking unauthorized liberty with the language of the Act. There is one consideration, however, which makes it certain that the legislation had no such meaning. To so read the statute exempts the plaintiff, The Kroger Grocery & Baking Company, from the act. The exemption is not of persons, but of retail merchants so engaged in selling and that plaintiff is such a merchant. It is inconceivable that the legislature intended to make such an exemption. Then, if it be taken that it did, this circumstances of itself would seem to affect the validity of the act. It will hardly do to hold that the plaintiff, The Kroger Grocery & Baking Company, shall not pay the tax and The Great Atlantic & Pacific Tea Company shall. This is a [fol. 596] case, as I see it, where this court is not bound to follow the state court in its construction of the Act. It is governed by the statement on this subject in the case of Edward Hines Trustees v. Martin, 268 U. S. 458, 463.

On the other question involved I think that the plaintiffs have a plain and adequate remedy at law in this court. Where this state levies a tax which the taxpayer claims is illegal and pays under protest, it is exacted from him by duress and the official into whose hands it comes and the state itself hold it in trust to repay to the taxpayer if it is held by the court to have been illegal. It cannot and should not be used for the purpose for which it was levied and collected, at least, until the lapse of a reasonable time for the taxpayer to assert his right. Nothing else appearing it is to be taken that this trust will be respected. In this state

it has been the invariable practice to so treat taxes so paid and upon its being held that the tax is illegal to repay it at once. This is unaffected by the present wretched financial condition of the state. If the tax paid has not been kept intact so as to enable such repayment to be made there is always enough cash in the general fund sufficient for that purpose. Sections 4688-1 to 4688a-2 and 4689, Kentucky Statutes, do not relate to warrants drawn by the Auditor on the Treasurer to repay illegal taxes which have been collected. They relate solely to warrants so drawn in favor of voluntary creditors of the state. Hence they have no bearing here. Section 162, Kentucky Statutes, relates to warrants drawn to pay such taxes. A decision of the Kentucky Court of Appeals is not needed to make good any of these propositions. Their correctness is apparent. A recognition of the invariable practice of the state officials to respect the trust imposed by payment under protest of taxes claimed to be illegal and an indication that the Appellate Court of the state will enforce such trust is to be [fol. 597] found in the case of Talbott, Auditor, vs. Childers, Executor, 247 Ky. 568. It involved the question as to whether a succession tax paid by an executor in order to procure the right to transfer corporate stock could be recovered when it had not been made under protest. The court in demonstrating the need for such a protest made at the time the tax was paid, said:

"So that the Collector thereof may become forewarned that an effort would be later made to recover the amount, either in whole or in part, and so that the distributors of such tax to said agencies entitled to it might become advised that payments so made are not permanent but only tentative, subject to be refunded by whatever proceeding payor might thereafter take."

See also case of Talbott vs. Urquhart's Ex'ors, 250 Ky. 143.

Section 10 of the act here involved expressly authorizes the taxpayer to bring an action to recover the tax which he has paid under protest. This authority is unlimited and amounts to a consent on the part of the state that it may be sued in this court. If judgment is rendered in its favor this court has jurisdiction by mandamus to compel repayment of the tax. If limited to the general fund therefor,

there is always sufficient in that fund out of which it can be paid. But it is not to be expected that it will be so limited. It should be taken that the tax paid, if paid under protest, will be kept intact so that it can be repaid upon such adjudication. There is nothing in the act against this.

[fol. 598] IN UNITED STATES DISTRICT COURT

MOTION FOR FINDINGS AND CONCLUSIONS—Filed December 26, 1933

The plaintiff in each of the above-styled cases, by counsel, moves the Court, before entry of a decree herein, to find the facts specially upon which its decree is based and to state separately its conclusions of law thereon, and to enter of record such findings and conclusions, all as provided by Equity Rule 70½ as expounded by the Supreme Court in Pub. Serv. Com. v. Wisconsin Tel. Co., 289 U. S. 67, at page 69; Tax Comm'rs v. Jackson, 283 U. S. 527, at page 533.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Attorneys for Plaintiffs.

Have seen—12/26/33. H. W. Batson.

[fol. 599] IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed May 21, 1934

Findings of Fact

The court, pursuant to Equity Rule 70½, makes the following findings of fact:

State Warrants

1. The state of the General Fund of Kentucky on the dates set out hereunder is indicated by the figures which appear after the respective dates.

[fol. 600]

Date	Balance to credit of general fund		Outstanding warrants against general fund
6/30/1922	$297,967.85		$4,702,709.11
6/30/1923	2,590,470.14		5,947,750.40
6/30/1924	167,535.74		4,089,151.37
6/30/1925	310,242.68		4,127,746.17
6/30/1926	10,387.44		4,329,772.33
6/30/1927	257,566.83	(deficit)	4,664,820.89
6/30/1928	440,328.14		6,715,347.99
6/30/1929	1,880,084.77		8,060,920.69
6/30/1930	1,826,244.05		8,533,394.79
12/31/1930	1,250,168.22		9,880,501.76
6/30/1931	2,440,128.46		11,023,911.53
12/31/1931	838,269.63		12,637,990.48
6/30/1932	1,302,267.69		13,851,414.57
12/31/1932	573,831.32		14,415,403.69
5/25/1933	1,898,229.25		14,668,744.57
7/30/1933	.....		15,197,005.42

2. Claims against the Commonwealth of Kentucky, whether for refund of taxes or on account of other obligations of the State, are first audited by the Auditor of Public Accounts, and, if found correct, he issues a State warrant for the amount thereof, which is, in effect, an order on the Treasurer for the amount of the claim. These warrants are made payable out of different funds, some out of the General Fund, and others out of other funds set aside by legislative act for specific State purposes. If the Treasurer has on hand in the fund against which the warrant is drawn sufficient funds to pay same at the time it is presented, it is usually paid; otherwise it is stamped interest bearing, and after warrants have been stamped interest bearing, they are called and paid in the order in which they are issued. Due to lack of funds, however, to the credit of the General Fund, no interest bearing warrants against that fund issued since 1927 have been paid.

3. Outstanding interest bearing warrants against the General Fund of the State, during all the time since the passage of the Act in question in these cases, have sold below par, the price at items being as low as eighty-three cents on the dollar.

4. It has been the practice of the State Treasurer in recent years to pay in cash, upon presentation, warrants issued for refund of taxes, and such has been the uniform [fol. 601] practice of the Treasurer who has been in office at all times since the passage of the Act in question, and he

has at all times since he has been in office followed the practice of keeping himself in financial position to refund all taxes paid under legal protest when required so to do, and he at all times has been in a position so to do with reference to the taxes involved in these actions. There is no statute in Kentucky, however, specifically authorizing such preferential treatment of tax refund warrants, nor has the Court of Appeals of the State ever held that such practice is authorized by the laws of the State.

5. Unless warrants drawn under Section 10 of the Act were given preferential treatment in payment, they could not be collected within a reasonable time.

Conclusions of Law Based upon the Above Findings of Fact

Inasmuch as there is doubt of the authority of the Treasurer of the State to give preference in payment to warrants issued under Section 10 of the Act, that section fails to afford to the plaintiffs as certain, speedy, complete and efficient a remedy at law as is available to them in equity, and therefore these actions are cognizable in equity.

Facts Relative to Fourteenth Amendment

1. The challenged Act is essentially a revenue measure.

2. The tax imposed by the Act, exclusive of the credits allowed, is as follows:

Sales of first four.....	$100,000	Rate of	1/20	of 1%, or a tax of	$200.00
Fifth.....	$100,000 of sales	" "	2/20	" " " " " "	100.00
Sixth.....	$100,000 of sales	" "	5/20	" " " " " "	250.00
Seventh.....	$100,000 of sales	" "	8/20	" " " " " "	400.00
Eighth.....	$100,000 of sales	" "	11/20	" " " " " "	550.00
Ninth.....	$100,000 of sales	" "	14/20	" " " " " "	700.00
Tenth.....	$100,000 of sales	" "	17/20	" " " " " "	850.00
Eleventh.....	$100,000 of sales	" "	1%	" " " "	1,000.00
On each.....	$100,000 of sales hereafter, 1%				

[fol. 602] 3. Examples of the special license taxes and corporation taxes allowed as credits under Section 4 of the Act are: the corporation license tax of seventy cents on each one thousand dollars of business transacted by the corporation in the State, or on the value of the capital stock of the corporation; cigarette license tax of $10; soft drink license $2.50; oleomargarine license $3.; playing cards $10.00; pistols $10; bowie knives, dirks, etc. $100; etc.

4. There are approximately 25,000 retail stores in the State of Kentucky.

5. No merchant in Kentucky has an annual sales volume in excess of fifteen million dollars. Without giving effect to the credits authorized by Section 4 of the Act, there is shown below the amount of taxes which are payable by merchants falling in the respective brackets fixed by the Act, and also the effective rate of such tax expressed in percentage of gross sales.

Amount of sales	Total tax payable	Effective rate
$400,000	$200	.05
500,000	300	.06
600,000	550	.0917
700,000	950	.1357
800,000	1,500	.1875
900,000	2,200	.2444
1,000,000	3,050	.305
2,000,000	13,050	.6525
3,000,000	23,050	.7683
4,000,000	33,050	.8263
5,000,000	43,050	.861
10,000,000	93,050	.9305
15,000,000	143,050	.96

6. For the year 1930, 24,163 returns were filed by merchants subject to the Act, and these returns showed an aggregate of gross sales of $362,848,264. 24,128 of these reporting merchants showed gross sales of less than $400,000 each, and the aggregate gross sales of these 24,128 was $340,197,497. 16,413 of the merchants falling in this group, by reason of credits allowed by Section 4, paid no tax. The total tax levied against this group, after the allowance of credits, amounted to $89,220.76 for the year 1930.

[fol. 603] 7. The following is a correct analysis of the report filed by the 24,163 merchants above referred to for the year 1930, showing the number of returns in the various brackets, their gross sales in the same groups, and the net tax after deduction of credits allowed by Section 4, except that there is not shown the effect of the operation of the challenged Act upon the business of those merchants (25 in number), who made no report, having availed themselves of the opportunity afforded by the court to post bond in order to secure the protection of the injunction issued in these cases.

	Number of returns	Gross sales	Net tax
Sales less than 400,000	24,128	$340,197,497	$89,220.76
Sales between $400,000 and $500,000	13	5,866,935	1,261.37
Sales between $500,000 and $600,000	8	4,416,568	1,317.40
Sales between $600,000 and $700,000	5	3,234,563	1,768.56
Sales between $700,000 and $800,000	4	2,989,019	1,383.09
Sales between $800,000 and $900,000	1	814,559	0
Sales between $900,000 and $1,000,000	0	0	0
Sales in excess of $1,000,000	4	5,329,123	11,391.76
Totals	24,163	$362,848,264	$106,342.94

8. The following is a correct analysis of the returns, gross sales and net tax, after the allowance of credits under Section 4, for the year 1931, excluding the operation of the Act on the business of those merchants who have posted bond, made no report and paid no tax.

[fol. 604]

	Number of returns	Gross sales	Net tax
Sales less than $400,000	20,351	$290,824,180	$66,769.82
Sales between $400,000 and $500,000	10	4,520,653	1,007.59
Sales between $500,000 and $600,000	9	4,887,385	1,360.02
Sales between $600,000 and $700,000	3	1,927,791	1,461.17
Sales between $700,000 and $800,000	2	1,472,166	905.08
Sales between $800,000 and $900,000	3	2,549,814	3,118.74
Sales between $900,000 and $1,000,000	2	1,895,680	4,128.35
Sales in excess of $1,000,000	2	2,389,404	6,386.22
Totals	20,382	$310,467,073	$85,136.99

9. Similarly, the following is a correct analysis of the returns of the same class of merchants for the year 1932, which had been filed up to and including April 17, 1933;

	Number of returns	Gross sales	Net tax
Sales less than $400,000	14,582	$178,783,514.26	$35,948.38
Sales between $400,000 and $500,000	4	1,835,261.79	282.28
Sales between $500,000 and $600,000	5	2,764,457.15	1,107.50
Sales between $600,000 and $700,000	1	601,558.29	.....
Sales between $700,000 and $800,000	2	1,522,598.66	1,297.06
Sales between $800,000 and $900,000	1	864,205.61	1,534.44
Sales between $900,000 and $1,000,000	1	939,417.13	.....
Sales in excess of $1,000,000	2	1,001,903.32	2,747.03
Totals	14,597	$186,313,016.81	$42,916.69

[fol. 605] 10. The evidence fails to show that there is no relation between sales volume and net earnings, nor does it satisfactorily rebut a widely accepted theory of economists that, as a general proposition, increased volume of sales results in increased profits and increased ability to pay. On the contrary, there is substantial evidence supporting the affirmative of each of these propositions.

11. The rate of profit realized from sales at retail generally varies with the character of goods sold.

12. Under the Act goods sold on credit are included in gross sales, whether payment therefor is made or not.

13. The management of a store or stores is one of the fundamental factors in determining whether or not a profit is realized, and the amount of profit.

14. As a general proposition, those merchants doing the largest volume of trade are enabled to secure the highest type of management.

15. In the field of retail merchandising large scale enterprises, properly and prudently managed, enjoy economies in operation, such as the ability to purchase in large quantities and wider spread of overhead, not generally enjoyed by those stores doing a small volume of business. Yet in exceptional instances some retail merchants enjoy a high rate of profit on a small volume of sales, while in other cases the margin of profit is very low, even though the sales volume be very large.

16. Sales made by merchants taxed under any of the brackets of the Act are in competition with sales made by merchants selling the same character of goods who are taxed under other brackets of the Act.

17. The Kroger Grocery & Baking Company operated 5,302 stores in the United States in 1930; 4,980 stores in 1931, and 4,816 stores in 1932. Of this number 289 were located in Kentucky in 1930; 254 in 1931, and 249 in 1932. [fol. 606] The average annual sales per store of the Kroger Grocery & Baking Company in Kentucky over the past few years has been approximately $50,000. Most, if not all, of the stores of this company are in competition with other grocery stores located in the neighborhood, and the sales of some of these competing stores exceed the sales of the Kroger Stores with which they compete. Some of these competitors of the Kroger stores are owned by merchants operating single stores with a relatively small volume of sales, and in some instances are entitled to enough credits under Section 4 of the Act to wipe out the tax liability under the Act, whereas the competing Kroger stores, by reason of the fact that the Kroger tax liability is determined upon the aggregate sales of all of its stores, pay an average annual tax of between $425.00 and $450.00.

18. The retail sales of Kroger in the United States for the years, 1930, 1931 and 1932 have been as follows:

1930	$267,094,345.26
1931	244,371,147.17
1932	213,159,742.69

and the Kentucky sales for this same three year period have been:

1930	$14,653,448
1931	13,496,915
1932	11,447,611

19. The gross sales of the Stewart Dry Goods Company are approximately $3,000,000 per year. Without taking account of the credits to which it is entitled under Section 4 of the Act, its annual tax under the Act is approximately $23,000, which would figure approximately 76/100 of one per cent of gross sales. This company operates seventy departments, each bearing its proportionate part of the

expense of the whole establishment. No department has annual sales in excess of $400,000, and in a considerable number of instances the total sales of a particular department of Stewarts are approximately the same as the sales of specialized stores selling the same line of goods, and in [fol. 607] some cases the sales of particular departments do not equal the sales of specialized stores in competition with that particular department. Department stores such as Stewart's do not enjoy any particular advantage over their specialty store competitors in purchasing, but do have over their specialized competitors some advantage, due to the fact that customers who come to purchase one article are attracted to articles and make purchases in other departments.

20. Levy Brothers are individuals, who operate as partners a department store in Louisville, Kentucky, with annual gross sales of approximately $1,250,000, on which they are required to pay a tax under the Act of approximately $5,500. Departments in this store compete with one or two chain store organizations which have only one store in the State of Kentucky. They also compete with individual specialized stores, which in some instances, because of the comparatively small volume of business done and credits allowed, pay little or no tax.

21. Byck Brothers operate a department store in Louisville, Kentucky, with annual gross sales of approximately $700,000. They also operate a department by lease in the Wolf-Wile Department Store at Lexington, Kentucky. This department in Lexington is in no way affected by the sale of goods in Louisville, but does compete directly with stores handling similar merchandise in Lexington, and its annual volume of sales is approximately $50,000. Under the Act, including the sales of this department, the tax of Byck Brothers is approximately 14/100 of one per cent of its gross sales. In a general way, this concern has the same problem of competition with single specialized stores as have Stewart Dry Goods Company and Levy Brothers, with relatively the same advantages.

Conclusions of Law on the Foregoing Findings of Fact

By reason of the foregoing findings of fact, we conclude that the Act does not deny the plaintiffs the equal protec-

[fol. 608] tion of the law, within the meaning of the Fourteenth Amendment, in any of the particulars asserted by the plaintiffs.

Findings of Fact with Reference to Interstate Commerce

1. A considerable volume of the trade of the Stewart Dry Goods Company consists of sales made to customers in other States who buy merchandise by telephone, mail or personally from Stewarts, to be delivered at their place of residence in such other State. The record, however, fairly justifies the conclusion that such sales are actually consummated in Kentucky.

2. The Kroger Grocery & Baking Company ships packaged articles from outside the State of Kentucky to its stores in that State, where such articles are sold in the original containers in which they are packed for shipment. The retail sales of such articles, however, are separate and distinct transactions had after the goods have come to rest and become a part of the stock of merchandise of the particular store making the sale, such retail sales being entirely consummated in Kentucky.

3. The Kroger Grocery & Baking Company operates a farm in Ohio, where it raises farm and garden products, a portion of which is placed in some of its stores in Kentucky and sold by retail from such stores. The amount of such farm and garden products, however, is relatively small as compared to the total of such products handled by such stores.

Findings of Fact Relative to the Decision of Moore vs. State Board of Charities and Corrections, 239 Ky. 729

1. The case of Moore v. State Board of Charities & Corrections, supra, was filed on the 22nd day of December, 1930, which was prior to the filing of any of these actions.

2. The D. T. Bohon Company, cross-petitioner in the Forrest Moore case, represented to the State courts of Kentucky in that action that it was a taxpayer under the act, [fol. 609] and the case was decided on the theory that such a statement was true, but the Bohon cross-petition was filed in the Moore case after the institution of these actions and after their submission on plaintiffs' motions for temporary injunctions.

Conclusions of Law Upon the Above Facts

1. The decision in the Moore case by the State court, as to the meaning and scope of the Act in question, is binding upon this court.

2. As the Act has been interpreted and construed by the Court of Appeal of Kentucky in the Moore case, it does not violate the commerce clause of the Federal Constitution in any of the particulars urged by the plaintiffs.

Facts Relative to Claim of Confiscation

1. The evidence fails to show that the tax imposed is generally so burdensome upon those taxed as to deprive them of an opportunity to make a reasonable profit in their business.

2. The Kroger Grocery & Baking Company, for the year 1930, realized a net profit of 55/100 per cent on its entire gross sales; 9/10 per cent for 1931, and 1.15 per cent for 1932. These figures, however, are not typical of the experience of the class taxed, nor of any subdivision of such class; nor do they present a fair picture of the operation of that company under reasonably efficient management. For the first six months of 1933, under the management of Mr. Morrill, who became president of the company in 1930, the net profit of the company was $2,294,000, as compared to approximately $1,475,600 for the entire calendar year 1930; $2,199,000 for the entire year 1931, and $2,441,000 for the entire year 1932; and the net profit for the first six months of 1933, after deduction of taxes, amounted to 2.49 per cent of gross sales.

[fol. 610] Conclusion of Law Based on the Foregoing Facts

Under the facts found, the tax imposed by the Act is not confiscatory, and therefore does not violate the due process clause of the Fourteenth Amendment, nor does it violate Section 181 of the Constitution of Kentucky or the Bill of Rights of that instrument.

These specific findings of fact are not to be construed as in derogation of any of our conclusions of fact set out in the opinion and not herein enumerated.

Xen. Hicks, U. S. Circuit Judge. Chas. I. Dawson, U. S. District Judge.

——, 1934.

[fol: 611] IN UNITED STATES DISTRICT COURT

Equity No. 609

ORDER AND DECREE—Entered June 19, 1934

This cause, having been heard on the merits, was submitted on August 21, 1933, upon the stipulations, proof and record set out in the order of submission entered as of that date, and the Court thereafter, to wit, on December 20, 1933, filed its opinion herein, concurred in by a majority of the Judges, Judge Cochran dissenting therefrom as set out in his dissenting opinion filed May 22, 1934, and now made part of the record herein.

Complainant, on December 26, 1933, moved the Court, before entry of any decree herein, to find the facts specially, upon which its decree is based, and to state separately its conclusions of law thereon, and to enter of record such findings and conclusions.

Thereafter, complainant, on March 24, 1934, and defendants on the — day of ——, 1934 by their respective counsel, tendered findings of fact and conclusions of law proposed by them respectively, and moved the Court to adopt same as set forth in their respective motions entered of record.

The Court, having considered this cause in chief and upon the respective motions made by the complainant and by the defendants as to findings of fact and conclusions of law proposed by them respectively, and being now advised, orders and decrees herein as follows:

[fol. 612] I

(1) Complainant's motion entered herein December 26, 1933, for findings of fact and conclusions of law, is hereby sustained, and the Court, in compliance therewith, now files herein its findings of fact and its conclusions of law and orders same to be entered of record, such findings of fact and conclusions of law being concurred in by a majority of the Court and dissented from in part by the Honorable Andrew M. J. Cochran.

(2) Except to the extent set forth or indicated in the findings of fact and conclusions of law this day filed herein by the Court as a compliance with Equity Rule 70½, the mo-

tion of complainant entered herein March 24, 1934, to adopt and enter the findings of fact and conclusions of law tendered with complainant's said motion of that date, is hereby overruled; to which the complainant excepts.

(3) In like manner, except to the extent set forth or indicated in the findings of fact and conclusions of law this day filed herein by the Court as a compliance with Equity Rule 70½, the motion of defendants entered herein ——, 1934, to adopt and enter the findings of fact and conclusions of law tendered with defendants' said motion of that date, is hereby overruled: to which the defendants jointly and severally except.

II

Pursuant to its opinion filed herein December 20, 1933, and its findings of fact and conclusions of law filed herein on the 21st day of May, 1934, the Court now adjudges and decrees:

(1) That the complainant is without an adequate remedy at law, and therefore the motion of defendants to dismiss the complaint as amended, for want of jurisdiction in equity, is denied: to which ruling the defendants except.

(2) That complainant take nothing by its bill of complaint as amended herein; that on final hearing upon the merits same is dismissed; and that defendants recover of [fol. 613] complainant their costs herein expended; to all of which the complainant excepts.

(3) That complainant having this day stated in Court its intention to appeal from this decree insofar as it denies the relief sought by it and dismisses its bill of complaint as amended, it is, for the reasons set forth in the Court's opinion filed herein December 20, 1933, hereby ordered and adjudged that the interlocutory injunction heretofore granted in this cause shall be continued in effect as to the complainant and as to each retail merchant listed of record (by order entered herein March 30, 1931, and supplemented, as to other intervening taxpayers, by later orders) as included in the same class of taxpayers as complainant, and such interlocutory injunction shall remain in full force as to the complainant and each of said taxpayers so listed, until the final determination of complainant's said appeal: to all of which the defendants except:

Provided, however, that the complainant, for itself only, and each of said taxpayers so listed desiring to avail himself or itself of the benefit of said restraining order pending such appeal, for himself or itself only (and not one for another), in addition to the bonds heretofore given by them respectively, with the approval of the District Judge for this District, shall within thirty (30) days from the entry of this decree execute such bond or make such deposit of money or securities as may be reasonably necessary to secure the Commonwealth of Kentucky against loss of any taxes, interest, court costs, or any other proper charges that may be or may become due from such taxpayer for the calendar year 1933 under the Act assailed herein by complainant, in the event the validity of such Act should be finally established.

The amount of any such additional bond so given, or the amount or value of securities or money deposited by any taxpayer, shall be fixed at an amount equal to the estimated [fol. 614] taxes claimed from such taxpayer for the calendar year 1933.

The parties to this action, through their respective counsel, may by agreement between them determine the amount of any such additional bond to be executed by any taxpayer, and the surety thereon, or the nature, kind and amount of money or securities to be deposited in lieu of bond, and if the parties, through their counsel, can not agree thereon, same shall be fixed by the District Judge of the District in which this cause is pending.

In the event the complainant or any one of said taxpayers shall fail to execute such bond or to give such security as is required of it or him or them to cover taxes accrued for the calendar year 1933, within thirty (30) days from the entry of this order and decree, said restraining order, as to such taxpayer so failing, shall be thereupon immediately dissolved as to taxes accrued for the calendar year 1933, and shall afford no further protection of such taxpayer as to such taxes for the calendar year 1933, but the taxpayer shall be entitled to the benefit of the injunction as to prior years for which it has executed a bond or made deposit of money or securities under orders heretofore entered in this cause.

The bonds heretofore executed by the complainant or by any taxpayer herein for any of the taxable years prior to the calendar year 1933 shall be continued in full force and

effect pending the final determination of this cause on appeal, and in like manner all deposits of securities heretofore made shall be continued in pledge for the purposes for which such deposits respectively were made.

Xen. Hicks, Circuit Judge. Chas. I. Dawson, District Judge.

June 19, 1934.

Have seen.

Trabue, Doolan, Helm & Helm, of Counsel for Plaintiff. S. H. Brown, Ass't Att'y Gen. Ky., H. W. Batson for Defendants.

[fol. 615] IN UNITED STATES DISTRICT COURT

ORDER APPROVING BONDS—Entered July 17, 1934

This 17th day of July, 1934, came the parties in the above styled cause, by counsel, and filed of record herein bonds executed by the plaintiffs and other taxpayers hereinafter listed in compliance with the order and decree of this Court entered herein June 19, 1934, conditioned as therein provided to secure the Commonwealth of Kentucky on account of its claim for taxes for the year 1933, together with interest, court costs and all other proper charges that may accrue thereunder.

J. C. Penney Company, in the amount of $13,000.00.
Kaufman-Straus Company, in the amount of $8,000.00
Levy Bros. in the amount of $2,600.00.
H. P. Selman & Company, in the amount of $1,500.00
Hook Drug Company, Inc., in the amount of $240.40.
Byck Bros. & Company, Inc., in the amount of $153.35
J. Bacon & Sons, in the amount of $4,002.33.
Montgomery Ward & Co., Incorporated, in the amount of $2,000.00.
The Stewart Dry Goods Co., in the amount of $20,000.00.
Ben Snyder, Incorporated, in the amount of $5,960.00.
Lerman Brothers, in the amount of $3,600.00.

Chas. I. Dawson, Judge.

Have seen.

S. H. Brown, Assistant Attorney General.

July 17, 1934.

[fol. 616] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed September 12, 1934

The plaintiff, The Stewart Dry Goods Company, conceiving itself aggrieved by the order and decree entered herein by this Court on the 19th day of June, 1934, in the above entitled cause, insofar as said order and decree denies the motion of this plaintiff, after notice and hearing, for an interlocutory injunction restraining the defendants as prayed for in the motion of the plaintiff for such interlocutory injunction and insofar as said order and decree dismisses the Bill of Complaint as amended, and denies to the plaintiff a permanent injunction or any injunctive or other relief, hereby appeals to the Supreme Court of the United States from said order and decree.

The appeal herein prayed for is taken upon the grounds and for the reasons specified in the assignment of errors filed herewith.

Plaintiff prays that said appeal be allowed and that a [fol. 617] citation be issued thereon directed to the above named defendants, John B. Lewis, W. P. Sullivan and Emerson Beauchamp, individually and as Members of the State Tax Commission of the Commonwealth of Kentucky, and J. Dan Talbott, individually and as Auditor of Public Accounts of the Commonwealth of Kentucky, commanding them and each of them to appear before its Supreme Court of the United States, to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record, proceedings and papers upon which said order and decree was entered be duly authenticated and sent to the Supreme Court of the United States.

Nichols, Morrill, Wood, Marx & Ginter, Traube, Doolan, Helm & Helm, Solicitors for Plaintiff.

[fol. 618] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed September 12, 1934

The plaintiff, by counsel, respectfully represents that in the record and proceedings had in the above-entitled cause and in the rendition of the decree herein appealed from

there is manifest error, for which said decree should be reversed, and as cause for such reversal the plaintiff makes the following assignments of error:

1. The Court erred in failing to hold that the challenged Act designedly denies to plaintiff and to other retail merchants similarly situated the equal protection of the laws, in that by reason of its classifications prescribed in Section 2 thereof, and its exemptions and credits or deductions provided in Section 4 thereof, and its consequent widely-varying rates of taxation, it unjustly and unreasonably discriminates against plaintiff and other retail merchants hav- [fol. 619] ing a large volume of annual gross retail sales and in favor of other retail merchants having gross annual retail sales in smaller volume, through its unreasonble and arbitrary exaction of taxes from plaintiff and other retail merchants in like situation, at excessive and grossly disproportionate rates arbitrarily levied in the higher brackets of said Act upon gross retail sales of larger volume, as compared with greatly reduced rates levied in its lower brackets upon other retail merchants having gross retail sales of smaller volume and therefore taxed at greatly reduced rates, or not taxed at all, by reason of credits or deductions allowed them—all in disregard of capital invested by the taxpayer, or of his ability to pay, or of his earnings, income or profits accruing from his business of retail merchant, and likewise in disregard of the fundamental factor of management.

2. The Court erred in failing to hold that the classification of retail merchants for purposes of taxation prescribed in Section 2 of the challenged Act does not rest upon a reasonable basis, and does not have any reasonable relation to the subject matter of the Act, and therefore effects an unjust and unreasonable discrimination against this plaintiff in the matter of taxation upon its gross annual retail sales as compared with the gross annual retail sales of other retail merchants having a smaller volume of such sales or greater exemptions, and thus denies to plaintiff the equal protection of the laws guaranteed to it by the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

3. The Court erred in holding that the enactment of the challenged Act might be sustained upon a mere academic

[fol. 620] theory of economists in classifying property for taxation, when the facts shown in the record and the actual results in operation of the law demonstrate (a) that such theory is fallacious and (b) that there is no reasonable relationship between the assumed theory and the varying rates of taxation prescribed for the several classifications made under the challenged Act.

4. The Court erred in failing to hold that there was no reasonable relationship between the "step up" or increase in rates of taxation levied by the challenged Act, on the one hand, and the claimed tendency of profits to increase with increased sales, regardless of capital investment, management, or other factors, on the other hand.

5. The Court erred in finding that there is a taxable relationship between sales volume and net earnings.

6. The Court erred in failing to hold that the classification of all retail merchants in one general class, including therein chain stores, department stores, mail order houses and singly-operated units, of whatever character, with subclassifications thereof and varying rates of taxation thereon, based on volume of sales alone, was arbitrary, unreasonable, vindictive and capricious.

7. The Court erred in failing to hold that the increases in rates imposed and taxes levied by the challenged Act in its higher brackets for taxation were out of all proportion to any actual or claimed increases in percentages of net profits to sales in such brackets respectively, and varied so greatly as to be arbitrary an unreasonable.

8. The Court erred in failing to hold, upon the evidence adduced, that the challenged Act, in its actual operation [fol. 621] and effect, exempts, wholly or substantially so, from the the burdens of taxation levied by said Act, retail merchants who compete with plaintiff in the same or similar lines of business but who have a smaller volume of gross sales than plaintiff, while at the same time levying upon plaintiff, with its larger volume of gross sales, excessive and exorbitant rates of taxation, wholly out of arithmetical proportion or any reasonable proportion to the volume of sales of other retail merchants exempted wholly, or substantially so, from the burdens of said Act.

9. The Court erred in failing to hold that the challenged Act denies to the plaintiff the equal protection of the law in that it unjustly and unreasonably discriminates against the plaintiff by reason of the facts found by the Court (except the mere computation of plaintiff's taxes under the Act) as follows: that plaintiff, for the taxable years of 1930, 1931 and 1932 had gross sales in Kentucky with resulting taxes under the challenged Act as follows:

	Sales	Taxes	Deduction
1930	$3,209,717.39	$25,147.17	$1,279.11
1931	3,618,126.00	29,231.26	1,407.85
1932	2,812,683.00	21,176.83	1,347.40

whereas for said years respectively a vast number of other retail merchants, many of whom actually and actively compete with plaintiff, had gross sales in Kentucky with resulting taxes under the challenged Act as follows:

	Number of merchants	Sales	Net tax less deductions
1930	24163	$362,848,264.00	$106,342.94
1931	20382	310,467,073.00	85,136.99
1932	14597	186,313,016.81	42,916.69

10. The Court erred in holding that the decision of Moore v. State Board of Charities and Corrections, re- [fol. 622] ported in 239 Ky. 729, was binding upon the Court as to the construction of the challenged Act and in then refusing to adopt the construction attributed by that decision to the challenged Act.

11. The Court erred in failing to hold that the challenged Act, according to the construction approved by the Court, denies to the plaintiff and others similarly situated the equal protection of the law in that, as so construed, it exempts from its operation merchants selling farm products raised by them, and therefore exempts The Kroger Grocery & Baking Company, together with other taxpayers, but applies to plaintiff and others doing a similar business.

12. The Court erred in failing to hold that the challenged Act is a burden on interstate commerce by reason of the fact that it taxes the sale by plaintiff to its customers resident in other States who buy merchandise (a) personally or (b) by telephone message or mail sent from such other State of the customer's residence, for delivery, in each of

the cases herein mentioned, to such customer at his residence in such State other than Kentucky.

Prayer for Reversal.

Wherefore, for each and all of the reasons set forth in the foregoing assignment of errors, plaintiff prays that the decree herein appealed from be reversed with directions to the District Court to set aside said decree and in lieu thereof to render a decree in all respects in accordance with the prayer of plaintiff's Bill of Complaint.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors for Plaintiff.

[fol. 623] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Entered September 12, 1934

This day came the parties, plaintiff and defendants, by their counsel, and plaintiff filed herein its petition for appeal to the Supreme Court of the United States for the final decree herein rendered by this court on June 19, 1934, and filed also its assignment of errors in support of said petition.

Therefore, it is ordered by the court

1. That the appeal to the Supreme Court of the United States prayed for by the plaintiff, as set forth in its petition for appeal, be and it hereby is allowed as prayed for in said petition.

2. That a transcript of such parts of the record and proceedings herein as the parties may by præcipe duly designate, be transmitted, duly authenticated, to the Supreme Court of the United States in the manner provided by law.

3. That a citation be issued admonishing the defendants and each of them to be and appear in the Supreme Court [fol. 624] of the United States within thirty days from this date as provided by law.

4. That an appeal bond for costs and damages upon said appeal in the penal sum of $1,000 shall be given by the plaintiff, conditioned as provided by law, and in view of the fact that the plaintiff and all other taxpayers claiming

the benefit of the temporary restraining order issued in this case have complied with the order and decree of this court entered June 19, 1934, by giving a bond or other approved security for the payment of estimated taxes that may become due from them respectively for the tax years 1930 to 1933, inclusive, it is now ordered that said appeal bond for costs and damages required herein shall act as a supersedeas bond as well as a bond for costs and damages on appeal.

5. The citation upon appeal shall be issued and the surety thereon herein required shall be approved by the District Judge presiding in the Western District of Kentucky.

Xen. Hicks, United States Circuit Judge. Chas. I. Dawson, United States District Judge.

Sept. 12, 1934.

[fols. 625 & 626] Bond on appeal for $1,000.00 approved and filed Sept. 12, 1934, omitted in printing.

[fols. 627 & 628] Citation in usual form, showing service on Bailey P. Wooton et al., issued Sept. 12, 1934, omitted in printing.

[fol. 629] IN UNITED STATES DISTRICT COURT

STIPULATION AND PRÆCIPE—Filed September 20, 1934

It is hereby stipulated and agreed that the record on appeal in this case in the Supreme Court of the United States shall consist of the following, omitting the style of the case, and also omitting certificates of oath or acknowledgment, and substituting therefor the words "duly verified":

1. The record from this Court as printed for use of the Supreme Court on the former appeal of this case.
2. Mandate from Supreme Court with order filing same.
3. Order entered December 10, 1932.
4. Order amending interlocutory injunction.
5. Amended Bill.

6. Answer to Amended Bill.
7. Second Amended Answer.
8. Stipulation as to evidence on final hearing.
9. Order substituting Emerson Beauchamp as a party defendant.
10. Order of submission.

[fol. 630] 11. Order filing tax return of D. T. Bohon Co. and said return.

12. Narrative of Testimony.
13. Opinion of Judge Hicks and Judge Dawson.
14. Dissenting opinion of Judge Cochran.
15. Motion to find facts.
16. Findings of fact and conclusions of law.
17. Decree.
18. Order approving bonds.
19. Petition for appeal.
20. Assignment of errors.
21. Order allowing appeal.
22. Appeal bond.
23. Citation and endorsement of accepted service.
24. This Stipulation.

Nichols, Morrill, Wood, Marx & Ginter, Trahue, Doolan, Helm & Helm, Solicitors for Plaintiff. B. P. Wootton, Attorney General, Solicitor for Defendants; S. H. Brown, Ass't Att'y Gen.

[fols. 631-634] Clerk's Certificates to foregoing transcript omitted in printing.

[fol. 635] Supreme Court of the United States

Statement of Points to Be Relied Upon and Designation as to Printing Record—Filed Oct. 9, 1934

Statement of Points

Comes now the appellant in the above entitled cause and states that the points upon which it intends to rely in this

Court in this case are that the United States District Court for the Western District of Kentucky erred in the rendition of its final decree and in dismissing appellant's bill of complaint, in the following particulars:

Point 1. In failing to hold that the Challenged Act, Chapter 149 Session Acts of 1930, designedly discriminates against and denies to appellant and to other retail merchants similarly situated the equal protection of the laws, for the reason that the Challenged Act imposes upon the appellant and other retail merchants similarly situated a grossly excessive and disproportionate tax burden and at the same time wholly or partially exempts from the burdens of said Challenged Act the vast majority of other retail merchants competing with appellant and engaged in the same business, and for the further reasons specifically set forth in appellant's assignment of errors numbered 1, 2 and 9.

[fol. 636] Point 2. In failing to hold that the Challenged Act is, by reason of its classifications, exemptions, credits, disproportionate and widely varying rates of taxation, arbitrary, unreasonable, vindictive and capricious, as specifically set forth in assignment of errors numbered 3, 4, 5, 6, 7 and 8.

Point 3. In failing to hold that the Challenged Act denies to appellant and other retail merchants similarly situated the equal protection of the laws for the reason that said Act as construed by said Court exempts from its operation merchants selling farm products raised by them but applies to appellant and others similarly situated as specifically set forth in assignment of errors numbered 11.

Point 4. In failing to hold that the Challenged Act is a burden on interstate commerce for the reasons specifically set forth in its assignment of errors numbered 12.

The Stewart Dry Goods Company, by Robert S. Marx, Frank E. Wood, John C. Doolan, Harry Kasfir, James W. Stites, Solicitors.

Service of a copy of the above list of points to be relied upon by appellant in the Supreme Court of the United

States of America is hereby acknowledged and accepted on behalf of the several defendants and appellees.

John B. Lewis, W. P. Sullivan and Emerson Beauchamp, Individually and as Members of the State Tax Commission of the Commonwealth of Kentucky, and J. Dan Talbott, Individually and as Auditor of Public Accounts of the Commonwealth of Kentucky, by S. H. Brown, Assistant Attorney General.

[fol. 637] DESIGNATION AS TO RECORD

Comes now the appellant in the above-entitled case and states that in its opinion the whole record as filed is necessary for consideration of the case excepting the following, which may be omitted:

1. Opinion of District Court filed December 9, 1931 (Printed Record, page 236).
2. Order approving bonds (Printed Record, page 246).
3. Stipulation re substitution of J. Dan Talbott (Printed Record, page 247).
4. Petition for appeal—on first appeal (Printed Record, page 248).
5. Assignment of errors—on first appeal (Printed Record, page 250).
6. Order allowing appeal—on first appeal (Printed Record, page 258).
7. Stipulation re Transcript of Record—on first appeal (Printed Record, page 259).
8. Statement of points to be relied on—on first appeal (Printed Record, page 260).
9. Statement of portion of record to be printed—on first appeal (Printed Record, page 264).

[fol. 638] 10. From the narrative of testimony the evidence of the following witnesses relating solely to the adequacy of the remedy at law:

W. P. Sullivan (typed narrative, page 1),
Jerry King (typed narrative, page 39),
Selden R. Glenn (typed narrative, page 70),
Elam Huddleston (typed narrative, page 74).

The Stewart Dry Goods Company, Appellant, by Robert S. Marx, Frank E. Wood, John C. Doolan, Harry Kasfir, James W. Stites, Solicitors.

Service of a copy of the above statement of portion of record to be printed by Clerk is hereby accepted and acknowledged on behalf of the several defendants and appellees mentioned hereinabove.

John B. Lewis, W. P. Sullivan and Emerson Beauchamp, Individually and as Members of the State Tax Commission of the Commonwealth of Kentucky, and J. Dan Talbott, Individually and as Auditor of Public Accounts of the Commonwealth of Kentucky. Bailey P. Wootton, Attorney General, by S. H. Brown, Assistant Attorney General.

[fol. 639] [File endorsement omitted.]

[fol. 640] SUPREME COURT OF THE UNITED STATES

STATEMENT BY APPELLEES OF PORTION OF RECORD TO BE PRINTED BY CLERK—Filed Oct. 9, 1934

Come now the appellees, in the above entitled case, and state that, in their opinion, in addition to those parts of the record designated by the appellant, there should be printed for consideration of the Court:

1. Opinion of the District Court filed December 9, 1931 (Printed Record, page 77.)

2. From the narrative of testimony the evidence of the following witnesses:

W. P. Sullivan (typed narrative, page 1),
Jerry King (typed narrative, page 39),
Seldon R. Glenn (typed narrative, page 70),
Elam Huddleston (typed narative, page 74).

[fol. 641] John B. Lewis, W. P. Sullivan and Emerson Beauchamp, individually and as Members of the State Tax Commission of the Commonwealth of Kentucky, and J. Dan Talbott, individually and as Auditor of Public Accounts of the Commonwealth of Kentucky. Bailey P. Wootton, Attorney General, by S. H. Brown, Assistant Attorney General.

Service of a copy of the above statement of portion of record to be printed by Clerk is hereby accepted and acknowledged on behalf of the appellant and appellees mentioned hereinabove.

The Stewart Dry Goods Company, Appellant, by Robert S. Marx, Frank E. Wood, John C. Doolan, Harry Kasfir, James W. Stitis, Solicitors.

[fol. 642] [File endorsement omitted.]

Endorsed on cover: File No. 39,082. W. Kentucky, D. C. U. S. Term No. 454. The Stewart Dry Goods Company, Appellant, vs. John B. Lewis, W. P. Sullivan and Emerson Beauchamp, Individually and as Members of the State Tax Commission of the Commonwealth of Kentucky, et al. Filed October 9, 1934. Filed No. 454, O. T., 1934.

(5739-C)

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 455

FRED LEVY ET AL., APPELLANTS,

vs.

JOHN B. LEWIS, W. P. SULLIVAN AND EMERSON BEAUCHAMP, INDIVIDUALLY AND AS MEMBERS OF THE STATE TAX COMMISSION OF THE COMMONWEALTH OF KENTUCKY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

FILED OCTOBER 1, 1934.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 455

FRED LEVY ET AL., APPELLANTS,

vs.

JOHN B. LEWIS, W. P. SULLIVAN AND EMERSON BEAUCHAMP, INDIVIDUALLY AND AS MEMBERS OF THE STATE TAX COMMISSION OF THE COMMONWEALTH OF KENTUCKY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY

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[fols. a-1] [Caption omitted]

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IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF KENTUCKY

FRED LEVY, ARNOLD H. LEVY, STUART G. LEVY, JAMES H. LEVY and S. L. Greenebaum, Partners, Trading and Doing Business under the Firm Name of Levy Bros., Plaintiffs,

vs.

JOHN B. LEWIS, SELDEN R. GLENN and HENRY M. CLINE, Individually and as Members of the State-Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, Individually and as Auditor of Public Accounts of the Commonwealth of Kentucky, Defendants

BILL OF COMPLAINT—Filed Jan. 24, 1931

The plaintiffs, Fred Levy, Arnold H. Levy, Stuart G. Levy, James H. Levy and S. L. Greenebaum, partners trading and doing business under the firm name of Levy Bros., bring this bill of complaint against the defendants, John B. Lewis, Selden R. Glenn and Henry M. Cline, indi-
[fol. 4] vidually and as members of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, individually and as Auditor of Public Accounts of the Commonwealth of Kentucky and say:

I

The plaintiffs, Fred Levy, Arnold H. Levy, Stuart G. Levy, James H. Levy and S. L. Greenebaum, are now and for more than five years past have been partners trading and doing business in Louisville, Kentucky, under the firm name of Levy Bros.

The plaintiffs are each and all citizens of the State of Kentucky and residents of Louisville, Kentucky, and inhabitants of the Western District of Kentucky.

The defendants, John B. Lewis, Selden R. Glenn and Henry M. Cline, are the duly and legally appointed, quali-

fied and acting members, and the only members, of the State Tax Commission of the Commonwealth of Kentucky, which is a Commission created pursuant to an Act of the General Assembly of the Commonwealth of Kentucky and at all times herein mentioned invested by the law of Kentucky with the duty of administering and enforcing all tax laws of the Commonwealth that are validly or constitutionally enacted.

The defendant, Clell Coleman, is now the duly elected, qualified and acting Auditor of Public Accounts of Kentucky.

[fol. 5] Said defendants, John B. Lewis, Selden R. Glenn, Henry M. Cline and Clell Coleman, are all citizens and residents of the Commonwealth or State of Kentucky. The said John B. Lewis and Selden R. Glenn are inhabitants of the Western District of Kentucky, and said defendants, Henry M. Cline and Clell Coleman, are inhabitants of the Eastern District of Kentucky.

II

Under and by virtue of the terms of an Act of the General Assembly of Kentucky at its 1930 session herein referred to, which was approved by the Governor of the Commonwealth of Kentucky on March 17, 1930, but is void for the reasons hereinafter set out (said Act being officially published as Chapter 149 of the Session Acts of 1930, at pages 475 to 482), it is provided that the defendant members of the State Tax Commission of Kentucky shall be, and they are, charged with the duty of preparing blank forms for certain retail merchants operating in Kentucky, stores as defined in said Act, and with the further duty of ascertaining from them information as to the amount and volume of gross sales made by such retail merchants, and of ascertaining and fixing the amount of license taxes due from all such retail merchants operating stores in Kentucky as defined in said Act, and with the further duty of employing clerical and other assistants to carry out the duties attempted to be imposed by said Act upon said State Tax [fol. 6] Commission, and further charged with the duty generally to administer and to enforce the provisions of said Act as therein set out.

It is further provided in said Act that the defendant, Clell Coleman, as Auditor of Public Accounts of Kentucky,

shall be, and he is, charged under said Act with the duty of collecting and of directing the disbursement of all taxes that may be levied or assessed or fixed by said State Tax Commission under or pursuant to the terms of said Act.

III

This suit arises under the Constitution or laws of the United States and the amount in controversy herein exceeds the sum or value of $3,000.00, exclusive of interest and costs.

This is a suit of a civil nature and is brought in equity for the purpose of enjoining the defendants and each of them from enforcing or attempting to enforce said Act of the General Assembly of Kentucky, being Chapter 149 of the Session Acts of 1930, approved by the Governor of the Commonwealth on March 17, 1930, and for the purpose of enjoining the defendants or any of them from requiring of the plaintiffs and other taxpayers similarly situated as hereinafter set forth, the reports which said Act purports to require of retail merchants as the term "retail merchant" is defined in said Act, or any information in reference to sales made by the plaintiffs or any of said retail merchants similarly situated, as hereinafter set forth, or [fol. 7] from collecting or seeking to collect from the plaintiffs or any of said retail merchants similarly situated any tax purporting to be levied or assessed upon the plaintiffs or any of said retail merchants similarly situated, as hereinafter set forth, or from instituting any prosecution against the plaintiffs or any of said retail merchants similarly situated as hereinafter set forth, to recover any of the penalties sought to be imposed by said Act upon the plaintiffs or any of said retail merchants similarly situated as hereinafter set forth, for a violation of any of the terms of said Act.

IV

At a regular session of the General Assembly of the Commonwealth of Kentucky held at the seat of government of the Commonwealth, beginning January 6, 1930, to-wit, on January 21, 1930, there was introduced into the House of Representatives a bill known as House Bill No. 111, which by its terms provided for a license or excise tax upon each merchant doing business in Kentucky, which

term "merchant" was defined in said bill as originally introduced to mean and include every person, association, copartnership or corporation engaged in the buying and selling of goods, wares or merchandise at any store, stand or place in Kentucky occupied for that purpose, said excise or license tax being graduated in said bill as introduced as follows:

[fol. 8] For each merchant conducting not more than one store, an annual license tax of $25.00, and

For each merchant conducting his business in more than one store, an annual license tax of $25.00 for the first store; $37.50 for the second store; $50.00 for the third store; and on each additional store so conducted by him, a tax in an amount to be determined by adding $12.50 consecutively for each such additional store so conducted by him.

Said House Bill No. 111 so introduced into the House of Representatives on January 21, 1930, was read on the day of its introduction by the following title as endorsed upon said original bill and as entered upon and shown by the official Journal of the House of Representatives for that day:

"H. B. 111, An Act to restrain the unfair competition of chain stores, and in aid of individual merchants in the Commonwealth."

Immediately upon its introduction in the House of Representatives and its reading by the title above set forth, said House Bill No. 111 was referred to the Committee on Kentucky Statutes in the House of Representatives, which Committee, on February 14, 1930, reported said bill with a substitute therefor, which substitute was likewise read, as shown by the Journal of the House of Representatives, in full as "An Act to restrain the unfair competition of chain stores, and in aid of individual merchants in the Commonwealth."

Thereafter a second reading of said bill was had in the House of Representatives on February 18, 1930, and a [fol. 9] third reading thereof had on February 19, 1930, and on each of said second and third readings said House Bill No. 111, as shown by the journals of the House of Representatives, was not read in full but was read only by the title above set forth, to-wit: "An Act to restrain

the unfair competition of chain stores, and in aid of individual merchants in the Commonwealth."

Upon the third reading of said bill by said title, it was passed by the House of Representatives, and after its passage its title was amended, as shown by the House Journal, and the bill was then sent to the Senate, where it was likewise read the first time in full, and the second and third times only by its title, and thereupon, on its third reading, was passed by the Senate and returned to the House of Representatives, in which it originated, where it was later, on March 7, 1930, as shown by the Journal of the House of Representatives, reported by the Committee on Enrollment, having been examined and found to be correctly enrolled under its title as hereinabove set forth, to wit: "House Bill 111, An Act to restrain unfair competition of chain stores, and in aid of individual merchants in the Commonwealth."

Thereupon the bill, having been enrolled, was signed by the Speaker of the House of Representatives and by the President of the Senate, and sent to the Governor of the Commonwealth, who on March 17, 1930, returned it to the [fol. 10] House of Representatives with his approval in writing appended thereto.

By its terms said bill, being thus passed and approved, became effective on March 17, 1930, and it is now officially published in the Session Act of 1930 as Chapter 149 of the Acts of 1930, approved March 17, 1930.

V

Said House Bill 111 was introduced into the House of Representatives in response to a recommendation made to the General Assembly by the Governor of Kentucky in his annual message of January, 1930, that legislation be enacted to curb the competition of so-called chain stores with owners of so-called independent unit stores individually owned and operated, and in aid of such individually owned and operated stores.

While said House Bill 111 was pending before the House Committee to which it was referred upon its introduction, the case of Jackson v. State Board of Tax Commissioners of Indiana was decided on February 1, 1930, in which a measure similar in legal effect to said House Bill 111 as originally introduced was held violative of the Fourteenth

Amendment to the Constitution of the United States and therefore void, as shown by the opinion in that case, reported in 38 Federal (2d) at pages 652-659.

Thereupon the nature, but not the purpose of said House Bill 111 was changed by amendment by the Committee to [fol. 11] which it had been referred, and that measure as so amended and passed in the manner hereinbefore set out and approved by the Governor was so framed as to contain the obnoxious and unconstitutional features hereinafter set out.

VI

Said House Bill 111 as finally passed and approved and now published officially as Chapter 149 of the Acts of 1930 provides in full as follows:

"An Act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act.

"Be is enacted by the General Assembly of the Commonwealth of Kentucky:

"§ 1. The words 'retail merchant,' as used in this act, shall mean and include every person, firm, association, copartnership or corporation opening, establishing, operating or maintaining any 'store,' as defined herein, for the purpose of and selling goods, wares or merchandise at retail in this State, except those actually engaged in gardening or farming and selling garden or farm products raised by them in this State. The term 'store,' as used in this act, shall be construed to mean and include any store or stores or any mercantile establishment or establishments in this [fol. 12] State which are owned, operated, maintained or controlled by the same 'retail merchant,' as defined herein, either domestic or foreign, in which goods, wares or merchandise of any kind are sold at retail. The provisions of this act shall be construed to apply to every 'retail merchant' and 'store,' as defined herein, which is controlled or held with others by majority stock ownership or ultimately

controlled or directed by one management or association of ultimate management.

"§ 2. Every retail merchant, as defined herein, shall pay an annual license tax for the opening, establishing, operating or maintaining of any store or stores, as defined herein, determined by computing the tax on the amount of gross sales as follows:

"One-twentieth of one per cent of the gross sales of Four hundred thousand ($400,000.00) Dollars or less; two-twentieths of one per cent on the excess of the gross sales over Four hundred thousand ($400,000.00) Dollars and not exceeding Five hundred thousand ($500,000.00) Dollars; five-twentieths of one per cent on the excess of the gross sales over Five hundred thousand ($500,000.00) Dollars and not exceeding Six hundred thousand ($600,000.00) Dollars; eight-twentieths of one per cent on the excess of the gross sales over Six hundred thousand ($600,000.00) Dollars and not exceeding Seven hundred thousand ($700,000.00) Dollars; eleven-twentieths of one per cent on the excess of the gross sales over Seven hundred thousand ($700,000.00) Dollars and not exceeding Eight hundred thousand ($800,000.00) Dollars; fourteen-twentieths of one per cent on the excess of the gross sales over Eight hundred thousand ($800,000.00) Dollars and not exceeding Nine hundred thousand ($900,000.00) Dollars; seventeen-twentieths of [fol. 13] one per cent on the excess of the gross sales over Nine hundred thousand ($900,000.00) Dollars and not exceeding One million ($1,000,000.00) Dollars; one per cent on the excess of the gross sales over One million ($1,000,000.00) Dollars.

"§ 3. Every retail merchant, as defined herein, in order to ascertain the amount of taxes due and payable under the next preceding section, shall file with the State Tax Commission on or before the first day of February each year a written report verified by the affidavit of the owner or chief officer on such forms as it may prescribe, giving the number and location of its store or stores, as defined herein, the name and post office address of its owner or principal officer, the name and address of its officer or agent in charge of its business at each separate store, the nature and kind of business, the total gross sales during the preceding year ending the thirty-first day of Decem-

ber, and such other facts bearing on the proper taxation as the Tax Commission may require.

"The State Tax Commission may, in any case, require such additional information as it may deem necessary to enable it to perform its duties herein. It shall be the duty of the State Tax Commission from such reports, and from such additional information, as it may obtain, to ascertain the amount of taxes due, and to certify to every such retail merchant the amount of taxes due for the preceding year, based upon such reports and information as it may ascertain. Upon final action by the State Tax Commission, it shall certify to the Auditor of Public Accounts and to the retail merchant the amount of such tax due by each retail merchant, as defined herein, and it shall be the duty of each retail merchant to pay the amount of such tax to the Auditor of Public Accounts not later than thirty days thereafter. [fol. 14] "In reporting the gross sales for the year, 1930, retail merchants shall include only those sales made between the date that this act becomes effective and December 31, 1930, and the license tax due for the year 1930 shall be based on the amount of those sales only.

"§ 4. The license or excise tax levied herein, shall not be in lieu of any special state license, excise, occupational or corporation license tax due under the provisions of any law now in force, or that may hereafter be enacted. Should any retail merchant, as defined herein, be liable for and pay any special state license, excise, occupational or corporation license tax under the laws now in force, or that may hereafter be enacted, credit may be taken on the tax levied in this act for the amount of such special license, excise, occupational or corporation license tax so paid not to exceed the amount of the license or excise tax levied herein.

"§ 5. If any retail merchant, as defined herein, neglects or refuses to file the verified report or pay the tax due at the time herein provided, the amount thereof with an addition of a penalty of twenty per centum thereof, with interest at the rate of six per centum per annum from the date when due until paid, shall be collected on an account settled by the State Tax Commission as other taxes are settled and collected; and if collected by proceedings in any court, an additional penalty of twenty per centum shall be collected, as is authorized to be collected in revenue agent's

proceedings under Section 4263-4 of the Kentucky Statutes.

"The said twenty per centum penalty thereon and interest due shall be paid into the State Treasury as part of the tax, and the twenty per centum penalty collected in revenue agent's proceedings shall be distributed as provided in section 4263-4 of the Kentucky Statutes.

[fol. 15] "§ 6. The State Tax Commission, or any assistant or representative thereof, appointed in writing by it, is hereby authorized to examine the books, records, papers, files and equipment of any retail merchant, as defined herein, made taxable by this act, and to that end, shall have the power to examine witnesses under oath to verify the accuracy of any return made under the provisions of this act, or to ascertain whether or not any tax is due under the provisions of this act by any retail merchant; and in the collection of said tax, the State Tax Commission shall have the power to institute legal proceedings for the purpose of ascertaining the amount of tax due and the collection thereof with the penalties thereon, and the State Tax Commission shall be vested with all the powers under the law of the State for the collection of taxes. The State Tax Commission may, at or after the commencement of an action for the purpose of collecting the amount of tax due and penalties and interest due thereon, as set out herein, have an attachment against the property of the defendant, including garnishees, without the execution of a bond upon the filing of an affidavit showing the nature of the claim, that it is just, the sum which the State Tax Commission believes the plaintiff ought to recover and that the collection of the demand will be endangered by delay in obtaining judgment or a return of no property found. Any information gained by the State Tax Commission, or any assistant, agent or representative thereof, as a result of the reports, investigations or verification herein required to be made, shall be confidential, and any person divulging such information shall be guilty of a misdemeanor, and, upon conviction, shall be fined not exceeding Five Hundred ($500.00) Dollars; provided that, this prohibition shall not extend [fol. 16] to information required in prosecutions for making false reports or returns or in the preparation and prosecution of legal proceedings, for the collection of any

tax due under the provisions of this act, or any prosecutions for any other infraction of the tax laws of this State.

"§ 7. Any retail merchant, as defined herein, or any officer, director, trustee or agent, who shall fail, neglect or refuse to make the reports and pay the tax herein prescribed, or shall refuse to permit the State Tax Commission, its assistants, agents or representatives appointed by it in writing to examine the books, records, papers, files and equipment of such retail merchant, as defined herein, or who does, or attempts to do, anything whatever to avoid a full disclosure of the amount of business done, or to avoid the payment of the whole or any part of the tax or penalties due, shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding One Thousand ($1,000.00) Dollars, and in case the offender is an individual, he may be imprisoned in the county jail not exceeding six months, or both so fined and imprisoned. Such penalty shall be in addition to the penalty imposed in Section 5 of this act.

"§ 8. It shall be the duty of the State Tax Commission to administer and enforce the provisions of this act, and it is hereby authorized and empowered to prescribe all blanks, forms and reports necessary to carry out the provisions of this act, and all costs and expenses incurred by the State Tax Commission in the administration of this act shall be paid out of the funds collected hereunder.

"§ 9. All taxes collected under the provisions of this act shall be paid to the Auditor of Public Accounts, and of [fol. 17] such amounts so received by the Auditor in any fiscal year, one-half part shall be set aside and credited to the Board of Charities and Corrections for the specific purpose of repairing, maintaining and constructing permanent improvements for the use of the institutions under the control of said board. The remainder of the amounts so collected and received by the Auditor in any fiscal year shall be credited to a fund to be used for the specific purpose of liquidating any indebtedness of the Commonwealth.

"§ 10. No suit shall be maintained in any court to restrain or delay the collection or payment of the tax herein imposed upon any ground whatever, but the aggrieved taxpayer shall pay the tax as and when due, and if paid under

protest may at any time within two years from the date of such payment sue the Auditor of Public Accounts in an action at law to recover the tax so paid, with legal interest thereon, from the date of payment. If it is finally determined that said tax, or any part thereof, was wrongfully collected for any reason, it shall be the duty of the Auditor of Public Accounts then in office to issue his warrant on the Treasurer of the Commonwealth of Kentucky for the amount of such tax so adjudged to have been wrongfully collected, together with interest thereon, and the Treasurer shall pay same out of the General Fund of the State. A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made, and which are not barred by the limitation of two years herein imposed.

"§ 11. The provisions of this act are severable and if any of its provisions or any penalty provided by this act shall be held unconstitutional, such provision or the particular [fol. 18] penalty held to be invalid may be rejected without affecting the remainder of the act or such part of the penalties as are not held to be invalid and the decisions of the courts shall not affect or impair the remaining provisions of this act or any of the other penalties anywhere in this act provided. It is hereby declared as a legislative intent that this act would have been adopted had such unconstitutional provisions or such invalid penalties not been included therein.

"§ 12. All laws and parts of laws in conflict herewith are hereby repealed to the extent of such conflict.

"§ 13. Whereas, the present state revenue does not meet the immediate needs for the maintenance and development of the State government and its agencies, an emergency is declared to exist, and this act shall become a law and be effective upon its passage and approval by the Governor.

"Approved March 17, 1930."

VII

The firm or partnership of which these plaintiffs are members has continuously conducted, under the same firm name, the same general character of retail business for al-

most seventy years past, with varying changes of its members (due to death), including successively three generations of the same family. During all that time it has conducted its retail store in the same location, at Third and Market streets, in Louisville, Kentucky.

The business so conducted by said firm is that of retail merchants owning and operating a single retail store for the sale of—

[fol. 19] Men's and boys' clothing, Hats, Shoes and Furnishings,

with the addition in more recent years of—

Ladies' hosiery.

Plaintiffs conduct in their retail store what is known as a department store, embracing approximately 17 separate departments, in which they sell at retail merchandise of various kinds, of which the following are illustrations:

Men's Clothing,
Men's Clothing (Basement).
Boys' Clothing.
Boys' Clothing (Basement).
Men's Furnishings.
Men's Furnishings (Basement).
Men's Shoes.
Men's Shoes (Basement).
Boys' Shoes.
Men's Hats.
Men's Hats (Basement).
Boys' Hats.
Boys' Furnishings.
Trousers.
Ladies' Hose.
Children's Hose.
Toilet Goods.

Each of said departments is operated by plaintiffs separately from other departments, and plaintiffs' books and accounts are kept so as to show separately as to each department the sales therein, the expense of operation, including its proper proportion of rental, taxes, insurance and [fol. 20] all other overhead expense, and the net results of such operation of each department, to the end that plain-

tiffs may determine, after allocating to each department its proper proportion of overhead general expense, including rental of floor space, taxes, insurance and all other proper overhead charges, the results of operation in each such department, and the wisdom or policy of maintaining or continuing the conduct of such department, or changes of policy or management necessary to make each department self-supporting if possible.

In the conduct of its general business, plaintiffs come into competition with a large number of other stores selling merchandise of a similar character in Louisville and in other cities in Kentucky, and the same is true as to each department operated by plaintiffs in their retail store inasmuch as each of said departments is compelled to and does actively compete with specialized stores or stores dealing in similar lines of goods in the city of Louisville and elsewhere in Kentucky. Such competition extends not only to the matter of buying power but also to the matter of selling and the fixing of prices on goods sold so as to make them sell in competition with other dealers in similar goods in Louisville or elsewhere in Kentucky, and such competition applies not only to the plaintiffs' conduct of its store as a whole but as to each unit or department therein.

[fol. 21] VIII

For many years past, plaintiffs have kept their capital invested in the retail store conducted by them in Louisville, Kentucky. In all that time, the partnership has been a large taxpayer to the State of Kentucky, the City of Louisville, and the County of Jefferson, paying all annual ad valorem taxes levied thereon by competent authority for State, County and City purposes. Their firm has exerted itself with the utmost diligence and prudence to build up its business as a retail merchant by all honorable means, and it has built up a large and valuable business in the face of the keenest competition with other retail merchants conducting a similar business, some of them with a larger volume of gross sales and others with a smaller volume of gross sales in the respective kinds or classes of merchandise sold by plaintiffs.

To do this has required of the plaintiffs the closest attention to every phase of their business, including the most careful foresight as to the class or style of goods they

should stock in their store and in each department thereof to attract the public and to satisfy its wishes and to stimulate purchases by it, and also the most effective methods of displaying and advertising its goods so as to attract buyers, as well as the most careful consideration as to prices to be placed thereon so as to stimulate sales and thus to obtain a turnover of its stock as rapidly as possible at all times, especially as to such articles as are seasonal in [fol. 22] character, thus avoiding the losses in business that inevitably result from carrying over old stock from one season to another, and at the same time giving to its buying public the benefit of attractive goods properly priced at the proper season for their sale and use.

In order to accomplish this result, plaintiffs have been obliged to expend each year, in the community served by them, large amounts of money for advertising in newspapers and for trade solicitation by personal letters to their customers, and circulars to the public generally, and have also expended large sums of money in the employment of skilled and competent persons to decorate their show-windows and make an inviting display of merchandise in their windows and in their store, and in the purchase of the proper equipment for such purposes. Only by such progressive methods and by the policy of continued fair dealing with the buying public, has their firm been able to build up its business and to take its own proper part in building up its city and State.

Likewise the plaintiffs have for many years past actively interested themselves in all forms of civic, cultural, religious and welfare work carried on in their city and State and contributed largely of their means and of the time of their members.

The plaintiff, Fred Levy, has been President of the National Association of Clothiers and Furnishers as well as of the Louisville Retail Merchants' Association and the Louisville Commercial Club, and of many other organiza- [fol. 23] tions engaged in civil, cultural, religious and welfare work, in addition to serving as a member of the Park Commission of the City of Louisville, in all of which capacities he has served without pay.

Likewise other members and employes of their firm have taken their part in public activities.

Plaintiffs' firm keeps its money on deposit in banks lo-

cated in Kentucky and makes purchases of goods produced in Kentucky when practicable to do so. It has more than 175 employes at all times, ranging as high as 225 employes during the rush seasons. It pays them the highest current compensation for services of the kind rendered by them. Nearly all of its employes have been with it continuously for more than five years. Most of them have been with it for periods ranging from 10 to 50 years. Many others are actually pensioned by it. Near the end of each calendar year it gives to various employes a bonus proportioned to services rendered. Every employe in its service for as much as a year gets a vacation of one week or more on full pay.

IX

In addition to the payment of its annual ad valorem taxes, plaintiffs have paid to the State of Kentucky for the calendar year 1930, automobile license taxes in the sum of $134.61. Plaintiffs' firm is not incorporated and it does not sell articles upon the sale of which any excise or license tax is levied by the State.

[fol. 24]

X

There is absolutely nothing in the business conducted or property or merchandise kept in plaintiffs' retail store, or in plaintiffs' method of conducting or managing same, that is in any degree inimical to the public health, the public welfare, the public morals, or the public safety, or which to any extent whatever increases any fire or police hazard beyond whatever hazard may appertain to other stores handling a similar class of merchandise with one-twentieth the annual volume of gross sales made by plaintiff.

Moreover, Chapter 149, Acts of 1930, herein referred to, is purely a tax measure and it does not purport to be an exercise of the police power of the State. It does not relate to the public health or the public welfare, or the public morals or the public safety. It does not attempt to regulate any business that is affected with a public interest. No provision is made therein for regulation, supervision or inspection of any retail merchant upon whom or upon whose occupation it attempts to impose a tax. It is not an inspection measure in which fees are prescribed to cover the cost of inspection. No standards are set up for the conduct of the business of a retail merchant.

XI

[fol. 25] As a tax measure, the operation or effect of said Chapter 149, Acts of 1930, is not equal or uniform as applied to the retail merchants therein sought to be taxed, and, as hereinafter more specifically shown, the classification of retail merchants therein attempted to be made is deliberately and designedly so made as to be arbitrary, unreasonable, discriminatory, oppressive and prohibitory as to these plaintiffs and all other retail merchants who are thereunder sought to be taxed at rates in excess of one-twentieth of one per cent. upon their gross sales respectively, and moreover, in its higher brackets of taxation, confiscatory as to these plaintiffs and all others similarly situated.

XII

During the calendar year 1930, the total gross retail sales made by plaintiffs in all departments conducted by it in their retail store aggregated $1,554,151.52, of which amount, gross retail sales aggregating $1,253,389.07 were made between March 17, 1930 (the date of approval of said Act herein challenged), and December 31, 1930, both dates inclusive.

Applying to said gross sales, claimed by defendants to be subject to taxation under Chapter 149, Acts of 1930, the geometrically graduated rates of taxation prescribed by [fol. 26] said challenged Act, and deducting the credits allowed by Section 4 of said challenged Act, would produce the following result:

1/20 of 1% on first $400,000 of sales	$200.00 Tax
2/20 of 1% on next $100,000 of sales	100.00 Tax
5/20 of 1% on next $100,000 of sales	250.00 Tax
8/20 of 1% on next $100,000 of sales	400.00 Tax
11/20 of 1% on next $100,000 of sales	550.00 Tax
14/20 of 1% on next $100,000 of sales	700.00 Tax
17/20 of 1% on next $100,000 of sales	850.00 Tax
1% on excess over $1,000,000 of sales	2,533.89 Tax
Total tax above computed	$5,583.89
Credit for motor vehicle licenses	134.61
Net tax levied upon Plaintiff	$5,449.28

XIII

Each of the separate departments conducted by plaintiffs in their retail store comes into direct competition with a number of other specialized individual retail stores in Kentucky dealing mainly and often exclusively in the particular kind or class of goods handled and sold by plaintiffs in the particular department of their stores handling or selling that class or line of goods. In no one department conducted by plaintiffs in their retail store (except Men's Clothing in which the gross annual sales are approximately $600,000.00) do the gross sales in any calendar year or for the period beginning March 17, 1930, and ending December 31, 1930, amount to as much as $400,000, nor do the gross annual sales of any specialized retail store in Kentucky competing [fol. 27] with any of the departments in plaintiffs' store, or its gross sales for the period beginning March 17, 1930, and ending December 31, 1930, exceed in any case the sum of $700,000, and practically all of them have gross annual sales not exceeding $400,000.00 in amount.

It thus results that the challenged Act of 1930, hereinabove set out, designedly, by its terms, works a discrimination against plaintiffs and denies to them the equal protection of the law, and imposes upon them a grossly unequal, oppressive, arbitrary and discriminatory burden of taxation in that the specialized single stores competing with any one department of plaintiffs are in nearly every case, if not in every case, taxed under said Act in the lowest bracket at 1/20 of one per cent of gross sales, subject to the credits provided by Section 4 of said Act, while, on the other hand, the gross sales of plaintiffs' department competing with said specialized single store are added to their gross sales in all other departments so as to produce an aggregate of gross sales during the taxable period, to be taxed at the highest brackets or rates of taxation provided in said Act, to-wit, at the rate of one per cent, which is 20 times in excess of the rate that in practically every case is levied under said Act upon the specialized single store competing with one of plaintiffs' departments in their retail store.

[fol. 28] XIV

Moreover, said challenged Act of 1930 contains in Section

4 thereof a provision which in effect entirely exempts from the payment of any tax thereunder all smaller retail merchants having gross sales for the taxable period under said Act comparable in amount with sales made by plaintiffs in the several separate departments of their retail store actually competing with said retail merchants with the smaller volume of gross sales.

Section 4 of said challenged Act provides, in substance and effect that while the license tax created and imposed by said Act shall not be in lieu of any special State license, excise, occupational or corporation license tax due under the provisions of any law now in force or that may hereafter be enacted, yet in the case of the retail merchants having smaller volumes of sales, such credits are in actual fact provided as in effect relieve said smaller retail merchants of the payment of any tax whatever under said challenged Act and in effect provide that the special State license, excise, occupational or corporation license tax exacted from them under laws now in force or hereafter enacted shall be in a substitute for any license tax otherwise exacted of them under the challenged Act.

The credits allowed under Section 4 of said challenged Act, by way of remission of the tax levied thereunder, are sufficient in practically all cases to offset entirely the rela- [fol. 29] tively small tax levied under said Act on sales of retail merchants as defined therein, whose annual gross sales do not exceed $400,000, and they were known to be sufficient for that purpose at the time of the passage and approval of said Act, and the allowance of said credits by way of remission of the tax levied in the Act and the graduation of said tax were both provided for in said Act as an essential part of a legislative scheme to tax retail merchants having a large volume of gross annual sales and to exempt from taxation retail merchants having a small volume of gross annual sales.

There are very few retail merchants in Kentucky whose gross annual sales in a single or individually-owned store exceed $400,000, and the gross annual sales of practically all such retail merchants are far below $100,000, and in most instances far below $50,000.

In practical effect and operation, only those retail merchants doing business in Kentucky who own or manage more than one department in a single store, or more than

two stores, with or without departments, and who have gross annual sales in all their stores or departments aggregating more than $400,000, are subject to taxation under said Act, in any appreciable amount and those who are taxed at all constitute a very small class of limited number as compared with the vast number of retail merchants who are wholly exempt from taxation under said Act. There is no just or reasonable basis for the classification of retail merchants [fol. 30] on the basis of taxing the limited class subject to taxation under said Act and exempting the overwhelmingly larger class not subject to taxation under said Act.

To illustrate: The average retail merchant conducting a general retail store in Kentucky has invested therein a capital not exceeding $25,000, and has gross annual sales aggregating less than $50,000, and such a retail merchant would, as a rule, pay to the State of Kentucky, upon the kind of stock carried in his general store, special State license or excise taxes aggregating from $10 to $15.

If such retail merchant conducts his business under form of a corporation organized in Kentucky, with an authorized capital stock of $25,000, fully paid in and invested in its single retail store in Kentucky, and has therein gross annual sales of $50,000, it could by no possibility be assessed under said challenged Act of 1930 with a tax exceeding $25, and as a matter of fact, in general practice it would not be assessed with any tax at all, or with a much smaller tax than $25, because its annual corporation license tax, levied under Sections 4189-1 and 4189-2, Kentucky Statutes, at the rate of 70 cents per $1,000 of authorized capital stock or capital invested in Kentucky, plus other State excise or license taxes paid by it, would largely if not completely offset any tax imposed upon it by said challenged Act, and would thus be a complete substitute for any tax so imposed upon it by said Act.

[fol. 31] On the other hand, exactly the same volume of annual gross sales made by plaintiffs in one of their departments in competition with said average retail merchant would be added to all the other gross annual sales made in all the other departments of plaintiffs' store and thus subjected to a tax at the rate of one per cent as compared with a tax of 1/20 of one per cent levied by said Act upon the average retail merchant conducting an average general retail store and competing with plaintiffs in the sale at retail

of goods of the same kind and character. Credits allowed to plaintiffs under Section 4 of said Act, when proportionately allocated to said department, would amount to a very insignificant part of the tax levied upon plaintiffs by reason of their annual gross sales in such department.

XV

Said challenged Act, by its terms and especially by Section 4 thereof, designedly makes or attempts to make a classification of retail merchants to be taxed thereunder, purely on the basis of whether such retail merchants are incorporated or unincorporated, and to allow to retail merchants that conduct their business in corporate form a credit upon any taxes otherwise levied upon or assessed against them under said Act for the amount of any annual corporation license tax levied upon them, pursuant to Sections 4189-1 and 4189-2, Kentucky Statutes, for the privilege enjoyed by them of conducting their business in corporate form, while [fol. 32] at the same time denying to the plaintiffs and other retail merchants similarly situated, who are not incorporated, any equal or corresponding credit upon the taxes levied upon or assessed against them by the terms of said challenged Act.

There are many hundreds of retail merchants conducting retail stores in Kentucky who are incorporated and thus entitled under Section 4 of said Act to a credit upon any license taxes imposed upon them by said Act, which credit in hundreds of cases amounts to a complete remission of all taxes levied upon them under said Act, and in many hundreds of other cases said credit amounts to a substantial remission of all taxes levied upon the incorporated retail merchant under said Act, when at the same time these plaintiffs and other retail merchants similarly situated, who are not incorporated, must under said Act pay the taxes thereby levied upon or assessed against them, without any equal or corresponding deduction.

Such classification of retail merchants as incorporated or unincorporated and such imposition upon them of different rates or methods of taxation, or such remission of taxes so levied, by the allowance of credits, based solely upon such classification, are and each of them is wholly unreasonable, arbitrary, capricious, unequal, unjust, oppressive and discriminatory against these plaintiffs and all

other retail merchants similarly situated, who do not con- [fol. 33] duct their business in corporate form, and said challenged Act in such respects denies to these plaintiffs and to other retail merchants similarly situated the equal protection of the law which is guaranteed to them by the Fourteenth Amendment to the Constitution of the United States, the benefits of which, and of all rights given to them thereunder, are hereby specially set up and claimed by these plaintiffs on behalf of themselves and all others similarly situated.

By reason of the facts set forth in this clause and in other clauses of this bill, said challenged Act is wholly unconstitutional, null and void, under the principles of law argued by counsel and expounded by the Supreme Court of the United States in Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389, and similar cases.

XVI

Section 1 of said Act provides that it shall be construed to apply to "every retail merchant" and "store" as defined therein, which is controlled or held with others by majority of stock ownership or ultimately controlled or directed by one management or association of ultimate management.

The design, intent, practical operation and effect of said provision is to require and compel the owner or management of two or more separate and distinct stores and/or departments as defined in said Act, to aggregate for the purposes of taxation the gross sales of all stores and/or [fol. 34] departments controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management without regard to the fact that said stores and/or departments may be separate and distinct enterprises; without regard to their location and without regard to the fact that said stores, and/or departments, are each engaged in the sale at retail of wholly different merchandise and commodities unrelated to the merchandise and commodities sold in other stores, and/or departments.

The design, intent and practical operation of said Act is thereby to tax, penalize and, because of the increased rate of taxation in the higher brackets, to prohibit the employment of capital in the acquisition of stock in corporations owning stores, as defined by said Act, which may result in

majority stock ownership, and to tax, penalize and in effect prohibit the employment of capital, skill, efficiency and economy in the operation of such stores under one management or co-operatively under an association of management.

XVII

For many years past there have been various voluntary co-operative associations or agencies organized and successfully conducted for the purpose of affording to so-called individual or single-store retail merchants engaged in Ken- [fol. 35] tucky and elsewhere in the business of selling at retail, goods, wares and merchandise of the character handled and sold by plaintiffs in their retail store and by retail merchants generally throughout Kentucky and other States, facilities, services and advice in selecting, buying, advertising and displaying the merchandise handled or sold by them at retail in their respective stores in Kentucky and elsewhere corresponding in all material respects as to price, quality or kind with the merchandise handled or sold by plaintiffs in their retail store and by other retail merchants similarly situated.

These co-operative associations or agencies, for a comparatively small fee, afford to retail merchants operating individual specialized stores throughout Kentucky and elsewhere, affiliated with them, all the facilities and advantages, in the matter of selection of goods and prices to be paid therefor, that can be obtained by any large organization operating on its own account, and in many cases such co-operative associations or agencies afford to their members or patrons very much better advantages and facilities along such lines.

Likewise such co-operative associations or agencies afford to many retail merchants in Kentucky and elsewhere, affiliated with them, the benefit of their advice and experience and co-operative action in securing increased results in advertising the goods of such retail merchants to the buying public, as well as advice and suggestions as to the [fol. 36] most approved and advanced method of selecting goods of the proper style and quality, and for displaying such goods in the retail stores of the various retail merchants affiliated with such co-operative associations or agencies.

Practically all retail merchants owning or operating in

Kentucky specialized individual retail stores, who have gross annual sales aggregating as much as $100,000, for some years past, as a part of the economic development of the business of a retail merchant, have availed themselves of the services and facilities thus afforded by said co-operative associations or agencies. In this manner, such retail merchants have as great buying power as the plaintiffs or any other retail merchant buying on his or its own account a stock of merchandise for sale in his or its retail store or stores, and they can buy goods of as high class and quality, at similar price, as the plaintiffs or any other retail merchant similarly situated, and they can and do get the benefit of the same facilities and services for advertising, displaying and handling their merchandise in their respective stores, and for effecting a rapid turnover thereof, even though the aggregate of their gross sales may be, and in practically every case it is, less than $400,000 per annum in any retail store or stores owned or operated by them in Kentucky.

Hence plaintiffs, by reason of their operation of a larger store and the larger volume of gross sales made by it therein, have no advantage whatever over the retail mer- [fol. 37] chant operating a specialized individual store in competition with the store of these plaintiffs or any department therein. On the contrary, many of said specialized individual stores have gross annual sales of merchandise handled by them substantially exceeding in volume the gross annual sales of such merchandise handled and sold in the department of plaintiffs' store competing with such specialized individual retail merchant.

In addition thereto, the specialized individual merchant has the advantage of better facilities for displaying his merchandise, of whatever character it may be, in a smaller store located directly on the ground floor with display windows facing directly upon the street upon which his retail store is located. As a matter of fact, many of said specialized individual retail stores competing with the plaintiffs have, by reason of their advantages, made substantial inroads and encroachments upon the trade of plaintiffs in their various departments established and conducted for many years prior to the opening or establishment of such specialized individual stores now operating in competition with plaintiffs.

Accordingly, there is no just, proper or reasonable basis whatever for discrimination in the matter of taxation against these plaintiffs and in favor of the retail merchant conducting a specialized individual store.

[fol. 38] XVIII

The classification made, as a basis for the tax imposed by said challenged Act, rests wholly upon gross retail sales and the percentage of said tax is increased with each one hundred thousand dollars of sales above $400,000.00, unequally, disproportionately, arbitrarily, and with the sole design and intent to burden, oppress, prohibit and discriminate against the ownership or ultimate management of a retail store in Kentucky having a large volume of gross sales (whether in one store or more or in one department or more in the same store), and thus unreasonably, unequally and disproportionately to discriminate against, oppress, burden and penalize the employment of capital, skill, efficiency and the ability of retail merchants in the State of Kentucky to increase their sales above four hundred thousand dollars. The rate of tax is one-twentieth of one per cent on the first four hundred thousand dollars of gross sales. The rate of tax is doubled for the next one hundred thousand dollars of sales. The rate of tax is five times as great for the next one hundred thousand dollars of sales; eight times as great for the next one hundred thousand dollars; eleven times as great for the next one hundred thousand dollars; fourteen times as great for the next one hundred thousand dollars; seventeen times as great for the next one hundred thousand dollars; and twenty times as great for all sales in excess of one million dollars. The [fol. 39] practical operation and effect of said unequal and disproportionate increase in the percentage of tax per one hundred thousand dollars of increased sales is that a retail merchant who increases his sales one hundred thousand dollars above four hundred thousand dollars pays as much tax on said one hundred thousand dollars as a retail merchant whose sales are two hundred thousand dollars. For the next one hundred thousand dollar increase, said merchant is required to pay an additional Two Hundred and Fifty Dollars; for the next one hundred thousand dollars increase, an additional four hundred dollars, or a

greater tax on said one hundred thousand dollars of increased sales than the entire tax of a retail merchant whose total sales are five hundred thousand dollars; for the next one hundred thousand dollars of sales, five hundred and fifty dollars, which tax on said one hundred thousand dollars of sales is as great as the total tax of a retail merchant having total sales of six hundred thousand dollars; for the next one hundred thousand dollars of sales the tax is seven hundred dollars; for the next one hundred thousand dollars of sales the tax is eight hundred and fifty dollars; for the next one hundred thousand dollars of sales and for every one hundred thousand dollars of sales thereafter, a tax is assessed of One Thousand Dollars, which is a greater tax per one hundred thousand dollars of sales than the total tax required of a merchant whose total sales are seven hundred thousand dollars. Under said Act, a [fol. 40] retail merchant having gross sales in any amount not exceeding three hundred thousand dollars, who increases said sales by one hundred thousand dollars, is only liable to a maximum increase in taxation of $50.00, less his permitted credits, whereas, the plaintiff is subject to a tax of $1,000.00 on every one hundred thousand dollar increase in its sales. Said classification is unreasonable, unequal, discriminatory, oppressive, arbitrary and confiscatory as to this plaintiff and other retail merchants similarly situated.

XIX

The classification and graduation made as a basis for the tax imposed rests wholly upon the amount of gross retail sales of all stores controlled or held with others by majority stock ownership, or controlled or directed by one management or association of ultimate management. Said classification does not rest in any particular upon the ability of the taxpayer to pay said tax. It does not rest in any particular upon the income or earnings from any store or stores. It has no necessary relation to receipts. It is imposed regardless of whether said sales are made at a profit or loss or the amount of profit or loss therefrom. It has no relation to profits or losses, if any accrue from said sales. It has no relation whatsoever to the capital employed or invested. It does not take into account the type of business. Said Act does not make any provision for the

[fol. 41] merchandise returned, for the cancellation of sales or resales of merchandise or the net amount of sales, or sales on credits for which payment is not received, but classifies sales solely as to the gross amount thereof by dollars, and strikes at the increase in said gross sales by a geometrical increase in the rate of taxation, as heretofore set forth, per one hundred thousand dollars of increased sales up to one million dollars, after which the increase of gross sales above one million dollars, and the tax thereon is levied and collected at the highest bracket of one per cent.

Although said Act purports to classify and tax sales by dollars, it taxes the dollar of sales of certain retail merchants upon a rate and basis materially and substantially different from the dollar of sales of other merchants engaged in direct competition and similarly circumstanced, and imposes upon a merchant having gross sales of eight hundred thousand dollars, a tax of fifteen hundred dollars, or seven and one-half times the tax imposed upon his competitor who does exactly one-half the volume, to-wit, four hundred thousand dollars, who is only subject to a tax of two hundred dollars.

Thereby, one retail merchant doing exactly twice the business of his competitor is required to pay seven and one-half times as much tax on his dollar of sales as his competitor, who, in the same class and similarly circumstanced, is required to pay on his dollar of sales. Said classification is unreasonable, without a rational basis, and is arbitrary, [fol. 42] unequal, burdensome and oppressive.

XX

Such competitive stores, by reason of connection with co-operative associations, agencies or organizations, although singly or individually owned, enjoy any and all the advantages which may flow from group or co-operative buying on a large scale, the pooling of purchasing power, the ability to contract for buying their goods upon a large scale, and for the scientific and efficient arrangement of stores, window displays and the development of merchandising methods through the employment, co-operatively, of experts and others experienced therein. Said co-operative associations combine co-operatively as great or a greater number of stores and have as great or greater purchasing and buying power and have as great or greater advertising and mer-

chandising ability as the plaintiffs and as those retail merchants who own two or more stores in the Commonwealth of Kentucky, or conduct two or more departments in any retail store so owned or operated by them. However, said singly or individually owned stores and members of co-operative associations, as aforesaid, although similarly circumstanced and in direct competition with the plaintiffs and with other retail merchants owning two or more stores, are not required to aggregate or combine for the purpose of [fol. 43] taxation or to report for taxation the total sales of all stores in Kentucky joined together in the same co-operative association or organization, and hence, said competitive stores, members of said associations or organizations, are not subject to taxation on the same basis, classification or rate as the plaintiffs, but in practical operation and effect are practically exempt from any taxation under said Act, whereas, the plaintiffs are subject to taxation at the highest rate prescribed in the said Act. By reason thereof, such competitive stores are given undue and unfair economic advantages over the retail store of the plaintiffs and other retail merchants similarly situated and are in effect aided, helped and subsidized by said Act in their competition with the plaintiffs and other retail merchants similarly situated.

XXI

The efficient and successful method of conducting retail business in the Commonwealth of Kentucky and elsewhere in the United States, at the present time, is to sell merchandise at the lowest possible price, consistent with a small percentage of profit on each individual sale, endeavoring thereby to increase the volume of sales and to secure a more rapid turnover of merchandise and capital. The retail merchant is required by reason of small percentage of profit on a single sale to have a large volume of sales and contin- [fol. 44] uously to increase his sales volume in order to secure a fair return on the capital employed by him in his business. The highly competitive character of the retail business, in which plaintiffs are engaged, and other retail business in the Commonwealth of Kentucky and elsewhere in the United States, makes it necessary for each merchant to meet such competition and to conform his business methods therewith. In conformity therewith the plaintiffs and

other retail merchants similarly situated have built up and developed in Kentucky for themselves respectively a large and valuable business, upon the basis of selling merchandise at retail to the public, at the lowest possible prices, consistent with a small average profit in individual sales. The plaintiffs and all other retail merchants similarly situated are dependent upon a large volume of sales in order to secure a fair, reasonable and adequate return upon invested capital employed in the conduct of their business. Such merchandising methods are the basis of the business of the plaintiffs and all other retail merchants similarly situated, are of benefit to the general public of the Commonwealth of Kentucky and have brought to the plaintiffs and all other retail merchants similarly situated a large and valuable good will and a large sales volume.

[fol. 45] XXII

The unfair, unjust, unequal, oppressive and discriminatory rates of taxation exacted by said challenged Act, of plaintiffs and all other retail merchants similarly situated, not only imposes upon them an unjust and intolerable burden for the benefit of other retail merchants engaged in like business but having a smaller volume of annual gross sales, but will inevitably destroy or impair, and the purpose of said challenged Act is to destroy or impair, the good will and established trade or business and thereby to reduce the volume of annual gross sales made by plaintiffs and other retail merchants similarly situated and, as far as possible under said Act; to divert trade and custom from the retail stores of plaintiffs and other retail merchants similarly situated and taxed in the higher brackets of taxation, to the more numerous but less progressive and enterprising retail merchants who have very much smaller annual gross sales and therefore, if taxed under said Act at all, are taxed at rates very much lower than those exacted by said Act of plaintiffs and other retail merchants similarly situated.

Said challenged Act, in its purpose and effect, is wholly lacking in uniformity in its application to the persons or occupations taxed thereunder; and it designedly transfers to and imposes upon plaintiffs and all other retail merchants similarly situated an undue proportion and prac-
[fol. 46] tically the entire burden of the license taxes at-

tempted in said challenged Act to be levied upon retail merchants.

Thus said challenged Act designedly discriminates in favor of retail merchants having a small or comparatively small volume of annual gross sales, and in effect levies a subsidy for their benefit to be paid wholly by plaintiffs and other retail merchants similarly situated, who have annual gross sales in larger volume. In so doing, said challenged Act denies to plaintiffs and other retail merchants similarly situated the equal protection of the law guaranteed to it and to them by the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and also by the fundamental law of the State of Kentucky.

XXIII

There is a large number of retail merchants lawfully engaged in Kentucky in the operation of one store, either with or without separate departments therein such as plaintiffs conduct in their retail store, or in the operation of two or more stores, either under the same management or controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management, which are in like situation with plaintiffs in that, under said challenged Act, each of them is subject to taxation in the higher brackets at the [fol. 47] excessive, unjust and discriminatory rates of taxation therein levied upon them by reason of the larger volume of gross annual sales made by them, to the exclusion of an overwhelmingly large number of retail merchants competing with them respectively, who have very much smaller gross annual sales and, by reason of credits allowed under Section 4 of said Act, are required under said Act to pay no tax whatever or a wholly insignificant amount of taxes.

The retail merchants conducting stores in Kentucky who are thus situated similarly to the plaintiffs are entirely too numerous to be joined in this suit as parties plaintiff, and the matters and things complained of in this bill and the questions herein raised as to the legality of the tax complained of, are all questions of common or general interest to many persons, as hereinbefore set forth, constituting a class so numerous as to make it impracticable to bring them all before the Court herein, and plaintiffs bring this suit on their own behalf and on behalf of all other indi-

viduals, firms, associations, copartnerships and corporations hereinbefore mentioned, for the purpose of enjoining the defendants from enforcing or attempting to enforce said challenged Act against plaintiffs or any of the other retail merchants similarly situated, on whose behalf this suit is brought, or from attempting to collect any tax under said Act against plaintiffs or any of said other retail merchants on whose behalf this suit is brought.

[fol. 48] While it is impracticable to bring them all before the Court, plaintiffs name herein some of the other retail merchants similarly situated and belonging to the class of retail merchants doing business in Kentucky, on whose behalf plaintiffs bring this suit, as follows:

Rodes-Rapier Co.
Louis Appel Co.

XXIV

By Section 5 of said challenged Act, any retail merchant who fails to file the report and to pay the tax as required therein is subject to an added penalty of 20 per cent plus 6 per cent per annum interest, with a further additional penalty of 20 per cent if collected by proceedings in Court.

By Section 7 of said challenged Act, any retail merchant, or any officer, director, trustee, or agent, who fails, in whole or in part, to make the report or to pay the tax required under said Act, is declared to be guilty of a misdemeanor and upon conviction subject to a fine of $1,000 and/or imprisonment in the county jail not exceeding six months—all in addition to the penalties imposed by Section 5 of said Act.

[fol. 49] XXV

Section 8 of said Act empowers the defendants, members of the State Tax Commission, to incur expenses and costs for the enforcement and administration of said Act, to be paid out of the funds collected thereunder.

Plaintiffs state that the defendants are preparing for the administration and enforcement of said Act, and have already expended monies out of the State Treasury for the purpose of preparing blank forms and reports necessary to carry out the provisions of said Act, and unless enjoined and restrained by this Court, all of the defendants hereto

will administer said law and expend funds raised by taxation in an amount in excess of Five Thousand ($5,000.00) Dollars for the enforcement thereof, and will require the plaintiffs and all other retail store owners not exempt under the provisions hereinbefore set forth, to pay the taxes prescribed by said Act, and upon the failure of said store owners, including the plaintiffs, to make said payments, the said defendants will attempt to enforce against them, including plaintiffs, the drastic penalties provided for by Sections 5 and 7 of said Act, and will attempt to enforce against them, including the plaintiffs, any other penalties or causes of action provided for by the statutes or General Laws of the Commonwealth of Kentucky, all to the irreparable injury and damage of plaintiffs and other retail merchants similarly situated.

[fol. 50] XXVI

By Section 55 of the Kentucky Constitution it is provided that no Act of the General Assembly shall become a law until 90 days after the adjournment of the session at which it was passed, except in cases of emergency, and the reasons for such emergency must be set out at length in the Journal of each House.

Section 13 of the challenged Act set forth an alleged emergency as the basis for making said Act effective immediately upon its passage and its approval by the Governor, which took place on March 17, 1930. It contains the only assignment of any reason for an emergency justifying the enactment of Section 13 that is set out at length or at all in said Act or in the Journal of either House of the General Assembly.

Section 13, being the emergency clause of said Act, is void in that the so-called emergency therein recited has no connection with or relation to the purposes for which said challenged Act was enacted by the General Assembly, and under the decision of the Kentucky Court of Appeals in McIntyre v. Commonwealth, 221 Kentucky, 16, and other decisions by the same Court, no reason whatever, meeting the requirements of Section 55, Kentucky Constitution, has been assigned for making said Act take effect upon its approval by the Governor on March 17, 1930, instead of according to the constitutional method and time prescribed

by Section 55, under which said Act could not and did not [fol. 51] become effective prior to June 17, 1930.

The reasons for the emergency assigned in Section 13 deal solely with the inadequacy of the present State revenue to meet the immediate needs for the maintenance and development of the State Government and its agencies. The taxes to be levied and collected under said Act are to be levied and collected, one-half for the purpose of liquidating the indebtedness of the Commonwealth of Kentucky, and the other one-half is to be levied and collected for the specific purpose of repairing, maintaining and constructing permanent improvements for the use of institutions under the control of the State Board of Charities and Corrections.

Neither of these purposes is related to or connected with the maintenance or development of the State Government or its agencies which are referred to in Section 13 of said Act as the reason for the alleged emergency therein declared.

Plaintiffs say that in no event, under Section 55 of the Kentucky Constitution, could said challenged Act become effective prior to June 17, 1930.

XXVII

Plaintiffs say that said Act, in the various particulars hereinbefore pointed out, is void because it violates the provisions of the Contsitution of the United States and of the Fourteenth Amendment thereof, and because it violates [fol. 52] the provisions of the Constitution of Kentucy as herein set forth, and plaintiffs now specially set up and claim herein the rights, benefits, privileges, immunities and exemptions secured to them by said provisions of the Fourteenth Amendment to the Constitution of the United States and by said Constitution of the Commonwealth of Kentucky hereinbefore set forth and especially in the following particulars:

(1) Said Act, for the reasons hereinbefore set forth, is void in the several particulars and respects hereinbefore pointed out.

(a) It denies to plaintiffs and all other retail merchants similarly situated, due process of law, and is an attempt to

levy upon them a tax that is confiscatory of their property, and moreover is an attempt to take their property without due process of law, as an arbitrary exaction, particularly insofar as any tax levied thereunder is measured by gross sales of retail merchants made prior to June 17, 1930.

(b) It denies to plaintiffs and other retail merchants similarly situated, the equal protection of the laws in that it exacts of the plaintiffs and other retail merchants similarly situated, an unreasonable, unjust, discriminatory, oppressive and prohibitive rate of taxation, based upon a classification that is unreasonable, unjust and discriminatory against the plaintiffs and all other retail merchants similarly situated, and in that it taxes plaintiffs and other retail merchants similarly situated, at geometrically increased rates, graduated according to increased volume of gross sales, without reference to any other consideration whatever and without any reasonable basis of classifica-[fol. 53] tion, and at the same time imposes upon other retail merchants, doing the same kind of business in substantially the same way, a very much lower rate and burden of taxation, and, as to an overwhelming number of such retail merchants, wholly exempts them from any taxation whatever under said Act and also in that it allows to retail merchants doing business in corporate form, a remission, in whole or in part, of taxes levied under said Act, or a credit thereon, when no such remission or like or corresponding credit is allowed to plaintiffs or to other retail merchants who are not incorporated.

(c) For the reasons hereinbefore set forth, said Act abridges the privileges and immunities guaranteed to plaintiffs by the said Fourteenth Amendment, in the particulars hereinbefore set forth, and is therefore illegal and void.

(2) Said Act violates the fundamental principles of uniformity in the matter of taxes levied upon occupations, persons or property upon some reasonable basis of classification as such principles of uniformity are recognized by Sections 171 and 181 of the Constitution of the Commonwealth of Kentucky.

XXVIII

Section 10 of said Act contains provisions designed to

deny to plaintiffs and other retail merchants attempted to be taxed under said Act, any remedy whatever in advance of the payment of said tax, and likewise to deny any remedy whatever, after the payment of the tax imposed thereunder, except that where the tax is paid under protest, the tax-[fol. 54] payer may, within two years after such payment, bring in a court of competent jurisdiction in the Commonwealth of Kentucky an action for mandamus against the Auditor of Public Accounts to compel him to draw his warrant upon the State Treasurer for the amount of such tax as may be adjudged to have been wrongfully collected from such taxpayer.

Such action could only be brought where the tax is paid under protest and after its payment, and could only be brought or prosecuted in the Courts of Kentucky, and a judgment therein in favor of the complaining taxpayer could only result in obtaining a warrant upon the General Fund of the State in the hands of the State Treasurer, to be paid if and when funds were available for the payment of such warrants in the usual and orderly course.

Plaintiffs say that the taxes collected under said Act do not go into the General Fund of the Commonwealth, but are immediately appropriated and applied as provided in said Act; that there are now outstanding many State warrants drawn by the Auditor of Public Accounts upon the General Fund in the hands of the State Treasurer which have been outstanding since June, 1927, and can not be collected by the owners or holders thereof, for lack of funds in the State treasury during such period, for the payment of such warrants.

Plaintiffs say that, as shown by a monthly financial statement officially issued by the State Treasurer of Kentucky as of January 1, 1931, the amount of money in the General [fol. 55] Fund on January 1, 1931, less minor accounts, was $12,565.81 as against which there were at the time outstanding warrants aggregating $9,880,502.76 drawn by the Auditor of Public Accounts upon the State Treasurer and presented for payment but not paid for lack of funds.

By reason of the facts herein set forth, the plaintiffs have no remedy whatever in the State Courts of Kentucky, and no remedy whatever at law in the courts of the United States.

XXIX

Plaintiffs say that the defendants and each of them are threatening to, and unless enjoined or restrained by order of this Court they will take steps, by prosecution of the plaintiffs and, through such prosecution, by the infliction of penalties of fines and/or imprisonment, provided by said challenged Act, to enforce against plaintiffs the severe penalties provided in said Act, and also to enforce the collection from these plaintiffs of said illegal tax, in the sum of $5,449.28 as hereinbefore computed and stated, and also to compel plaintiffs, under said void Act, to make reports to the State Tax Commission of Kentucky of all its gross sales as therein provided, and also will attempt to enforce against plaintiffs, by prosecution and the infliction of penalties provided in said void Act, the payment of an illegal tax upon the gross sales of these plaintiffs amounting *of* [fol. 56] $1,253,389.07, upon which, under said Act, a tax would result against these plaintiffs of $5,449.28 as hereinabove set out, and will also proceed to enforce the excessive penalties provided in said Act for failure of a taxpayer assessed thereunder to make prompt payment of the taxes assessed against him as provided therein, and in like manner and with like results will proceed against all other retail merchants similarly situated.

XXX

Unless the defendants, after notice and hearing, are enjoined and restrained from enforcing or attempting to enforce said Act, the plaintiffs and all others similarly situated, will sustain irreparable loss and injury for which they have no plain, adequate or complete remedy at law, or any remedy at all in the Courts of Kentucky, in each of the following particulars:

(1) The plaintiffs and all others similarly situated, will be compelled to pay taxes pursuant to an invalid and unconstitutional enactment, and for which they are not legally liable.

(2) Upon the failure of the plaintiffs, and others similarly situated, to pay said illegal taxes, the drastic penalties provided by said Act will be attempted to be enforced by the defendants against the plaintiffs, and others similarly

situated, and as a result thereof, plaintiffs, and others simi-
[fol. 57] larly situated, will be compelled to defend innumerable prosecutions brought to recover said taxes and penalties and criminal proceedings brought to impose the criminal penalties provided in Section 7, of said Act, all at great expense and damage to it and them.

(3) The defendants will expend public funds raised by taxation for the purpose of preparing to enforce and carry out the provisions of said Act to the irreparable injury and damage of the plaintiffs as taxpayers of the Commonwealth of Kentucky.

(4) If plaintiffs and others similarly situated should pay said taxes under protest and be compelled to commence actions to recover the same as provided in Section 10, of said Act, they would be put to large expense for attorneys' fees and court costs, and would be required to bring a multiplicity of actions in order to recover said monies, and said Act contains no provisions of any kind for the reimbursement to plaintiffs and others similarly situated, of said large sums which it would be required to expend in prosecuting such actions for attorneys' fees, expenses, court costs and other expenses.

(5) No waiver is provided of the right of the Commonwealth of Kentucky to defend any action brought in the courts of the United States as a suit against a State within the meaning of the Eleventh Amendment to the Constitution of the United States. In consequence whereof, the plaintiffs and others similarly situated do not have a plain, [fol. 58] adequate and complete remedy in an action at law in the courts of the United States.

The only remedy afforded by said Act, or by any law of the Commonwealth of Kentucky, is a suit at law in the Franklin Circuit Court against the Auditor of Public Accounts for a mandamus to compel him to draw his warrant upon the Treasurer for the amount of taxes erroneously exacted of the taxpayer and paid by him under protest, all of which appears from Section 10, of said challenged Act of 1930, and from Section 162, Kentucky Statutes, these being the only statutes of the State of Kentucky which afford any remedy in such cases to the taxpayer from whom illegal taxes have been collected by the State of Kentucky.

By no other statute has the Commonwealth of Kentucky

ever consented in any way to be sued itself or through any of its officers for the recovery of taxes illegally exacted from a taxpayer and covered into the Treasury of the State.

(6) Said Act is ambiguous and doubtful as to its application and meaning, and as to the procedure and requirement thereunder, and has never been interpreted by the Court of Appeals of the Commonwealth of Kentucky.

(7) The amount of said annual tax which the plaintiffs would be required to pay under the terms of said Act will be a substantial portion of the capital invested by them in their retail store and needed by them to carry on their [fol. 59] business therein. The payment of so large a sum of money will impair the ability of the plaintiffs to operate their business in Kentucky and will possibly decrease the amount of annual business which they will be enabled to do, and will give competitors of the plaintiffs who are not required to withdraw any money from their respective businesses or who are not required to withdraw a proportionate sum therefrom, an unfair and undue advantage over the plaintiffs, for which the plaintiffs have no plain, adequate or complete remedy at law, and the same is true as to all other retail merchants similarly situated.

(8) The enforcement of said Act will have the effect of injuring and impairing all lawful business in which the plaintiffs and others similarly situated are engaged and in which they have the undoubted right to engage, and which right is guaranteed and protected by the State and Federal constitution-.

PRAYER FOR RELIEF

Inasmuch, therefore, as the plaintiffs are without adequate remedy at law, and can obtain relief only in a Court of equity, the plaintiffs pray.

1. That writs of subpœna be issued to each of said defendants, requiring each of them to answer this complaint fully and truthfully, but not under oath, an answer under oath being hereby expressly waived as to each and all of said defendants.

[fol. 60] 2. That a temporary restraining order be issued, restraining the defendants and each of them, from enforcing said Act against the plaintiffs and all others similarly situated, under the provisions of said Act hereinbefore set out, and that each and all of said defendants and their successors in office be enjoined and restrained, after final hearing, from enforcing against the plaintiffs and all others similarly situated, the provisions of House Bill No. 111 of the General Assembly of Kentucky (Chapter 149, Acts of 1930, pages 475-482), directly or indirectly; from instituting or maintaining any actions at law or suits in equity to recover of or from the plaintiffs, and others similarly situated, the tax complained of, or for the recovery of any of the penalties prescribed in said tax for the nonpayment thereof; from expending any monies received by taxation or otherwise; from enforcing or preparing for the enforcement of said Act complained of, and from taking any steps looking to the exclusion of the plaintiffs and/other persons similarly situated, from carrying on its and/or their business in the Commonwealth of Kentucky, and from taking any steps looking to the prosecution of the plaintiffs, its agents, servants or employees, or any person, firm or corporation similarly situated in the Commonwealth of Kentucky, and their agents, servants and employees for a violation of said Act, and from in any manner interfering with the carrying on and operation of such business in the Commonwealth of Kentucky.

[fols. 61 & 62] 3. That upon the final hearing of said cause, this Court will order, adjudge and decree that House Bill No. 111 of the General Assembly of Kentucky at a session of 1930 (Chapter 149, Acts of 1930, Pages 475 to 482, entitled: "An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act," be declared unconstitutional, null and void, as violating the Constitution of the United States and of the Commonwealth of Kentucky, in the particulars hereinbefore pointed out, and that the enforcement thereof

be perpetually enjoined; and for all other and further and general relief, as may be just and equitable in the premises.

Nichols, Morrill, Wood, Marx & Ginter, Cincinnati, Ohio; Trabue, Doolan, Helm & Helm, Louisville, Ky., Solicitors for Plaintiffs.

[fol. 63] IN UNITED STATES DISTRICT COURT

ORDER PERMITTING PLAINTIFF TO SUE AS REPRESENTATIVE OF CLASS—January 24, 1931

On motion of plaintiff, based upon its verified petition herein, it appearing that the issues and questions raised in plaintiff's Bill of Complaint are of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the Court, it is now ordered, pursuant to Equity Rule 38, that plaintiff may sue on behalf of all other persons similarly situated, as well as on its own behalf, as to any issue or question presented by said Bill of Complaint that is of common or general interest to other taxpayers similarly situated, who are affected by said Chapter 149 of the Acts of 1930.

Chas. I. Dawson, Judge.

[fol. 64] IN UNITED STATES DISTRICT COURT

MOTION FOR TEMPORARY RESTRAINING ORDER—Filed January 24, 1931

The plaintiffs, Fred Levy et al., by counsel come and move the court, upon their verified Bill of Complaint herein showing that immediate and irreparable injury, loss or damage will result to plaintiffs before notice upon defendants can be served and a hearing had upon their application this day made for an interlocutory injunction, to grant them a temporary restraining order, without notice, enjoining and restraining the defendants herein and each of them, pending the hearing and determination of plaintiffs' application for an interlocutory injunction upon notice as required by law for such interlocutory or preliminary injunction,

(1) From enforcing or executing, either directly or indirectly, against these plaintiffs and/or other taxpayers similarly situated, the provisions of Chapter 149 of the Acts of the General Assembly of Kentucky at its 1930 session, entitled:

"An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; and declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act";

on the ground that said Act is unconstitutional, null and void in that it denies to plaintiffs and other taxpayers similarly situated, rights, privileges and immunities guaranteed to plaintiffs and such other taxpayers by the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and by the Constitution of Kentucky.

(2) From instituting or maintaining against these plaintiffs and/or other taxpayers similarly situated, any prose-
[fol. 65] cution or action at law, or any suit or suits in equity, to recover of or from the plaintiffs or other taxpayers similarly situated any portion of the alleged tax sought to be exacted of them under said Act, or for the infliction of any of the penalties prescribed in said Act for the nonpayment of such tax or for failure to make or file any reports or returns required thereunder.

(3) From further expending any moneys, received by taxation or otherwise, in the attempted enforcement of said Act, and also from further enforcing or preparing for the enforcement of said Act, or from taking any steps looking to the prosecution of the plaintiffs or any of their agents or servants or employes, or any other person, firm or corporation similarly situated, or any of their agents or servants or employes, for a violation of said Act in any of its provisions.

Nichols, Morrill, Wood, Marx & Ginter; Trabue Doolan, Helm & Helm, Solicitors for Complainants.

[fol. 66] IN UNITED STATES DISTRICT COURT

MOTION FOR INTERLOCUTORY INJUNCTION—Filed January 24, 1931

The plaintiffs, Fred Levy et al., by counsel come and move the Court, upon their verified Bill of Complaint herein, for an interlocutory injunction, to be granted after notice as required by law, enjoining and restraining the defendants herein and each of them until further order of Court herein:

(1) From enforcing or executing, either directly or indirectly, against these plaintiffs and/or other taxpayers similarly situated, the provisions of Chapter 149 of the Acts of the General Assembly of Kentucky at its 1930 session, entitled:

"An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act,"

on the ground that said Act is unconstitutional, null and void in that it denies to plaintiffs and other taxpayers similarly situated, rights, privileges and immunities guaranteed to these plaintiffs and such other taxpayers by the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and by the Constitution of Kentucky.

(2) From instituting or maintaining against these plaintiffs and/or other taxpayers similarly situated, any prosecution or action at law, or any suits or suits in equity, to recover of or from the plaintiffs or other taxpayers similarly situated any portion of the alleged tax sought to be exacted of them under said Act, or for the infliction of any of the penalties prescribed in said Act for the non-payment of such [fol. 67] tax or for failure to make or file any reports or returns required thereunder.

(3) From further expending any moneys, received by taxation or otherwise, in the attempted enforcement of said Act, and also from further enforcing or preparing for the en-

forcement of said Act, or from taking any steps looking to the prosecution of the plaintiff or any of its agents or servants or employes, or any other person, firm or corporation similarly situated, or any of their agents or servants or employes, for a violation of said Act in any of its provisions.

Nichols, Morrill, Wood, Marx & Ginter; Trabue, Doolan, Helm & Helm, Solicitors for Complainant.

[fol. 68] IN UNITED STATES DISTRICT COURT

ORDER GRANTING TEMPORARY RESTRAINING ORDER—January 24, 1931

This day came the plaintiffs, Levy Brothers by counsel, and upon their verified Bill of Complaint herein, entered their motion, without notice thereof to defendants or any of them, for a temporary restraining order pending the hearing of their application herein made for an interlocutory injunction because of immediate and irreparable injury, loss or damage shown by said verified Bill of Complaint to result to the plaintiffs before notice of such application for an interlocutory injunction can be served upon defendants and a hearing thereon had, inasmuch as

(1) It is impossible to convene a statutory court of three Judges as required by Section 266 of the Judicial Code as amended (U. S. Code, Title 28, Section 380) until after February 1, 1931, and

(2) Before such statutory court of three Judges can be convened to hear plaintiffs' application for an interlocutory injunction,

(a) The penalties prescribed by said Chapter 149 of the Acts of 1930 of the Commonwealth of Kentucky will have accrued, and plaintiffs and other taxpayers similarly situated, under said Act assailed herein as unconstitutional and void, will, on and after February 1, 1931, be subject to the fines and penalties in said Act prescribed for failure to make the reports or returns required of them under said Act, and will be subject to prosecutions and suits thereunder to recover the fines and penalties thereby imposed for failure to make such reports or returns, and

[fol. 69] (b) Any officer, director, trustee or agent of said plaintiffs and/or other taxpayers under said Act, similarly situated, will be subject to prosecution or to fine or imprisonment and other penalties denounced by said Act for failure to make such reports or returns, and otherwise will be without remedy for the protection of the constitutional rights of the plaintiffs and such other taxpayers similarly situated, or of any officer, director, trustee or agent of plaintiffs or such other taxpayers.

Thereupon the Court, being sufficiently advised, now finds that immediate and irreparable injury, loss or damage will result to plaintiffs and/or other taxpayers similarly situated, before notice upon defendants can be served and a hearing had upon said application for an interlocutory injunction, and therefore the Court now sustains said motion for a temporary restraining order without notice, and hereby grants to plaintiffs a temporary restraining order without notice, enjoining and restraining the defendants herein, and each of them, pending the hearing and determination of plaintiffs' application for an interlocutory injunction upon notice as required by law for such interlocutory or preliminary injunction.

(1) From enforcing or executing, either directly or indirectly, against these plaintiffs and/or other taxpayers similarly situated, the provisions of Chapter 149 of the Acts of the General Assembly of Kentucky at its 1930 session, entitled:

"An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act,"

[fol. 70] on the ground that said Act is unconstitutional, null and void in that it denies to plaintiffs and other taxpayers similarly situated, rights, privileges and immunities guaranteed to plaintiffs and such other taxpayers by the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and by the Constitution of Kentucky.

(2) From instituting or maintaining against these plaintiffs and/or other taxpayers similarly situated, any prosecution or action at law, or any suit or suits in equity, to recover of or from the plaintiffs or other taxpayers similarly situated any portion of the alleged tax sought to be exacted of them under said Act, or for the infliction of any of the penalties prescribed in said Act for the non-payment of such tax or for failure to make or file any reports or returns required thereunder.

(3) From further expending any moneys, received by taxation or otherwise, in the attempted enforcement of said Act, and also from further enforcing or preparing for the enforcement of said Act, or from taking any steps looking to the prosecution of the plaintiffs or any of their agents or servants or employes, or any other person, firm or corporation similarly situated, or any of their agents or servants or employes, for violation of said Act in any of its provisions.

The temporary restraining order herein granted shall expire in ten (10) days from this date unless, within the time so fixed, said temporary restraining order is extended for a like period, for good cause shown, the reasons for which extension shall be entered of record.

Before such temporary restraining order herein granted shall issue, the plaintiffs shall give bond with good security, to be approved by this Court or the Judge thereof, in the penal sum of -2,500.00 conditioned upon the payment of such costs and damages as may be incurred or suffered [fol. 71] by the defendants or any of them who may be found to have been wrongfully enjoined or restrained thereby.

Chas. I. Dawson, Judge.

[fol. 72] IN UNITED STATES DISTRICT COURT

ORDER POSTPONING HEARING AND CONTINUING RESTRAINING ORDER—January 29, 1931

The above styled three cases having been set for hearing at Louisville on Monday, February 2, 1931, at ten o'clock A. M., upon application of the respective plaintiffs for an

interlocutory injunction, and a restraining order in each case having been granted, to continue in effect until said date, and it now appearing that a statutory court of three Judges can not be convened for the hearing of said motions for a preliminary injunction before Saturday, February 7, 1931, at which time the case of Kroger Grocery & Baking Company vs. John B. Lewis et al., now pending in the United States District Court for the Eastern District of Kentucky, will come on for hearing upon a similar motion for injunction against the same defendants, wherein the validity of the same law is assailed, and the Judge of this Court has been requested by Honorable A. M. J. Cochran, Judge of the District Court for the Eastern District of Kentucky, to sit with him and with the Honorable A. C. Denison, United States Circuit Judge, in the hearing of said motion for an interlocutory injunction in the Kroger Grocery & Baking Company's case.

Now come the defendants herein, by Honorable J. W. Cammack, Attorney-General of Kentucky, and Honorable S. H. Brown, Assistant Attorney-General, and enter their appearance herein, and by agreement between parties plaintiff and defendant in each of the above styled cases,

It is now ordered that the hearing of plaintiffs' motion for an interlocutory injunction in each of the above-styled three actions be now postponed from February 2, 1931, to February 7, 1931, and that the hearing thereof on February 7, 1931, shall be held at the Federal Court Hall in Covington, Kentucky, simultaneously with the hearing of a similar motion in the case of Kroger Grocery & Baking Company against the same defendants, now pending in the Eastern District of Kentucky.

[fol. 73] By further agreement of parties, it is now ordered that the restraining order heretofore issued in each of the above-styled three cases be continued in effect beyond February 2, 1931, and until the motion for an injunction in each such case shall be heard and determined by the statutory court of three Judges to be convened for that purpose at the time and place above stated.

Chas. I. Dawson, Judge.

Nichols, Morrill, Wood, Mar[illegible] & Ginter, Trabue, Doolan, Helm & Helm, Solicitors for Plaintiffs. J. W. Cammack, Attorney General; S. H. Brown, Assistant Attorney General, Solicitors for All Defendants.

[fol. 74] IN UNITED STATES DISTRICT COURT

MOTION TO STRIKE FROM BILL OF COMPLAINT—Filed February 14, 1931

Come now the defendants and move the Court to strike from the Bill of Complaint herein the following:

1. Beginning with the word "immediately" at line 12 from top of page 6, and on page 6, down to and including the figures "1930" on page 7 of the Bill of Complaint.

2. All of paragraph 5 on page 8 of the Bill of Complaint.

3. All of paragraph 8 on page 19 of the Bill of Complaint.

4. Beginning with the word "likewise," line 14 from top of page 21, on page 21, down to and including the word "pay" on page 22 of the Bill of Complaint.

5. Beginning with the words "said Act," line 10 from top of page 38, on page 38, down to and including the word "dollars" on line 15 from top of page 38, on page 38, of the Bill of Complaint.

6. All of paragraph 21, on pages 41 and 42 of the Bill of Complaint.

7. All of paragraph 26, on pages 47 and 48 and 49 of the Bill of Complaint.

8. All of paragraph 28, on pages 51 and 52 of the Bill of Complaint.

And, upon this motion, the defendants pray the judgment of the Court.

J. W. Cammack, S. H. Brown, Batson, Cary & Welch, Leslie W. Morris, Howard S. Gentry, Attorneys for Defendants.

[fol. 75] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed February 14, 1931.

Now comes the defendants, John B. Lewis, Seldon Glenn and H. M. Cline, members of the State Tax Commission

of the Commonwealth of Kentucky, and Clell Coleman, Auditor of Public Accounts of the Commonwealth of Kentucky, and move the Court to dismiss the bill of complaint filed in the above entitled case upon the grounds and reasons therefore as follow-:

1. Because it appears in the bill of complaint filed in this case that this action is prosecuted by a citizen and resident of the State of Kentucky and that no diversity of citizenship exists betwen the parties hereto, and that the bill shows on its face that complainants are being deprived of no rights guaranteed them under the Constitution or laws of the United States.

2. That there is insufficiency of fact to constitute a valid cause of action in equity against these defendants.

3. Because it appears in the bill of complaint that plaintiffs have plain, adequate and complete remedy at law.

4. Because it appears in the bill of complaint that plaintiffs are, by the act under consideration, prohibited from maintaining any suit in equity to restrain the collection of the tax complained of.

J. W. Cammack, Attorney General; S. H. Brown, Assistant Attorney General; Howard S. Gentry, Solicitor for Defendants. Leslie W. Morris, Batson, Carey & Welch, of Counsel.

[fols. 76 & 77] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed Feb. 14, 1931.

Come now the defendants, John B. Lewis, Selden R. Glenn and Henry M. Cline, individually and as members of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, individually and as Auditor of Public Accounts of the Commonwealth of Kentucky, and for answer to the Bill of Complaint filed in the above styled action plead as follows, to-wit:

I

For answer to paragraph 1 of plaintiffs' Bill of Complaint, defendants admit all the allegations therein.

[fol. 78]

II

For answer to paragraph 2 of said Bill of Complaint, defendants deny that said Act is void for any reasons hereinafter set out, and admit all the other allegations contained in said paragraph.

III

For answer to paragraph 3 of said Bill of Complaint, defendants deny that this suit arises under the Constitution or laws of the United States, or that the amount in controversy herein exceeds the sum or value of $3,000, exclusive of interest and cost. They deny that this is a suit of a civil nature or that it is brought in equity for the purpose of enjoining the defendants or each of them from enforcing or attempting to enforce said Act of the General Assembly of Kentucky, Chapter 149 of the Session Acts of 1930, approved by the Governor of the Commonwealth on March 17, 1930, or that it is brought for the purpose of enjoining the defendants or any of them from requiring of the plaintiffs, or other taxpayers similarly situated, the reports which said Act purports to require of retail merchants as the term "retail merchant" is defined in said Act, or any information in reference to sales made by the plaintiffs, or any of said retail merchants similarly situated, or from collecting or seeking to collect from the plaintiffs, or any of said retail merchants similarly situated, any tax purporting to be levied or assessed upon the plaintiffs, or any of said retail merchants similarly situated, to recover any of the penalties sought to be imposed by said Act upon the plaintiff or any of said retail merchants similarly situated, for violation of any of the terms of said Act.

IV

For answer to paragraph 4 of the said Bill of Complaint, defendants admit that House Bill 111 was passed [fol. 79] at the 1930 term of the General Assembly, but deny that it was introduced, read, signed, or enrolled under the title:

"H. B. 111. An Act to restrain the unfair competition of chain stores, and in aid of individual merchants in the Commonwealth."

And further deny that it was passed under any title except that shown by the enrolled bill in the Office of the Secretary of State, a certified copy of which bill is filed herewith.

V

For answer to paragraph 5 of said Bill of Complaint, defendants deny that said House Bill 111 was introduced into the House of Representatives in response to a recommendation made to the General Assembly by the Governor of Kentucky in his annual message of January, 1930, that legislation be enacted to curb the competition of so-called chain stores with owners of so-called independent unit stores individually owned or operated, or in aid of such individually owned or operated stores. They deny that while said House Bill 111 was pending before the House Committee to which it was referred upon its introduction, the case of Jackson v. State Board of Tax Commissioners of Indiana was decided on February 1, 1930, in which a measure similar in legal effect to said House Bill 111 as originally introduced was held violative of the Fourteenth Amendment to the Constitution of the United States, as shown by the opinion in that case.

They deny that both the nature and purpose of said House Bill 111 was not changed by amendment by the Committee to which it had been referred, or that the measure as so amended and passed in the manner set out and approved by the Governor was so framed as to contain any obnoxious or any unconstitutional features.

[fol. 80]

VI

For answer to paragraph 6, defendants admit the allegations contained therein.

VII

For answer to paragraph 7, they deny that in the conduct of plaintiffs' store each of said departments is operated separately, or that plaintiffs' books or accounts are kept so

as to show separately as to each department the sales therein, the expense of operation, its proper proportion of rental, taxes, insurance or all or other overhead expense, or the net results of such operation of each or any department, to the end that plaintiffs may determine after allocating to each department its proper proportion of overhead general expense, including rental of floor space, taxes, insurance or any or all other proper overhead charges, the result of operation in each or any such department, or the wisdom or policy of maintaining or continuing the conduct of such department, or changes of policy or management to make each or any department self supporting, or for any other reason.

They deny that in the conduct of its general business plaintiffs come into competition with a large or any number of other stores selling merchandise of a similar character in Louisville, or in other cities in Kentucky, or that the same is true as to each or any department operated by plaintiffs in their retail store, or that each or any of said departments is compelled to or does actively or at all compete with specialized stores or stores dealing in similar lines of goods in the city of Louisville or elsewhere in Kentucky. They deny that such competition exists or extends to the matter of buying power or to the matter of selling or to the fixing of prices on goods sold so as to make them sell in competition with other dealers in similar goods in Louisville or elsewhere in Kentucky, or that such or any competition applies to plaintiffs' conduct of its store as a whole or as to each unit or any unit or department therein. [fol. 81]

VIII

For answer to paragraph 8, defendants deny that for many years last past or any years, plaintiffs have kept their capital invested in the retail store conducted by them in Louisville, Kentucky; deny that at any time the partnership has been a large taxpayer in the State of Kentucky, City of Louisville or County of Jefferson, paying all or any ad valorem taxes levied therein by competent authority for State, County or City purposes; deny that their firm has exerted itself with the utmost diligence or prudence, or at all, to build up its business as a retail merchant by all or any honorable means, or that it has built up a large or valuable business in the face of the keenest or any competition

with other retail merchants conducting a similar business, or that some of them have a larger volume of gross sales, or others have a smaller volume of gross sales in the respective kind or class of merchandise sold by plaintiffs.

They deny that to do this has required of the plaintiffs the closest attention to every or any phase of their business, or careful foresight as to the class or style of goods they should stock in their store or in each department thereof to attract the public or to satisfy its wishes or to stimulate purchases by it, or the most effective methods of displaying or advertising its goods so as to attract buyers, or the most careful or any consideration as to prices to place thereon so as to stimulate sales or to obtain a turnover of its stock as rapidly as possible at all or any times, or as to such articles as are seasonal in character in order to avoid losses in business that result from carrying over old stock from one season to another, or otherwise, or at the same time giving to its buying public the benefit of at-[fol. 82] tractive goods properly priced or at the proper season for their sale or use.

Defendants deny that plaintiffs have been obliged to expend each or any year, in the community served by them, large or any amounts of money for advertising in newspapers or for trade solicitation by personal letters to their customers, or circulars to the public generally, or have expended large or any sums of money in the employment of skilled or competent persons to decorate their show windows or to make an inviting display of merchandise in their windows or in their store, or in the purchase of the proper equipment for such purposes. They deny that by such methods or by the policy of continued fair dealing with the buying public, their firm has been able to build up its business or to take its own proper part in building up its City or State.

Defendants deny that plaintiffs have for many years or at all actively interested themselves in all or any forms of civic, cultural, religious or welfare work carried on in their City or State, or contributed largely or at all of their means or the time of their members.

They deny that plaintiff, Fred Levy, has been President of the National Association of Clothiers or Furnishers or of the Louisville Retail Merchants' Association or the Louisville Commercial Club, or of any other organizations

engaged in civic, cultural, religious or welfare work, or that he has served as member of the Park Commission of the City of Louisville, or that in such capacity he has served without pay.

They deny that other members or employees of their firm have taken their part, or any part, in public activities.

Defendants deny that plaintiffs' firm keeps its money on deposit in banks located in Kentucky, or makes purchases of goods produced in Kentucky. They deny that the firm has more than one hundred and seventy-five employees at [fol. 83] all times or as high as two hundred and twenty-five during rush seasons, or that they have either of such number; deny that it pays them the highest current compensation for services of the kind rendered by them; deny that nearly all or any of its employees have been with it continuously for more than five years, or for any such time, or that most or many of them have been with it for a period ranging from ten to fifty years, or any such time; deny that any others are actually pensioned by it; deny that near the end of each calendar year or at all, it gives to any employees a bonus proportioned to services rendered; deny that any employee in its service for as much as a year gets a vacation of one week or more, or at all, on full or any pay.

IX

For answer to paragraph 9 of said Bill of Complaint, defendants say that they do not have sufficient information to answer the allegations contained in paragraph 9 of said Bill of Complaint, and therefore neither admit nor deny the same, but require strict proof thereof.

X

For answer to paragraph 10, defendants deny that there is nothing in the business conducted or property or merchandise kept in plaintiff's retail store, or in plaintiff's method of conducting or managing same that is inimical to the public health, public welfare, public morals or the public safety, or which increases any fire or police hazard beyond whatever hazard may appertain to other stores having a similar class of merchandise with one-twentieth the annual volume of gross sales made by the plaintiff.

Defendants deny that Chapter 149, Acts 1930, is purely a tax measure or that it does not purport to be an exercise

of the police powers of the State, or that it does not relate [fol. 84] to public health or public welfare or public morals or the public safety; deny that it does not attempt to regulate any business that is affected with public interest; deny that no provision is made therein for the regulation, supervision or inspection of any retail merchant upon whom or whose occupation it attempts to impose a tax.

XI

For answer to paragraph 11, defendants deny that as a tax measure, the operation or effect of said Chapter 149, Acts 1930, is not equal or uniform as applied to retail merchants therein sought to be taxed, or that the classification of retail merchants attempted to be made is deliberately or designedly so made as to be arbitrary, unreasonable, discriminatory, oppressive or prohibitory as to these plaintiffs or any other retail merchants who are thereunder sought to be taxed at rates in excess of one-twentieth of one per cent upon their gross sales respectively, or that in its higher brackets, or at all, said tax is confiscatory as to these plaintiffs or any others similarly situated.

XII

For answer to paragraph 12 of said Bill of Complaint, defendants say they do not have sufficient information to answer the allegations contained in paragraph 12 of said Bill of Complaint, and therefore neither admit nor deny the same, but require strict proof thereof.

XIII

Defendants deny that each or any of the separate departments conducted by plaintiffs in their retail store comes into direct competition with any specialized individual retail store in Kentucky dealing mainly or exclusively, or [fol. 85] at all, in the particular kind or class of goods handled or sold by plaintiffs in the particular department of their stores handling or selling that class or line of goods. They deny that in no one department conducted by plaintiffs do the gross sales in any calendar year or for the period beginning March 17, 1930, and ending December 31, 1930, amount to $400,000, or that the gross annual sales of any specialized retail store in Kentucky competing with

any of the departments in plaintiffs' store, or its gross sales for the period beginning March 17, 1930, and ending December 31, 1930, exceeds in any case the sum of $700,000, or that practically all or any of them have gross annual sales not exceeding $400,000 in amount.

Defendants deny that said Act of 1930 designedly or at all, by its terms works a discrimination against plaintiffs or denies to them equal protection or the law, or imposes upon them an unequal, oppressive, arbitrary or discriminatory burden of taxation in that the specialized single stores competing with any one department are in any case, or in every case, taxed under said Act in the lowest bracket of one-twentieth of one per cent of gross sales, subject to the credits provided by Section 4 of said Act, or that on the other hand or at all the gross sales of plaintiffs' department competing with any specialized single store are added to their gross sales in all other departments so as to produce an aggregate of gross sales during the taxable period, to be taxed at the highest bracket or rates or taxation provided in said Act, to-wit, one per cent, or that said sum is twenty times in excess, or in any times in excess, of the rate that in every case is levied upon the specialized single store competing with one of the plaintiffs' departments in their retail trade.

[fol. 86] XIV

For answer to paragraph 14, they deny that said challenged Act of 1930 contains in Section 4, or any part thereof, a provision which in effect entirely or otherwise exempts from the payment of any tax thereunder all or any smaller retail merchants having gross sales for the taxable period under said Act comparable in amount with sales made by plaintiffs in the several separate or any departments of their retail store actually competing with said retail merchants with the smaller volume of gross sales.

They deny that Section 4, or any part of said challenged Act, provides, in substance or otherwise, that while the license tax created or imposed by said Act shall not be in lieu of any special State license, excise, occupational or corporation license tax due under the provisions of any law now in force or that may hereafter be enacted, that in a case of retail merchants having a smaller volume of sales such credits are in actual fact provided as in effect, or

otherwise, relieve said smaller retail merchants from the payment of any tax whatever under said challenged Act or in effect provide that the special State license, excise, occupational or corporation license tax exacted from them under laws now in force or hereafter enacted shall be a substitute for any license tax otherwise exacted from them under the challenged Act.

They deny that the credits allowed under Section 4 of said challenged Act, by way of remission of the tax levied thereunder are sufficient in any case to offset any tax levied under said Act on sales of retail merchants as defined therein, whose annual gross sales do not exceed $400,000, or that they were known to be sufficient for that purpose at the time of the passage and approval of said Act, or at any time, or that the allowance of such credits on the tax levied in the Act or the graduation of such tax were provided for in said Act as any part of a legislative scheme to tax retail [fol. 87] merchants having a large volume of gross annual sales, or to exempt from taxation retail merchants having a small volume of gross annual sales.

They deny that there are few retail merchants in Kentucky whose gross annual sales in a single or individually owned store exceeds $400,000, or that the gross annual sales of practically all or any such retail merchants are below $100,000, or in most or any instances below $50,000.

They deny that in practical effect or operation only retail merchants doing busines in Kentucky who own or manage more than one department in a single store, or more than two stores, with or without departments, or who have gross annual sales in all of their stores or departments aggregating more than $400,000 are subject to taxation under said Act in an appreciable amount, or that those who are taxed at all constitute a small class of limited number as compared with the vast number of retail merchants, or that any retail merchants are wholly exempt under said Act. They deny that there is no just or reasonable basis for the classification of retail merchants on the basis of taxing the limited class subject to taxation under said Act, or that any class is exempt from taxation under said Act. They deny that the average retail merchant conducting a general retail store in Kentucky has invested therein a capital not exceeding $25,000, or has gross annual sales aggregating less than $50,000, or that such retail merchant

would, as a rule, pay to the State of Kentucky, upon the kind of stock carried in his general store, special State license or excise tax aggregating from $10 to $15.

They deny that if such retail merchant conducts his business under form of a corporation organized in Kentucky with an authorized capital stock of $25,000, fully paid in and invested in its single retail store in Kentucky, or has a gross annual sales of $50,000, that it could by any pos- [fol. 88] sibility be assessed under said Act of 1930 with a tax exceeding $25; deny that as a matter of fact, in general practice it would not be assessed with any tax at all or with a smaller tax than $25, because its annual corporation license tax levied under Section 4189-1 and Section 4189-2, Kentucky Statutes, at the rate of 70c per $1,000 of authorized capital stock or capital invested in Kentucky, plus other State excise or license taxes paid by it, would largely or at all offset any tax imposed upon it by said Act or would thus be a substitute for any tax so imposed upon it by said Act.

They deny that on the other hand the same volume of annual gross sales made by plaintiffs in one of their departments in competition with said average retail merchant would be added to all or any of the other gross annual sales made in all or any of the other departments of plaintiffs' store, or would thus be subjected to a tax at the rate of one per cent as compared with a tax of one-twentieth of one per cent levied by said Act upon any retail merchant conducting an average general retail store or competing with plaintiffs in the sale, at retail, of goods of the same kind or character; deny that the credits allowed by plaintiffs under Section 4 of said Act, when proportionately allocated to said department, would amount to an insignificant part of the tax levied upon plaintiffs be reason of their annual gross sales in such department.

XV

For answer to paragraph 15, they deny that this Act, by its terms, or especially by Section 4, or any part hereof, designedly or at all makes or attempts to make a classification of retail merchants to be taxed thereunder on a basis of whether such retail merchants are incorporated or unincorporated, or to allow to retail merchants that conduct their business in corporate form a credit upon any taxes

[fol. 89] otherwise levied upon or assessed against them under said Act for the amount of any annual corporation license tax levied upon them pursuant to Sections 4189-1 and 4189-2, Kentucky Statutes, for the privilege enjoyed by them of conducting their business in corporate form; deny that at the same time said Act denies to plaintiffs or other retail merchants similarly situated who are not incorporated, equal or corresponding credit upon the taxes levied or assessed against them by the terms of said Act.

They deny that there are many or any retail merchants conducting retail stores in Kentucky who are incorporated or thus entitled under Section 4 of said Act, or any part thereof, to a credit upon any license taxes imposed upon them by said Act, or that this credit in any case amounts to a complete or any remission of any taxes levied upon them under said Act, or that in any other case said credit amounts to a substantial remission of any taxes levied upon the incorporated retail merchant under said Act, when at the same time these plaintiffs or other retail merchants similarly situated who are not incorporated, must pay the taxes thereby levied upon or assessed against them without equal or corresponding deduction.

They deny that such classification of retail merchants as incorporated or unincorporated or that such imposition upon them of different rates or methods of taxation, or such remission of taxes so levied, by the allowance of credits, is based upon such classification, or that any of them is unreasonable, arbitrary, capricious, unequal, unjust, oppressive or discriminatory against these plaintiffs or any other retail merchants similarly situated who do not conduct their business in corporate form, or that said Act in such respect denies to these plaintiffs or to other retail [fol. 90] merchants similarly situated the equal protection of the law which is guaranteed to them by the Fourteenth Amendment to the Constitution of the United States.

They deny that by reason of the facts set out in this clause, or in any other clause of this bill, said Act is unconstitutional, null or void.

XVI

For answer to paragraph 16, they deny that the design, intent, practical operation or effect of Section 1 of said Act is to require or compel the owner or management of

two or more separate or distinct stores or departments, as defined in said Act, to ag-regate for the purpose of taxation, or otherwise, the gross sales of all stores or departments controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management without regard to the fact that said stores or departments may be separated or distinct enterprises, without regard to their location, or without regard to the fact that said stores or departments are each engaged in the sale at retail of wholly different merchandise or commodities unrelated to the merchandise or commodities sold in other stores or departments.

They deny that the design, intent or practical operation of said Act is thereby to tax, penalize or because of increased rate of taxation in the higher brackets, to prohibit employment of capital in the acquisition of stock in corporations owning stores, as defined by said Act, which may result in majority stock ownership, or to tax, penalize or in effect prohibit the employment of capital, skill, efficiency or economy in the operation of said stores under one management or co-operatively under an association of management.

[fol. 91] XVII

For answer to paragraph 17, they deny that for many years past, or at all, there have been many or any voluntary co-operative associations or agencies organized or successfully conducted for the purpose of affording to so-called individual or single store retail merchants engaged in Kentucky or elsewhere, in the business of selling at retail goods, wares, merchandise of the character handled or sold by plaintiffs in their retail store or by retail merchants generally throughout Kentucky or other States, facilities, services or advice in selecting, buying, advertising or displaying the merchandise handled or sold by them at retail in their respective stores in Kentucky or elsewhere, corresponding in any material respect as to price, quality or kind with the merchandise handled or sold by plaintiffs in their retail store or by other retail merchants similarly situated.

They deny that these co-operative associations or agencies for any fee, afford to retail merchants operating individual specialized stores throughout Kentucky, or else-

where, affiliated with them, any of the facilities or advantages in the matter of selection of goods or prices to be paid therefor, that can be obtained by any large organization operating on its own account, or that in any cases such co-operative associations or agencies afford to their members or patrons better advantages or facilities along such lines.

They deny that such co-operative associations or agencies afford to any retail merchants in Kentucky, or elsewhere, affiliated with them, the benefit of their advice or experience or co-operative action in securing increased results in the advertising of goods of such retail merchants to the buying public, or any advice or suggestions as to the most approved or advanced method of selecting goods of the proper style [fol. 92] or quality, or for displaying such goods in the retail stores of the various retail merchants affiliated with such co-operative associations or agencies.

They deny that many, or any, retail merchants owning or operating in Kentucky specialized individual retail stores, who have gross annual sales aggregating as much as $100,000, for some years past, or at any time, as a part of the economic development of the business of a retail merchant, or otherwise, have availed themselves of the services or facilities thus afforded by said co-operative associations or agencies; deny that such retail merchants have as great buying power as plaintiffs or other retail merchant buying on his or its own account a stock of merchandise for sale in his or its retail store or stores, or that they can buy goods of as high class or quality, at similar price as plaintiffs or any other retail merchant similarly situated, or that they can or do get the benefit of the same facilities or services for advertising, displaying or handling their merchandise in their respective stores, or for effecting a rapid turnover thereof, even though the aggregate of their gross sales may be, or that in any case it is, less than $400,000 per annum in any retail store or stores owned or operated by them in Kentucky.

They deny that plaintiffs, by reason of their operation of a larger store or the larger volume of gross sales made by it therein, have no advantage over the retail merchant operating a specialized individual store in competition with the store of these plaintiffs or any department therein, or that on the contrary many of said specialized individual stores have gross annual sales of merchandise handled by them

exceeding in volume the gross annual sales of such merchandise handled or sold in the department of plaintiffs' store competing with such specialized retail merchant.

[fol. 93] They deny that the specialized individual merchant has advantage of better facilities for displaying his merchandise, of whatever character it may be, in a smaller store located directly on the ground floor with display windows facing directly upon the street upon which his retail store is located, or that any of said specialized individual retail stores competing with plaintiffs have, by reason of their advantage, or otherwise, made any inroads or encroachments on the trade of plaintiffs in their various departments established or conducted for many years prior to the establishment of such specialized individual stores now operating in competition with plaintiffs.

They deny that there is no just, proper or reasonable basis whatever for discrimination in the matter of taxation against these plaintiffs or in favor of the retail merchant conducting a specialized individual store, or that there is any such discrimination.

XVIII

For answer to paragraph 18, defendants deny that the classification made as a basis of the tax imposed by said Act rests wholly, or at all, upon gross retail sales, or that the percentage of said tax is increased with each $100,000 of sales above $400,000, unequally, disproportionately, arbitrarily or with design or intent to burden, oppress, prohibit or discriminate against the ownership of any retail store in Kentucky having a large volume of gross sales whether in one store or more or in one department or more in the same store, or unreasonably, unequally or disproportionately to discriminate against, oppress, burden or penalize the employment of capital, skill, efficiency or the ability of retail merchants in the State of Kentucky to increase their sales above $400,000. Defendants deny that the practical operation or effect of said increase in the [fol. 94] percentage of tax per $100,000 of increased sales is unequal or disproportionate, or that the effect of same is that a retail merchant who increases his sales $100,000 above $400,000 pays as much tax on said $100,000 as a retail merchant whose sales are $200,000, or that for the next $100,000 increase said merchant is required to pay an ad-

ditional $250,000, or that for the next $100,000 increase an additional $400, or a greater tax on said $100,000 of increased sales than the entire tax of retail merchant whose total sales are $500,000, or that for the next $100,000 of sales $550, or that said tax on said $100,000 of sales is as great as the total tax of a retail merchant having total sales of $600,000, or that for the next $100,000 of sales the tax is $700, or that for the next $100,000 the tax is $850, or that for the next $100,000 of sales or for every $100,000 of sales thereafter, a tax is assessed of $1,000, or that same is a greater tax per $100,000 of sales than the total tax required of a merchant whose sales are $700,000. They deny that under said Act a retail merchant having gross sales not exceeding $300,000 who increases his said sales by $100,000 is only liable to a maximum increase in taxation of $50, less his permitted credits, or that the plaintiff is subject to a tax of $1,000 on every $100,000 increase in sales; deny that said classification is unreasonable, unequal, discriminatory, oppressive, arbitrary or confiscatory as to this plaintiff or other retail merchants similarly situated.

XIX

For answer to paragraph 19, defendants deny that the classification or graduation made as a basis for the tax imposed rests upon the amount of gross retail sales of all stores controlled or held with others by majority stock ownership, or controlled or directed by one management or association of ultimate management; deny that said classification does not rest upon the ability of the taxpayer to pay said tax; that it does not rest upon the in-[fol. 95] come or earnings from any store or stores; that it or has no necessary relation to receipts; deny, that it is imposed without regard to whether said sales are made at a profit or loss or the amount of profit or loss therefrom; deny it has no relation to profits or losses; deny that it has no relation to the capital employed or invested; deny that it does not take into account the type of business; that it does not make any provision for the merchandise returned or for the cancellation of sales or resales of merchandise or the net amount of sales, or sales on credits for which payment is not received, or that the classification is solely as to the gross amount thereof by dollars or that it strikes

at the increase in said gross sales by geometrical increase in the rate of taxation per $100,000 up to $1,000,000.

Defendants deny that said Act taxes the dollars of sales of certain retail merchants upon a rate or basis different from the dollars of sales of other merchants engaged in direct competition or similar circumstances, or imposes upon a merchant having gross sales of $800,000 a tax of $1,500 or seven and one-half times the tax imposed upon his competitor who does exactly one-half the volume, to wit; $400,000, or who is only subject to a tax of $200.

They deny that one retail merchant doing twice the business of his competitor is required to pay seven and one-half times as much tax or any times as much tax on his dollar of sales as his competitor who is similarly situated is required to pay on his dollar of sales; deny that said classification is unreasonable, without a rational basis or is arbitrary, unequal, burdensome or oppressive.

XX

For answer to paragraph 20, defendants deny that any competitive stores, by reason of connection with co-opera- [fol. 96] tive associations, agencies or organizations, although similarly or individually owned, enjoy any of the advantages which flow from group or co-operative buying on a large scale, the pooling of purchasing power, the ability to contract for buying their goods upon a large scale, or for the scientific or efficient arrangement of stores, window displays, or the development of merchandising methods through the employment, co-operatively, of experts or others experienced therein. They deny that said co-operative associations combine co-operatively as great or greater number of stores or have as great or greater purchasing power or buying power, or have as great or greater advertising or merchandising ability as the plaintiffs or as those retail merchants who own two or more stores in the Commonwealth of Kentucky, or conduct two or more departments in any retail store owned or operated by them. They deny that said singly or individually owned stores or members of co-operative associations are similarly circumstanced or are in direct competition with plaintiffs or other retail merchants owning two or more stores, or that said competitive stores, members of said associations or organizations, are not subject to taxation

on the same basis, classification or rate as plaintiffs, or are, in practical operation and effect, exempt from any taxation under said Act, or that the plaintiffs are subject to taxation at the highest rate prescribed in said Act, or that such competitive stores are given undue or unfair economic advantages over retail stores of the plaintiffs or other retail merchants similarly situated or are in effect aided, helped or subsidized by said Act in their competition with plaintiffs or other retail merchants similarly situated.

XXI

For answer to paragraph 21, defendants deny that the efficient or successful method of conducting retail business [fol. 97] in the Commonwealth of Kentucky, or elsewhere in the United States, at the present time or any other time, is to sell merchandise at the lowest possible price, consistent with a small percentage of profit on each individual sale, endeavoring thereby to increase the volume of sales or to secure a more rapid turnover of merchandise or capital; deny that the retail merchant is required by reason of small percentage of profit on a single sale to have a large volume of sales or continuously to increase the volume in order to secure a fair return on the capital employed by him in his business. They deny that the highly competitive character of the retail business in which plaintiffs are engaged, or any other retail business in the Commonwealth of Kentucky or elsewhere in the United States, makes it necessary for each merchant to meet such competition or to conform his business methods therewith; deny that in conformity therewith plaintiffs, or any other retail merchants similarly situated, have built up or developed in Kentucky for themselves respectively a large or valuable business, upon the basis of selling merchandise at retail to the public, at the lowest possible prices, consistent with a small average profit in individual sales; deny that plaintiffs, or any other retail merchants similarly situated, are dependent upon a large volume of sales in order to secure a fair, reasonable or adequate return upon invested capital employed in the conduct of their business; deny that such merchandising methods are the basis of the business of plaintiffs or any other retail merchants similarly situated or are of benefit to the public of the Commonwealth of Kentucky, or have brought to

plaintiffs, or any other merchants similarly situated, a large or valuable good will or a large sales volume.

[fol. 98] XXII

For answer to paragraph 22, defendants deny that the rates of taxation exacted by said Act are unfair, unjust, unequal, oppressive or discriminatory, or that such rates imposed upon plaintiffs or any other retail merchants similarly situated, imposed upon them an unjust or intolerable burden, or any burden, for the benefit of other retail merchants engaged in like business having a smaller volume of annual gross sales, or that the purpose of such Act is to destroy or impair the good will or established trade or business, or to reduce the volume of annual gross sales made by plaintiffs or other retail merchants similarly situated, or to divert trade or custom from retail stores of plaintiffs or other retail merchants similarly situated who are taxed in the higher brackets of taxation, to the retail merchants who have smaller annual gross sales or who are taxed under said Act at rates lower than those exacted by said Act of plaintiffs or other retail merchants similarly situated.

They deny that said Act, in its purpose or effect, is lacking in conformity in its application to the persons or occupations taxed thereunder, or that it transfers to or imposes upon plaintiffs or any other retail merchants similarly situated, an undue proportion or the entire burden of the license taxes attempted in said Act to be levied upon retail merchants.

They deny that said Act discriminates in favor of retail merchants having a small or comparatively small volume of annual gross sales, or against any retail merchants, or that it levies a subsidy to be paid in any part by the plaintiffs, or other retail merchants similarly situated, who have annual gross sales in larger volume; deny that said Act denies to plaintiffs, or any other retail merchants similarly situated, the equal protection of the laws guaranteed to it or to them by the equal protection clause of the Fourteenth Amendment to the Constitution of the United States [fol. 99] or by the fundamental law of the State of Kentucky.

XXIII

For answer to paragraph 23, they deny that there is a large number, or any number, of retail merchants lawfully engaged in Kentucky in the operation of one store either with or without separate departments therein such as plaintiffs conduct in their retail stores, or in the operation of two or more stores either under the same management or controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management, which are in like situation with plaintiffs in that under said Act each of them is subject to taxation in the higher brackets, or that the rates of taxation therein levied upon them by reason of the large volume of gross annual sales made by them is excessive, unjust or discriminatory, or that a large number of retail merchants are competing with them, or that such large or any number of retail merchants by reason of credits allowed under Section 4 of said Act are required to pay no tax or insignificant amount of tax.

They deny that the retail merchants conducting stores in Kentucky who are thus situated similarly to the plaintiffs are too numerous to be joined in this suit as parties plaintiff, or that the matters or things complained of in this bill or the questions herein raised as to the legality of the tax complained of, are all, or any, questions of common or general interest to any persons, or that such persons constitute a class so numerous as to make it impracticable to bring them all before the Court herein, or that this suit is brought on behalf of others besides plaintiffs, namely, Rodes Rapier Co. and Louis Appel Co.

[fol. 100] XXIV

For answer to paragraph 24 of said Bill of Complaint, defendants admit the allegations contained therein.

XXV

For answer to paragraph 25 of said Bill of Complaint, defendants admit that they are preparing for the administration and enforcement of said Act, but deny that they will attempt to enforce any drastic penalties against plaintiffs

or others similarly situated, or that any irreparable injury or damage, or any injury or damage, would result to plaintiffs, or other retail merchants similarly situated.

XXVI

For answer to paragraph 26, they deny that Section 13, being the emergency clause of said Act, is void in that such emergency thereto cited has no connection with or relation to the purposes for which said challenged Act was enacted by the General Assembly, or under the decision of the Kentucky Court of Appeals in McIntyre vs. Commonwealth, 221 Ky. 16, or any other decision by the same Court, or that no reason meeting the requirements of Section 55, Kentucky Constitution, has been assigned for making said Act take effect upon its approval by the Governor on March 17, 1930, instead of according to it the constitutional method or time prescribed by Section 55, or that said Act did not become effective prior to June 17, 1930.

They deny that the reasons for the emergency assigned in Section 13 deal solely with the inadequacy of the present State revenue to meet the immediate needs for the maintenance or development of the State Government or its agencies; deny that neither of the purposes is related to or connected with the maintenance or development of the [fol. 101] State Government or its agencies which are referred to in Section 13 of said Act as a reason for the latest emergency therein declared, or that said Act could not take effect under Section 55 of the Kentucky Constitution prior to June 17, 1930.

XXVII

For answer to paragraph 27, defendants deny that said Act in the various particulars hereinbefore set out is void because it violates the provisions of the Constitution of the United States or the Fourteenth Amendment thereof, or because it violates provisions of the Constitution of Kentucky as herein set forth, or for any reason.

(1) They deny that for the reason hereinbefore set forth, said Act is void in several particulars or respects hereinbefore pointed out.

(a) They deny that it denies to plaintiffs, or any other retail merchants similarly situated, due process of law, or

that it is an attempt to levy upon them a tax that is confiscatory of their property, or is an attempt to take their property without due process of law as an arbitrary exaction insofar as any tax levied thereunder is measured by gross sales of retail merchandise made prior to June 17, 1930.

(b) They deny that it denies to plaintiffs, or any other retail merchants similarly situated, equal protection of the laws in that it exacts of the plaintiffs, or any other merchants similarly situated, an unjust, unreasonable, discriminatory, oppressive or prohibitive rate of taxation, or that it is based upon a classification as unreasonable, unjust or discriminatory against the plaintiffs, or any other retail merchants similarly situated, or that it taxes plaintiffs, or any other retail merchants similarly situated at geometrically increased rates, graduated according to increased [fol. 102] volume of gross sales without reference to any other consideration whatever or without a reasonable basis of classification, or that it at the same time imposes upon other retail merchants doing the same kind of business in substantially the same way, any lower rate or burden of taxation, or as to any number of such retail merchants at all, exempts them from taxation under said Act, or that it allows to retail merchants doing business in corporate form a remission, in any part, of taxes levied under said Act, or a credit thereon, or that no such remission or like or corresponding credit is allowed to plaintiffs or other retail merchants who are not incorporated.

(c) They deny that for the reason hereinbefore set forth said Act abridges the privileges or immunities guaranteed to plaintiffs by the Fourteenth Amendment, or that it is illegal or void.

(2) They deny that said Act violates any principles of uniformity in the matter of taxes levied upon occupations, persons or property upon a reasonable basis of classification as such principles of uniformity are recognized by Sections 171 and 181 of the Constitution of the Commonwealth of Kentucky.

XXVIII

For answer to paragraph 28, they deny that Section 10 of said Act contains any provisions designed to deny to

plaintiffs or other retail merchants attempted to be taxed under said Act, a remedy in advance of the payment of said tax; or likewise to deny a remedy after the payment of the tax imposed thereunder except that where the tax is paid under protest, the taxpayer may within two years after such payment bring in a court of competent jurisdiction in the Commonwealth of Kentucky, an action for mandamus against the Auditor of Public Accounts to compel him to draw his warrant upon the State Treasurer for the amount [fol. 103] of such tax as may be adjudged to have been wrongfully collected from such taxpayer.

They deny that such action could only be brought where the tax is paid under protest and after the payment, or that it could only be brought or prosecuted in the courts of Kentucky, or that a judgment therein in favor of the complaining taxpayer could only result in obtaining a warrant upon the general fund of the State in the hands of the State Treasurer, to be paid as and when funds were available for the payment of such warrant in the usual and orderly course, or that such taxes collected under said Act do not go into the general fund of the Commonwealth; or that they are immediately appropriated or applied as provided in said Act, or that there are now outstanding any State warrants drawn by the Auditor of Public Accounts upon the general fund in the hands of the State Treasurer which have been outstanding since June, 1927, or any time, or that they can not be collected by the owners or holders thereof for lack of funds in the State Treasury during such period for the payment of such warrants.

They deny that as of January 1, 1931 the money in the General Fund of the State Treasury in the office of the State Treasurer was $12,565.81, or that at that time there were outstanding warrants aggregating $9,880,502.76 drawn by the Auditor of Public Accounts and presented for payment to the State Treasurer, but were not paid for lack of funds.

XXIX

For answer to paragraph 29 of said Bill of Complaint, defendants admit that they will enforce said Act, but deny that such act is illegal, and say that they do not have sufficient information to answer the allegations contained in paragraph 29 as to the amount of the tax owed by plain-

[fol. 104] tiffs, and therefore neither admit nor deny the same, but require strict proof thereof.

They deny that by reason of the facts herein set forth plaintiffs have no remedy in the State courts of Kentucky, or no remedy at law in the courts of the United States, or that there are no available funds to refund said tax in the event of a judgment in the State Court commanding such refund.

XXX

Defendants for answer to paragraph 30 deny that unless they are enjoined or restricted from enforcing or attempting to enforce said Act, plaintiffs or any others similarly situated will sustain irreparable loss, or any, loss for which they have no plain, adequate or complete remedy at law, or any remedy at all in the courts of Kentucky in any of the following particulars.

(1) They deny that plaintiffs or any others similarly situated, will be compelled to pay taxes pursuant to an invalid or unconstitutional method or for which they are not legally liable.

(2) They deny that upon failure of the plaintiffs, or others similarly situated, to pay said taxes, that the enforcement or attempted enforcement of penalties provided by said Act against plaintiffs, or others similarly situated, will result in plaintiffs, or others, being compelled to defend innumerable prosecutions or any prosecutions brought to recover said taxes or penalties or criminal proceedings brought to impose criminal penalties provided in section 7 of said Act, or at great or any expense to it or them.

(3) Defendants deny that they will expend public funds raised by taxation for the purpose of preparing to enforce or carry out provisions of said Act to the irreparable injury or damage of the plaintiffs or any injury or damage of [fol. 105] plaintiffs as taxpayers of the Commonwealth of Kentucky.

(4) Defendants deny that if plaintiffs or others similarly situated should pay said taxes under protest or be compelled to commence actions to recover the same as provided in Section 10 of said Act, they will be put to large or any

expense for attorneys' fees or court costs, or will be required to bring a multiplicity of actions in order to recover said moneys, or that said Act contains no provisions of any kind for the reimbursement to plaintiffs of said sums which it would be required to expend in prosecuting such actions for attorneys' fees, expenses, court costs or other expenses, or that plaintiffs or others will be required to expend any such sum. They deny that no waiver is provided of the right of the Commonwealth of Kentucky to defend any action brought in courts of the United States as a suit against a State within the meaning of the Eleventh Amendment of the Constitution of the United States, or that in consequence thereof plaintiffs, or others similarly situated, do not have a plain, adequate or complete remedy in an action at law in the courts of the United States.

— They deny that the only remedy afforded by said Act, or by any laws of the Commonwealth of Kentucky, is a suit at law in the Franklin Circuit Court against the Auditor of Public Accounts for a mandamus to compel him to draw his warrant upon the Treasurer for the amount of taxes erroneously exacted of the taxpayer or paid by him under protest, or that same appears from Section 10 of said Act of 1930, or from Section 162, Kentucky Statutes, or that these are the only statutes of the State of Kentucky which afford any remedy in such cases to the taxpayer from whom illegal taxes have been collected by the State of Kentucky.

Deny that by no other statute has the Commonwealth of Kentucky ever consented to be sued itself or through any of [fol. 106] its officers for the recovery of taxes illegally exacted from a taxpayer and covered into the Treasury of the State.

(6) They deny that said Act is ambiguous or doubtful as to its application or meaning, or as to the procedure or requirement thereunder, or has never been interpreted by the Court of Appeals of the Commonwealth of Kentucky.

(7) They deny that the amount of said annual tax which plaintiffs will be required to pay under terms of said Act will be a substantial portion, or any portion, of the capital invested by them in their retail stores or needed by them to carry on their business therein. They deny that the payment of such sum of money will impair the ability of the plaintiffs to operate their business in Kentucky, or will at

all decrease the amount of annual business which they will be enabled to do, or will give competitors of plaintiffs who are not required to withdraw any money from their respective businesses or who are not required to withdraw a proportionate sum therefrom, any unfair or undue advantage over the plaintiffs, for which the plaintiffs have no plain, adequate or complete remedy at law, or that the same is true as to any other retail merchant similarly situated.

(8) They deny that the enforcement of said Act will have the effect of injuring or impairing any lawful business in which the plaintiffs or others similarly situated are engaged, or in which they have the undoubted right to engage, or which right is guaranteed or protected by the State or Federal Constitution.

XXXI

For further answer defendants deny each and every allegation contained in plaintiff's bill of complaint not heretofore specifically denied, controverted or admitted. [fol. 107] For further answer the defendants aver and allege as follows:

1. The Act in question (H. B. 111, now Chapter 149 of the Acts of the General Assembly of Kentucky, 1930 session) levies a tax, graduated progressively as to rates upon all sales of goods at retail in this Commonwealth.

2. The classification, made as a basis for the tax imposed by said Act, rests on the volume of gross retail sales and also upon ability of those affected by the various graduation of said act to pay the tax at the rate levied, it being a well recognized law of merchandizing that the percentage of income of capital invested increases progressively in the same, or approximately the same, ratio to the volume of sales as does the rate levied by said Act; that is to say, those merchants having a great volume of sales have a much greater ability to pay the higher rates levied under said act than merchants having a smaller volume of sales; for example, this plaintiff, and those similarly situated, have as a class an income upon the capital invested in the retail business in this state of —%, while individual merchants competing with plaintiffs, and those similarly situ-

ated, having gross annual sales of less than $400,000.00 earn an income on their capital invested in the retail business of only —%. The defendants further say that the example set out above is illustrative of the progressive increased ratio of earning power of invested capital to volume of sales.

3. The defendants say that the progressive increase of earning power of invested capital based on volume of sales, as illustrated heretofore, conclusively proves a proportionate increase of ability to pay the tax levied by the act in question.

4. The defendants further allege that the plaintiffs, Levy Bros., and other- similarly situated, have for many years enjoyed a large and prosperous retail business in this state, and that the gross annual retail sales in many instances [fol. 108] have exceeded $— per annum, and that they have, for many years, made a profit of more than —% on the aggregate of said annual sales, and that this represents a net income on capital, invested in the retail business in this state, of more than —%. They say, however, that merchants affected by the lower graduation of said tax earn a much lower return on the amount of capital invested, and that this is especially true of those having gross annual business of less than $400,000.00.

5. The defendants further allege that the great volume of business enjoyed by the plaintiffs, and those similarly situated and the consequent progressive increase in ratio of income from invested capital to volume of business, is brought about by the operation of natural and well recognized economic laws as follows:

(a) Purchasing power increases progressively with volume of sales.

(b) As purchasing power increases, prices decrease.

(c) As volume increases, expenses decrease.

(d) As volume increases the ratio of turnovers or volume of sales to capital invested progressively increases.

6. Defendants further allege that the tax imposed by the Act in question was designed, intended and, in practical operation and effect, does equalize the tax burden heretofore borne by retail merchants in this Commonwealth and

that said equalization is brought about by reason of the fact that the individual merchants in this State, competing with this plaintiff, have heretofore and are now bearing an unjust and disproportionate share of the tax burden and that the imposition of the graduated tax levied by this Act will equalize said burden in that those who are now paying [fol. 109] the greatest amount of taxes in ratio to the capital invested will be taxed at the minimum rate under said Act, while those merchants having a great volume of sales and paying a small percentage of taxes on invested capital will be taxed at the higher rates under said Act.

7. Defendants further say that the above result is brought about in part by the fact that property is assessed for ad valorem taxes in this State on July 1st in each year, and that the amount of goods, wares and merchandise on hand in this State on that date determines the amount of taxes to be paid for State purposes. They say that this plaintiff and others similarly situated, by reason of the fact that they do maximum amount of business on a minimum stock of goods, are enabled to and do pay a much smaller tax rate, based on volume of retail business, than that paid by merchants having a small annual gross business who are forced to compete directly with this plaintiff and others similarly situated; that this plaintiff and others similarly situated, are enjoying a great volume of business in this Commonwealth and are not now paying and have never paid their just and due proportion of the taxes levied upon retail merchants, and are not now paying and have never paid for State purposes taxes at a greater rate than —% upon their volume of sales, while their smaller competitors have been forced to pay —% on their volume of sales.

8. Defendants say that House Bill 111, Chapter 149 of the Acts of the General Assembly of 1930, was introduced, passed, enrolled, and signed in the manner shown by the certified copies of the entries in both House and Senate Journal relating to said bill, such certified copies are filed herewith and made a part hereof as if copied in full, marked for identification "Exhibit A."

Defendants further say that said bill was introduced, passed, enrolled, and filed in exact conformity with the Constitution and laws of the State of Kentucky.

[fol. 110] 9. For a separate and distinct defense in point of law arising upon the face of the Bill of Complaint herein,

the defendants say that the facts alleged in said Bill of Complaint are insufficient to constitute a valid cause of action.

Wherefore defendants pray judgment that the Bill of Complaint be dismissed and held for naught; and the prayer thereof denied; for all costs about this action expended, and for all proper relief.

J. W. Cammack, Attorney General; S. H. Brown, Assistant Attorney General; Howard Smith Gentry, Frankfort, Kentucky, Solicitors for Defendants. Batson, Cary & Welsh, Louisville, Kentucky; Leslie W. Morris, Frankfort, Kentucky, of Counsel.

[fol. 111] In United States District Court

[Title omitted]

Stipulation as to Statement of Evidence—Filed March 23, 1332

This case having been heard with the case of Stewart Dry Goods Company v. John B. Lewis, et al., (simultaneously herewith appealed to the Supreme Court of the United States) upon the plaintiffs' motion for an interlocutory injunction, and the same testimony having been read in each case, it is agreed by counsel that the narrative of testimony printed in the record of the said Stewart Dry Goods Company case shall be considered as a part of this record upon appeal without the necessity of duplicating same in this record.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors for Appellant. Bailey P. Wootton, Atty. Gen. Ky.; S. H. Brown, Asst. Atty. Gen., Ky., Solicitors for Appellees. H. W. Batson, J. Whitcomb Welch, Lesile W. Morris.

[fol. 112] In United States District Court

Order of Submission—February 14, 1931

This day the above-styled three cases came on for hearing before Hon. Charles H. Moorman, Circuit Judge, Hon. Charles I. Dawson, District Judge, and Hon. A. M. J. Coch-

ran, District Judge, on motion of the respective plaintiffs for an interlocutory injunction.

By agreement of parties plaintiff and defendant, the above-styled three cases are heard together upon the pending motions for an interlocutory injunction, and the same evidence was heard in these cases as in the case of Kroger Grocery & Baking Company against the same defendants, pending in the Eastern District of Kentucky and heard at the same time.

The plaintiffs by counsel filed and read the deposition of Shirley E. Haas and exhibits therewith and the affidavits of the following persons:

Robert W. Lyons,	John B. Bonham,	W. A. Steiden,
D. T. Petty,	Gilbert J. Schneider,	Albert Berger,
John E. Donahue,	John Scanlan,	Chris Schumann,
Louie J. Jones,	Brack M. Ferrill,	Arch B. Davis,
M. R. Anderson,	C. J. Henry,	Harmon Noe,
R. W. Owens,	Crawford Lee,	Robert J. McKim,
Fred Levy,	Dann Byck,	C. B. Turley,
N. A. Bash;	G. H. Parker,	James R. Karibo,
B. E. Van Antwerp,	C. R. Leininger,	E. R. Probasco,
M. S. Gesley,	W. G. Howell,	E. C. Purvis,
W. T. Morgan,	A. C. Miller,	O. A. Rhodes,
H. H. Craven,	W. G. Jenkins,	Robert Wright,
C. W. Gowin,	T. B. Jones,	P. O. Wolverson,
J. A. Gude,	B. E. Willis,	J. D. Delano,
L. M. Ross,	B. A. Aistrop,	H. C. Amstutz,
Milton Marx,	Dolph Wile,	C. H. Parsons,
Paul H. Nystrom,	Daniel M. Cohen,	James W. Stites.

and a synopsis and analysis of reports concerning the Gross Sales Tax in controversy, signed by Joseph Martin, Supervisor of the Gross Sales Tax Department, and A. H. Brendel, Certified Public Accountant.

Came the defendants by counsel and entered a motion to dismiss the bill of complaint in each of the above-styled three cases, and, not waiving same entered motion to strike [fol. 113] out certain parts of the bill of complaint in each case, and, not waiving same, filed an answer in each case.

Likewise defendants filed and read evidence upon the hearing of plaintiffs' motion for interlocutory injunction in each of the above cases the affidavits of Henry F. Walradt, together with Exhibits A, B, C, D, E, F, G, H, I, and J;

the affidavit of James W. Martin, together with Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16; the affidavit of Clyde W. Phelps; the affidavit of B. T. Brewer; and a certified copy of the House and Senate Journal relating to the introduction, passage, approval, and enrollment of House Bill No. 111 of the 1930 Session; and a certified copy of the Gross Retail Sales Tax Law; the deposition of Walter Burre and a paper dated Feb. 13, 1931, in regard to retail gross sales tax reports audited.

Thereupon these cases were argued by counsel for the respective plaintiffs and defendants and ordered to be submitted upon plaintiffs' pending motions for an interlocutory injunction, and the Court, not being fully advised, takes time.

Leave is given to plaintiffs to February 28, 1931, and to defendants to March 10, 1931, within which to file briefs.

It is further ordered and adjudged that the temporary restraining order heretofore entered in each of the above-styled cases be and the same is hereby continued in full force and effect until the determination of plaintiffs' motion for an interlocutory injunction entered therein respectively.

Chas. H. Moorman, Circuit Judge. A. M. J. Cochran, District Judge. Chas. I. Dawson, District Judge.

[fol. 114] IN UNITED STATES DISTRICT COURT

KROGER GROCERY & BAKING COMPANY, Plaintiffs,

vs.

JOHN B. LEWIS, SELDEN GLENN, and HENRY M. CLINE, as Member of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, Auditor of Public Accounts of the Commonwealth of Kentucky, Defendants

Before Moorman, Circuit Judge, and Cochran and Dawson, District Judges

OPINION—Filed December 9, 1931

In this action plaintiff, an Ohio corporation, owning and operating a chain of retail grocery stores in the United

States, two hundred and sixty-three of which are located in different parts of the Commonwealth of Kentucky, attacks Chapter 149 of the 1930 Acts of the General Assembly of the Commonwealth of Kentucky, commonly known as the Retail Merchants' Gross Sales Tax Act, as violative of the Federal and State Constitutions. The case is now before us on application of the plaintiff for an interlocutory injunction, under Section 266 of the Judicial Code (28 U. S. C. A., Section 380).

At the threshold of the case we are met with the contention of the defendants that a Federal court of equity is without power to grant the relief sought, for the reason that the law of Kentucky affords plaintiff an adequate remedy at law for any injury sustained by it resulting from its enforced compliance with the terms of the Act. A [fol. 115] decision of this question involves a construction of Section 10 of the Act, which reads as follows:

"No suit shall be maintained in any court to restrain or delay the collection or payment of the tax herein imposed upon any ground whatever, but the aggrieved taxpayer shall pay the tax as and when due, and if paid under protest may at any time within two years from the date of such payment sue the Auditor of Public Accounts in an action at law to recover the tax so paid, with legal interest thereon from the date of payment. If it is finally determined that said tax, or any part thereof, was wrongfully collected for any reason, it shall be the duty of the Auditor of Public Accounts then in office to issue his warrant on the Treasurer of the Commonwealth of Kentucky for the amount of such tax so adjudged to have been wrongfully collected, together with interest thereon, and the Treasurer shall pay same out of the General Fund of the State. A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made, and which are not barred by the limitation of two years herein imposed."

If this section of the Act affords to the aggrieved taxpayer a remedy as certain, complete, practicable and efficient as is available in equity, and if the remedy thus afforded is available in the Federal courts, other jurisdictional requirements appearing, then this action must be dismissed. The declared purpose of Section 10 is to prevent

injunctive interference with the operation of the law. It is quite apparent from a reading of this section that its draftsman was familiar with the rule, that in order to make effective the prohibition against injunctive interference, the statute must furnish an adequate remedy at law in lieu thereof. The effort in Section 10 is to afford such adequate remedy at law, and, in view of the well settled rule that such a remedy must be available in the Federal Courts, if the necessary jurisdictional facts exist, it will not be presumed that the legal remedy provided was intended to be confined to the State courts, unless the language of the Act requires such construction. On the contrary, the statute will be construed to render effective the evident legislative intent, if such construction is not inconsistent with the plain language of the Act. Of course, the common law action authorized by Section 10 against the [fol. 116] Auditor of Public Accounts is, in reality, an action against the State. The section does not contemplate that the Auditor shall personally satisfy any judgment obtained under its provisions. By its express terms the ultimate liability is that of the State, and the Auditor is simply designated as a convenient alter ego of the State in suits for the recovery of taxes and interest claimed to have been illegally collected under the Act in question. Highway Commission of Wyoming v. Utah Construction Co., 278 U. S. 194. So we must regard Section 10 as the standing consent of the State, subject to the conditions therein imposed, to be sued for the recovery of taxes exacted under the provisions of the Act in question. Of course, when a sovereign consents to be sued, it may fix the condifions under which such suit may be maintained. It may even name the court in which such suit may be maintained, and the State's consent to be sued in its own courts can not be enlarged into a consent to be sued in a Federal court. Chandler v. Dix, 194 U. S. 590; Murray v. Wilson Distilling Co., 213 U. S. 151.

We are unable, however, to agree with the suggestion of the plaintiff that Section 10 limits the common law action therein provided for to State courts. The section contains no language, expressly or by implication, so limiting the cause of action. The language is certainly broad enough to authorize actions in the Federal courts, and having in mind the evident purpose of the General Assembly to pro-

vide an adequate remedy at law for all taxpayers under the Act, we conclude that the legal remedy provided by Section 10 was intended to be available in the Federal courts, as well as in the State courts. Such being the case, Section 10 operates as a waiver—the immunity against suits in Federal Courts granted to States by the Eleventh Amendment to the Federal Constitution.

[fol. 117] The plaintiff contends that even conceding that it is the purpose of Section 10 to make the legal remedy provided by that section available in the Federal courts, such purpose is aborted by reason of the fact that the suit at law authorized by that section is a mandamus proceeding, of which United States District Courts have no original jurisdiction. If the premise thus advanced is sound, the conclusion necessarily follows, as it is well settled that Federal courts are without jurisdiction to issue a writ of mandamus in an original action brought for the sole purpose of securing relief by such writ. Marbury v. Madison, 1 Cranch, 137; Covington Bridge Co. v. Hager, 203 U. S. 109; Knapp v. Lake Shore & Michigan Southern Ry. Co., 197 U. S. 536. But we can not agree with the premise. The common law suit authorized by Section 10 is not an original mandamus proceeding. It is an ordinary common law action against the Auditor of Public Accounts in his official capacity as the agent and representative of the State for a money judgment for the amount of taxes paid under the Act under protest, and interest thereon. The suit has none of the characteristics of an original mandamus proceeding. If, after judgment is obtained, the Auditor then in office declines to issue a warrant for the amount of such judgment and interest, the Federal court which rendered the judgment could issue a mandamus to compel the issual of such a warrant. Such a writ, however, would not be one issued in an original mandamus proceeding, but would be one issued in aid of the court's jurisdiction, which had already attached in the common law action for a money judgment. The issual of the writ in such a situation is authorized by Section 262 of the Judicial Code (Title 28, Section 377, U. S. C. A.) and is fully justified by the authorities. County of Green v. Daniel, 102 U. S. 187; Davenport v. County of Dodge, 105 U. S. 237.

We do not agree with the suggestion of the plaintiff that [fol. 118] the settled and approved practice under Sec-

tion 162 of Kentucky Statutes fixes the nature of the proceeding under Section 10 of the Act in question. Section 162 is, in part, as follows:

"When it shall appear to the Auditor that money has been paid into the treasury for taxes when no such taxes were in fact due, he shall issue his warrant on the Treasurer for such money so improperly paid in behalf of the person who paid the same."

This section makes no provision whatever for a common law action against the Auditor for a money judgment. It simply lays upon the Auditor the duty in a proper case of issuing his warrant for the taxes illegally or improperly collected. If he fails in the performance of this statutory duty, then mandamus in the State court is the only remedy against him, and in such proceeding the court must determine if he wrongfully refused to issue warrant for the amount claimed. Under Section 10 of the Act under consideration, however, the statutory duty of the Auditor to issue his warrant never arises until the amount for which the warrant is to be issued has been fixed by a money judgment in a common law suit. The difference between the two provisions of the statute is obvious. Furthermore, if the remedy under Section 10 is the same remedy granted by Section 162 of Kentucky Statutes, there would have been no occasion for the incorporation of Section 10 in the Act under consideration. We must and do regard Section 10 as a specific remedy at law, intended to apply only to the recovery of taxes exacted under the Gross Sales Tax Act.

The plaintiff suggests that conceding that Section 10 gives a right of action in Federal courts, still the remedy at law is not adequate, for the reason that the General Fund of the State, out of which Section 10 directs the warrants to be paid, is not in such condition as to enable these warrants to be paid within a reasonable time after they are issued. In support of this argument plaintiff has introduced proof, showing that there are now outstanding nearly ten million dollars of warrants against the General Fund, [fol. 119] and that this fund is usually over two years behind in the redemption of warrants drawn against it. It may be conceded that if taxpayers obtaining judgments under Section 10 were compelled to wait an unreasonable

length of time for their money, the remedy at law given by this section would not be adequate; but no such unreasonable delay is indicated. The fair and reasonable meaning of that part of Section 10 which provides for the payment of warrants issued in satisfaction of judgments obtained under that section is that such warrants shall be paid when presented, if there is sufficient money in the General Fund to do so, even though there may be outstanding other and prior warrants against this fund. The general law of Kentucky contains no express direction to the Treasurer to pay warrants drawn on the treasury in the order of their issue, although such is probably the fair inference to be drawn from language used in Section 4688a-4, Kentucky Statutes, Carroll's 1930 Edition, and the Court of Appeals in the case of Rhea v. Newman, 153 Ky., 604, held that the Treasurer should pay them in the order issued, for the purpose of insuring fair treatment to all. Bearing in mind, however, that the purpose of Section 10 is to afford the taxpayers entitled to its provisions a full and complete remedy at law, and that this remedy would not be full and complete unless the holders of judgments obtained under its provisions could secure the reasonably prompt payment thereof, it seems entirely consistent to hold that it was the purpose of the General Assembly to give warrants issued in satisfaction of judgments obtained under Section 10 priority of payment over other outstanding warrants against the General Fund, and to that extent to make an exception to the general rule as to the order of payment of State warrants. Such a construction of the section does no violence to its language and works no impairment of any contract obligation of the State to holders of prior warrants, as such outstanding warrants do not [fol. 120] pledge the State to redeem them at any particular time. Even if we should be mistaken in this construction of Section 10, and if warrants issued under its provisions enjoy no priority of payment, we would not be justified in holding that taxpayers recovering judgments under Section 10 would be required to wait an unreasonable length of time to realize on such judgments.

Under the general law of Kentucky, when a warrant against the General Fund is presented for payment, and the fund is not sufficient to satisfy same, the Treasurer

must stamp same as interest bearing, and it thereafter draws interest at the rate of five per cent per annum, payable semi-annually, until called for redemption. (Section 4688a-2, Kentucky Statutes, Carroll's 1930 Edition.) Such warrants by the law of Kentucky are made negotiable instruments and are exempt from State and local taxation. (Section 4688a-8, Kentucky Statutes, Carroll's 1930 Edition.) It appears that these warrants are readily salable, and the record fails to disclose that any concession in the way of discount must be made to effect their sale. It will be observed that Section 10 not only provides for the recovery of the taxes paid, but for interest thereon as well. So far as we are advised, the Supreme Court has never held that the recovery of interest on taxes paid is necessary in order to make the remedy at law adequate. On the contrary, it is fairly deducible from the cases that the remedy at law is adequate, even though no recovery of interest is allowed. In the cases of Shelton v. Platt, 139 U. S. 591, and Allen v. Pullman Palace Car Co., 139 U. S. 658, the Supreme Court held that a law of Tennessee which permitted a taxpayer to recover from the State taxes paid under protest if they were wrongfully collected, but which made no provision for the recovery of interest, afforded an adequate remedy at law. Inasmuch as it is a settled principle of law that interest can not be collected from a sovereign State unless its recovery is specifically authorized by a State statute, we can not presume that the Supreme [fol. 121] Court in the cases referred to went on the assumption that interest as a matter of right followed the judgment. So we think it may be safely said that in permitting the recovery of interest under Section 10, the Commonwealth has bound itself to return more than was necessary in order to meet the test of an adequate remedy at law. Therefore, even if it appeared as a fact that some discount must be accepted by those who sell warrants issued under Section 10, it is probable that such discount would not exceed the interest which had accumulated on the tax from the date of its payment to the date of the rendition of the judgment. Furthermore, the State of Kentucky has no bonded indebtedness and is entirely solvent. Subject to the requirement of uniformity, the power of the General Assembly to tax for public purposes of the State is unlimited, and with this unlimited power residing in the Gen-

eral Assembly, this court will not assume that under Section 10 an aggrieved taxpayer can not recover within a reasonable time the full amount of the taxes paid.

Neither are we impressed with the contention of the plaintiff that Section 10 does not afford an adequate remedy at law, because under it a taxpayer would be compelled to resort to a multiplicity of suits to recover the various payments made under the Act. There is no necessity for a multiplicity of suits under Section 10. That section specifically provides that—

"A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made, and which are not barred by the limitation of two years herein imposed."

This is the law even though such a provision had not been incorporated in Section 10. Therefore, the plaintiff may unite in one suit its claims growing out of each payment of taxes made under the Act up to the time of filing its suit, [fol. 122] and that action would fully determine every question which could be determined in an equitable action. There would be no necessity for other suits, except possibly to avoid the running of the statute of limitations pending the final determination of the suit already filed. A court of equity will not interfere on the ground of multiplicity of suits, where such multiplicity consists of suits by the same plaintiff against the same defendant for causes of action arising out of the same facts and legal principles. A multiplicity of suits in such a situation would be a multiplicity of the plaintiff's own making, and would afford no ground for equitable intervention. Boise Artesian Water Co. v. Boise City, 213 U. S. 276; Standard Oil Co. v. Atlantic Coast Line Co., 13 Fed. (2d) 653. We will not assume that after the validity of the tax has been once definitely settled in an action at law, the State will make any attempt to enforce further collections.

Finally, the fact that the Act imposes drastic penalties for failure to comply with its terms, and pay the tax when due, affords no basis for equitable intervention. The Act visits these penalties upon the taxpayer only in event of failure to comply with its terms and pay the tax. To test the validity of this Act in an action at law, it is not neces-

sary for the plaintiff to refuse to pay the tax and take the hazard of the courts deciding against him when the State undertakes in a legal action to enforce the penalties. All the taxpayer is required to do is to pay the tax, and when he has done this, he not only avoids the imposition of penalities, but has open to him a simple and direct way in a common law suit of attacking the validity of the law and of recovering the taxes paid, with interest thereon.

We therefore conclude that the remedy afforded by Section 10 of the Act is an adequate one within the Federal rule, and the motion to dismiss for want of equitable jurisdiction must be sustained.

[fol. 123] November 6, 1931.

Chas. H. Moorman, U. S. Circuit Judge. A. M. J. Cochran, U. S. District Judge. Chas. I. Dawson, U. S. District Judge.

Nichols, Morrill, Wood, Marx & Ginter, Cincinnati, O.; Trabue, Doolan, Helm & Helm, Louisville, Ky., Attorneys for Plaintiff.

J. W. Cammack, Attorney General, Frankfort, Ky.; S. H. Brown, Asst. Attorney General, Frankfort, Ky.; H. S. Gentry, Batson, Cary & Welch, Louisville, Ky.; Leslie W. Morris, Frankfort, Ky., Attorneys for Defendants.

IN UNITED STATES DISTRICT COURT

[fol. 124] ORDER AND DECREE—Entered by Judge Chas. I. Dawson, et al., December 9, 1931

This cause having been heard by consent of parties, together with the causes of The Stewart Dry Goods Company against the same defendants, and The J. C. Penney Company, against the same defendants, pending in this court, and the cause of The Kroger Grocery & Baking Company against the same defendants, pending in the United States District Court for the Eastern District of Kentucky, and having been submitted with them on February 14, 1931, upon plaintiffs' motion for an interlocutory injunction heard by the court upon the depositions, affidavits and exhibits referred to in the order of submission as having been introduced by plaintiffs and defendants respectively,

this Court, being advised, on November 6, 1931, delivered its written opinion entitled in the cause of The Kroger Grocery and Baking Company against John B. Lewis, et al., a copy of which opinion is now filed in this cause as a part of the record herein and as equally applicable to this cause, and pursuant thereto, and solely for the reasons stated in said opinion, plaintiffs' said motion for an interlocutory injunction herein is hereby denied, to which the plaintiffs except.

It is further ordered by the Court that this cause be and it is hereby submitted upon motion of the defendants to dismiss the bill, and the Court, being of opinion that there is a plain, adequate and complete remedy at law, afforded to the plaintiffs for the reasons set forth in their said opinion, declines to consider any issue or question raised herein except the single question as to the adequacy of the remedy at law, and, solely for the reasons stated in its said opinion, sustains the motion of defendants to dismiss the bill, and denies to the plaintiffs a permanent injunction or [fol. 125] any injunction or other relief prayed by them.

It is therefore adjudged and decreed that the plaintiffs' bill herein be dismissed, and that the defendants recover of the plaintiffs their costs herein expended: to all of which the plaintiffs except.

The plaintiffs having this day stated in Court their intention to appeal from this Order and Decree, denying plaintiffs' motion for an interlocutory injunction, and denying their application for a permanent injunction, and dismissing their bill of complaint, it is hereby further ordered and adjudged that the Temporary Restraining Order heretofore issued in this cause shall be continued in effect as to the plaintiffs, and as to each retail merchant listed of record (by Order entered herein March 30, 1931, and supplemented as to Ben Snyder, Incorporated, by later Order) as included in the same class of taxpayers as plaintiffs, and shall remain in full force and effect as to the plaintiffs and each of said taxpayers so listed, until the final determination of plaintiffs' said appeal, to all of which defendants except and object; Provided, however, that the plaintiffs, for themselves only, and each of said taxpayers so listed desiring to avail himself or itself of the benefit of said restraining order pending such appeal, for himself or itself only (and not one for another), shall within thirty (30)

days from the entry of this Decree execute such bond or make such deposit of money or securities as required herein and as may be reasonably necessary to secure the Commonwealth of Kentucky against loss of any taxes, interest, court costs, and all other proper charges that may be or become due from such taxpayer under the Act assailed herein by plaintiffs, in the event the validity of such Act should be finally established.

The amount of any such bond given and the amount or value of securities or money deposited by any taxpayer, [fols. 126-128] shall be fixed at an amount equal to the estimated taxes claimed from said taxpayer for the taxable period of 1930 and 1931, and said bond shall be secured by corporate surety or the pledge and deposit of negotiable securities acceptable to the Attorney General of Kentucky.

In the event the plaintiffs or any one of said taxpayers shall fail to execute such bond or give such security as required of it or him or them, within thirty (30) days from the entry of this Order and Decree, said restraining order as to such taxpayer so failing shall be thereupon immediately dissolved and shall afford no further protection to such taxpayer.

Upon the execution by the plaintiffs herein of a bond secured as herein provided, the bond or bonds heretofore executed by the plaintiffs in this cause shall be cancelled as to all future liability, and the like order is made as to the bond heretofore executed herein by Ben Snyder, Inc., upon its compliance, within thirty (30) days, with the provisions of this Order by the execution of a new bond or the deposit of securities as herein required.

Chas. H. Moorman, Circuit Judge. Chas. I. Dawson, District Judge. A. M. J. Cochran, District Judge.

[fols. 129-144] IN UNITED STATES DISTRICT COURT

ORDER SUBSTITUTING AUDITOR OF PUBLIC ACCOUNTS, ETC.—March 1, 1932

This day came the parties herein and filed a stipulation noting that the term of office of the defendant, Clell Coleman, has expired within six months of the date hereof, and the said defendant has retired from said office and was thereupon succeeded therein by J. Dan Talbot,

And it appearing to the Court that there is a substantial need for continuing and maintaining this cause and obtaining an adjudication of the questions involved,

It is ordered that J. Dan Talbot, Auditor of Public Accounts of the Commonwealth of Kentucky, be and he is hereby substituted as a defendant herein in lieu of the defendant, Clell Coleman, and with the same effect as if he had been an original defendant to the bill of complaint herein, and said cause is continued and maintained against the said J. Dan Talbot, Auditor of Public Accounts of the Commonwealth of Kentucky.

Chas. H. Moorman, Circuit Judge. A. M. J. Cochran, District Judge. Chas. I. Dawson, District Judge.

[fols. 145-149] Bond on appeal for $1,000.00 omitted in printing.

[fols. 150-164] Citation, in usual form, showing service on John B. Lewis, et al., omitted in printing.

[fol. 165] IN UNITED STATES DISTRICT COURT

MANDATE OF UNITED STATES SUPREME COURT

UNITED STATES OF AMERICA, ss:

(Seal.)

The President of the United States of America, to the Honorable the Judges of the District Court of the United States for the Western District of Kentucky, greeting:

Whereas, lately in the District Court of the United States for the Western District of Kentucky, before you, or some of you, in a cause between Fred Levy, Arnold H. Levy, Stuart G. Levy, et al., etc., Plaintiffs, and John B. Lewis, Selden R. Glenn and Henry M. Cline, Individually and as Members of the State Tax Commission of the Commonwealth of Kentucky, et al., etc., Defendants, wherein the decree of the said District Court, in favor of the said defendants, was duly entered in said cause on the 9th day

of December, A. D. 1931, which decree is fully set out in the record of said cause in the office of the Clerk of said District Court and is incorporated herein by reference thereto; as by the inspection of the transcript of the record of the said District Court, which was brought into the Supreme Court of the United States by virtue of an appeal agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and thirty-two, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court, in this cause be, and the same is hereby [fol. 166] reversed with costs; and that the said Plaintiffs, Fred Levy, et al., recover against the said Defendants Two Hundred and Ninety-seven Dollars and Ninety-five Cents for their costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the said District Court for final hearing upon the merits, without prejudice to a determination upon evidence with respect to the questions of the status of outstanding warrants upon the General Fund in the State Treasury, and whether warrants of the sort contemplated by section 10 of the Act in question are accorded preference in payment over other warrants and the basis, if any, for the assurance that such preference will be continued so that in the event of actions by the plaintiffs at law under section 10 they would be afforded a certain, reasonably prompt and efficacious remedy.

October 24, 1932.

You, therefore, are hereby commanded that such execution and further proceedings be had in such cause, in conformity with the opinion and decree of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Charles Evans Hughes, Chief Justice of the United States, the nineteenth day of No-

vember, in the year of our Lord one thousand nine hundred and thirty-two.

Charles Elmore Cropley, Clerk of the Supreme Court of the United States. (Seal.)

[fol. 167] IN UNITED STATES DISTRICT COURT

ORDER FILING MANDATE—Entered December 10, 1932

This day came the parties, plaintiff- and defendants, by their respective counsel, and on motion of plaintiffs, the mandate and opinion of the Supreme Court of the United States, reversing the orders and the final decree entered herein December 11, 1931, are filed of record, and pursuant to such mandate, it is now ordered and adjudged that the order and decree herein entered on December 11, 1931, be and every part thereof is hereby set aside, vacated and held for naught, and this cause is now reinstated upon the docket of the court for further proceedings in accordance with said mandate and the opinion of the Supreme Court.

By consent of parties, J. Dan Talbott, the present duly elected, qualified and acting Auditor of Public Accounts, is made defendant, individually and as such Auditor, in substitution for Clell Coleman, whose term of office has expired; and in like manner, W. P. Sullivan, at present a duly appointed, qualified and acting member of the State Tax Commission, in succession to Henry M. Cline, whose [fol. 168] term of office has expired, is made a party defendant, individually and as such member of the State Tax Commission, in substitution for said Henry M. Cline.

Chas. H. Moorman, A. M. J. Cochran, Chas. I. Dawson.

Dec. 10, 1932.

Trabue, Doolan, Helm & Helm; Nichol, Morrill, Wood, Marx & Ginter, Solicitors for Plff. Bailey P. Wootton, Attorney General.

[fol. 169] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING INTERLOCUTORY INJUNCTION—Entered December 10, 1932

This day came the parties, plaintiffs and defendants, by their respective counsel, and the plaintiffs renewed their motion for an interlocutory injunction, made herein January 24, 1931.

Said motion having been heretofore heard and submitted, and the Court being sufficiently advised, it is considered, ordered and adjudged that said motion be sustained and that the defendants and each of them be, and each of them is hereby, enjoined and restrained, until the further order of court herein:

(1) From enforcing or executing, either directly or indirectly, against these plaintiffs and/or other taxpayers similarly situated, the provisions of Chapter 149 of the Acts of the General Assembly of Kentucky at its 1930 session, entitled:

"An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this act."

[fol. 170] (2) From instituting or maintaining against the plaintiffs and/or other taxpayers similarly situated, any prosecution or action at law, or any suit or suits in equity, to recover of or from the plaintiffs or other taxpayers similarly situated any portion of the alleged tax sought to be exacted of them under said Act, or for the infliction of any of the penalties prescribed in said Act for the non-payment of such tax or for failure to make or file any reports or returns required thereunder, or from taking any steps looking to the prosecution of the plaintiffs or any of their agents or servants or employes, or any other person, firm or corporation similarly situated, or any of their agents or servants or employes, for a violation of said Act in any of its provisions.

The interlocutory injunction herein granted shall, until further order of court herein, continue in effect as to the plaintiffs and as to each retail merchant listed of record (by order entered herein March 30, 1931, and supplemented as to Ben Snyder, Incorporated, by later order) as included in the same class of taxpayers as plaintiffs, and shall remain in full force and effect as to the plaintiffs and each of said taxpayers so listed, until the final determination of this cause by this Court, or until further order of Court herein.

To all of which the defendants and each of them object and except.

Provided, however, that the plaintiffs, for themselves only, and each of said taxpayers so listed, desiring to avail himself or itself of the benefit of said interlocutory injunction pending the final determination of this cause, for himself or itself only (and not one for another), shall within thirty (30) days from the entry of this order execute such bond or make such deposit of money or securities as required herein and as may be reasonably necessary to secure the Commonwealth of Kentucky against loss of any taxes accruing for the calendar years 1930, 1931 and 1932 under the Act assailed herein by plaintiffs, in the event [fol. 171] the validity of said Act should be finally established, and also against the loss of any interest or court costs or other proper charges that may be or become due from each such taxpayer under said Act.

The amount of any such bond given and the amount or value of securities or money deposited by the plaintiffs or by any taxpayer entitled hereunder to the benefit of the interlocutory injunction herein granted, shall be fixed at an amount equal to the estimated taxes claimed from said taxpayer for the taxable period of the years 1930, 1931 and 1932, and said bond shall be secured by corporate surety or by a pledge and deposit of negotiable securities acceptable to the Attorney General of Kentucky, and if the parties can not agree upon the amount of such bond or the amount or character of such negotiable securities, then the amount of such bond or the amount and character of negotiable securities, and the pledge and deposit thereof, shall be as prescribed by the regular Judge of this Court, without the necessity of calling in the other two Judges for that purpose.

In the event the plaintiffs or any one of said taxpayers entitled hereunder to the benefit of the interlocutory injunction herein granted shall fail to execute such bond or to give such security as may be required of it or him or them, within thirty (30) days from the entry of this order, said interlocutory injunction as to such taxpayer so failing shall be thereupon immediately dissolved and it shall afford no further protection herein to such taxpayer.

Upon the execution by the plaintiffs or by any one of said listed taxpayers entitled hereunder to the benefit of the interlocutory injunction herein granted, of a bond secured as herein provided, or the making by the plaintiffs or such taxpayer of a pledge or deposit of securities as herein provided, the bond or bonds heretofore executed by the plaintiffs in this cause shall be canceled as to all future liability, and any such pledge or deposit released as to all future liability, and all deposits of securities theretofore made by [fol. 172] the plaintiffs or by any such taxpayer shall be released, and such deposited securities shall be redelivered to the persons respectively depositing same.

Chas. I. Dawson, Judge.

December 10, 1932.

Have seen.

Trabue, Doolan, Helm & Helm; Nichol, Morrill, Wood, Marx & Ginter, Solicitors for Plaintiff-. Bailey P. Wootton, Atty. General. S. H. Brown, Assist. Atty. Gen. Francis M. Burke, Assist. Atty. Gen. Batson, Carey & Welch; Leslie W. Morris, Solicitors for Defts.

[fol. 173] In United States District Court

Agreed Order Amending Order Allowing Injunction—Entered December 20, 1932

By agreement of parties, it is now ordered that the order entered herein on December 10, 1932, granting an interlocutory injunction, be amended in the following particulars only:

(1) Plaintiffs or those taxpayers herein who have hitherto given bond for the payment of taxes accruing from

sales for the calendar years 1930 and 1931 may, if they, or any of them, so elect, continue said bonds in force, and may give an additional bond for the estimated taxes accruing from sales made in the year 1932, said additional bond to be in all respects as required in said order of December 10, 1932, except as herein limited.

(2) Said bonds for the taxes accruing from sales for the calendar years 1930 and 1931 shall, in the event the taxpayer so elects, be and remain in full force and effect unless substituted bonds for the three years' taxes be filed in lieu thereof.

Dec. 20, 1932.

Chas. H. Moorman, Circuit Judge; A. M. J. Cochran, District Judge; Chas. I. Dawson, District Judge.

Bailey P. Wootton, Attorneys for Defendants. Nichols, Morrill, Wood, Marx & Ginter; Trabue, Doolan, Helm & Helm, Attorneys for Plaintiffs.

[fol. 174] IN UNITED STATES DISTRICT COURT

In Equity. No. 610.

Amendment to Bill of Complaint—Filed February 18, 1933.

The plaintiffs, by leave of Court, amend their bill of complaint and unite, as party plaintiff with themselves, Levy Bros., Incorporated, a corporation, and by way of amendment to the bill, the plaintiffs jointly reiterate the averments contained in the original bill of complaint and make the following additional averments:

In the year 1932 the plaintiff Levy Bros., Incorporated, was organized under the laws of the State of Kentucky by the original plaintiffs herein, who conducted the business of retail merchants at Third and Market Streets in Louisville, Kentucky, down to and including July 31, 1932; and, effective August 1, 1932, the original plaintiffs herein sold and conveyed their partnership assets to said corporation, Levy Bros., Incorporated, which took control and possession thereof on August 1, 1932, and since said time the said

corporation has continuously conducted the same business previously conducted by the said partnership.

Said Levy Brós., Incorporated, as a Kentucky corporation, is entitled to sue and be sued, contract and be contracted with, to conduct the business of a retail merchant, [fol. 175] and to exercise all such other powers as are conferred by the laws of Kentucky upon corporations organized for similar purposes.

Said corporation desires to unite with the original plaintiffs in this cause, and it is accordingly hereby joined as a party plaintiff.

Paragraph I

Amending Paragraph IX of the original bill, plaintiffs repeat the averments contained therein, and in addition thereto state:

That the plaintiffs doing business as a partnership, in addition to their annual ad valorem taxes, have paid to the State of Kentucky automobile license taxes in the following sums:

$134.61 for the calendar year 1931
$134.61 for the calendar year 1932.

The plaintiffs did not sell articles upon which any special excise or license tax is levied by the State.

Paragraph II

Amending and adding to the averments contained in Paragraph XII of the original bill, plaintiffs state:

That during the calendar year 1931 the total gross retail sales made by the plaintiffs doing business as a partnership, in all departments conducted by them in their retail store, aggregated $1,320,075.00.

Applying thereto the rates of taxation prescribed by the challenged Act, and taking the credits allowed by said Act, would produce the following results in taxes claimed of the plaintiffs doing business as a partnership, for the calendar year 1931:

[fol. 176]

1/20 of one per cent on first	$400,000 of sales	$ 200.00 tax
2/20 of one per cent on next	100,000 of sales	100.00 tax
5/20 of one per cent on next	100,000 of sales	250.00 tax
8/20 of one per cent on next	100,000 of sales	400.00 tax
11/20 of one per cent on next	100,000 of sales	550.00 tax
14/20 of one per cent on next	100,000 of sales	700.00 tax
17/20 of one per cent on next	100,000 of sales	850.00 tax
One per cent on excess over	1,000,000 of sales	3,200.75 tax
Total tax above computed		$6,250.75
Credits allowed under Section 4 of Act, as per Paragraph I of this amendment		134.61
Net tax demanded of plaintiffs doing business as a partnership, for the year 1931		$6,116.14

That during the calendar year 1932, the total gross retail sales made by the plaintiffs doing business as a partnership, in all departments conducted by them in their retail store, down to and including July 31, 1932, when the partnership sold its store to the corporation, aggregated $450,-310.84.

Applying thereto the rates of taxation prescribed by the challenged Act, and taking the credits allowed thereby, would produce the following result in taxes claimed of the plaintiffs doing business as a partnership, for the calendar year 1932:

1/20 of one per cent on first	$400,000 of sales	$ 200.00 tax
2/20 of one per cent on next	$50,310.84 of sales	50.31 tax
Total tax above computed		250.31
Credits allowed under Section 4 of Act, as per Paragraph I of this amendment		134.61
Net tax demanded of plaintiffs doing business as a partnership, for 1932		$115.70

That during the calendar year 1932, the total gross retail sales made by the plaintiff Levy Bros., Incorporated, in all departments conducted by it in its retail store, from the time it acquired control and possession thereof on August 1, 1932, down to and including December 31, 1932, aggregated $480,146.56.

Applying to the gross sales of said corporation for 1932, the rates of taxation prescribed by the challenged Act, would produce the following result in taxes claimed of the plaintiff Levy Bros., Incorporated, for the calendar year 1932:

[fol. 177]

1/20 of one per cent on first $400,000 of sales	$200.00 tax
2/20 of one per cent on next $80,146.56 of sales	80.15 tax
Total tax above computed	$280.15

No credits are allowed for 1932 under the challenged Act as the corporation did not pay a license tax for that year.

Paragraph III

Amending Paragraph XIII of the original bill, plaintiffs state that the same averments apply with full force and effect and are hereby restated with respect to the gross sales by plaintiffs respectively in each of the calendar years 1931 and 1932, and with respect to the taxes exacted of plaintiffs for each of said years 1930, 1931 and 1932 under the challenged Act.

Paragraph IV

Amending Paragraphs XIV and XV of the original bill, plaintiffs reiterate and extend all the averments therein contained, to include and apply to the operation of said challenged Act during each of the calendar years 1930, 1931 and 1932, and likewise reiterate all of said averments with respect to the unjust and unequal discrimination effected by said Act between the plaintiffs and the 25 other taxpayers listed of record as similarly situated and as protected by orders of the Court herein, on the one hand, and from 20,000 to 25,000 other competing retail merchants conducting a general retail store in Kentucky, on the other hand.

In addition thereto, plaintiffs state that in their actual operation for the years 1930 and 1931, said challenged Act of 1930 has in fact produced the following results, as disclosed by the records of the State Tax Commission of Kentucky, which afford complete returns from all taxpayers with the exception of plaintiffs and others listed by order of Court herein as entitled to the benefits of this litigation and of the restraining order heretofore granted [fol. 178] herein:

Aside from the plaintiffs and the 25 other taxpayers in the several classes represented in this litigation and protected by the restraining orders issued herein, it appears

from records of the State Tax Commission that there are or were in the State of Kentucky 24,096 retail merchants who were required to and did make reports to said Commission for the calendar year 1930, and 20,084 retail merchants who were required to and did make reports to said Commission for the calendar year 1931.

The following summaries show the actual operation and effect of said challenged Act as to the taxpayers who have made the reports required of them under said Act, down to and including December 2, 1932:

Summary of Reports to Kentucky State Tax Commission Relative to Gross Retail Sales in Calendar Year 1930

Number of reports filed by retail merchants showing—	Number filed	Number indicating tax	Number indicating no tax
Retail sales less than $400,000	24,061	16,374	7,687
Retail sales between $400,000 and $500,000	13	7	6
Retail sales between $500,000 and $600,000	8	5	3
Retail sales between $600,000 and $700,000	5	4	1
Retail sales between $700,000 and $800,000	4	2	2
Retail sales between $800,000 and $900,000	1	0	1
Retail sales between $900,000 and $1,000,000	0	0	0
Retail sales in excess of $1,000,000	4	3	1
Totals	24,096	16,395	7,701

Statement Showing Number of Retail Merchants Reporting for the Year 1930, Classified by Amounts of Tax Paid Pursuant to Reports

Number of taxpayers reporting tax less than 50¢	2,630
Number of taxpayers reporting tax 50¢ to $1.00	2,187

[fol. 179]

Number of taxpayers reporting tax $1.00 to $2.00	2,743
Number of taxpayers reporting tax $2.00 to $3.00	1,750
Number of taxpayers reporting tax $3.00 to $4.00	1,186
Number of taxpayers reporting tax $4.00 to $5.00	889
Number of taxpayers reporting tax $5.00 to $10.00	2,046
Number of taxpayers reporting tax $10.00 to $15.00	816
Number of taxpayers reporting tax $15.00 to $20.00	429
Number of taxpayers reporting tax $20.00 to $25.00	342
Number of taxpayers reporting tax $25.00 to $50.00	495
Number of taxpayers reporting tax $50.00 to $100.00	175
Number of taxpayers reporting tax $100.00 to $200.00	60
Number of taxpayers reporting tax $200.00 to $300.00	6
Number of taxpayers reporting tax $300.00 to $400.00	4
Number of taxpayers reporting tax $400.00 to $500.00	1
Number of taxpayers reporting tax $500.00 to $600.00	0
Number of taxpayers reporting tax $600.00 to $700.00	2
Number of taxpayers reporting tax $700.00 to $800.00	1
Number of taxpayers reporting tax over $1,000.00	3
Total	15,765
Undetermined and unclassified	630
Total	16,395

Number of merchants reporting sales of—	Showing tax liability	Showing no tax liability
Less than $10,000.00	8,784	5,353
$10,000.00 and under $25,000.00	4,431	1,553
$25,000.00 and under $50,000.00	1,905	507
$50,000.00 and under $75,000.00	596	148
$75,000.00 and under $100,000.00	241	45
$100,000.00 and under $150,000.00	216	40
$150,000.00 and under $200,000.00	90	19
$200,000.00 and under $250,000.00	48	12
$250,000.00 and under $300,000.00	27	3
$300,000.00 and under $400,000.00	36	7
Over $400,000.00	21	14
Total	16,395	7,701

Analysis of Reports Showing Tax Liability

	Number of returns	Gross sales	Gross tax	Credits allowed	Net tax	Credits shown in excess of tax liability
Sales less than $400,000	24,061	$338,870,755.00	$167,214.07	$78,211.02	$89,003.05	$222,674.01
Sales between $400,000 and $500,000	13	5,866,935.00	3,454.81	2,193.44	1,261.37	6,709.42
Sales between $500,000 and $600,000	8	4,416,568.00	3,440.42	2,123.02	1,317.40	5,306.50
Sales between $600,000 and $700,000	5	3,234,563.00	3,266.68	1,498.12	1,768.56	177.20
Sales between $700,000 and $800,000	4	2,989,019.00	4,110.66	2,727.57	1,383.09	2,298.47
Sales between $800,000 and $900,000	1	814,559.00	636.15	636.15	0	1,755.24
Sales between $900,000 and $1,000,000	0	0	0	0	0	0
Sales in excess of $1,000,000	4	5,329,123.00	25,491.24	14,099.48	11,391.76	4,593.15
Total	24,096	$361,521,522.00	$207,614.03	$101,488.80	$106,125.23	$243,513.99

[fol. 180] Summary of Reports to Kentucky State Tax Commission Relative to Gross Retail Sales in Calendar Year 1931

Number of reports filed by retail merchants showing—	Number filed	Number indicating tax	Number indicating no tax
Retail sales less than $400,000	20,053	11,992	8,061
Retail sales between $400,000 and $500,000	10	6	4
Retail sales between $500,000 and $600,000	9	6	3
Retail sales between $600,000 and $700,000	3	3	0
Retail sales between $700,000 and $800,000	2	1	1
Retail sales between $800,000 and $900,000	3	2	1
Retail sales between $900,000 and $1,000,000	2	2	0
Retail sales in excess of $1,000,000	2	2	0
Totals	20,084	12,014	8,070

Analysis of Reports Showing Tax Liability

	Number of returns	Gross sales	Gross tax	Credits allowed	Net tax	Credits shown on reports in excess of tax liability
Sales less than $400,000	20,053	$286,786,721.00	$143,464.51	$77,551.95	$65,912.56	$173,735.79
Sales between $400,000 and $500,000	10	4,520,653.00	2,520.64	1,513.05	1,007.59	3,260.06
Sales between $500,000 and $600,000	9	4,887,385.00	3,572.59	2,212.57	1,360.02	5,699.06
Sales between $600,000 and $700,000	3	1,927,791.00	2,161.17	700.00	1,461.17	.....
Sales between $700,000 and $800,000	2	1,472,166.00	2,296.25	1,391.17	905.08	3,109.00
Sales between $800,000 and $900,000	3	2,549,814.00	5,548.72	2,429.98	3,118.74	237.08
Sales between $900,000 and $1,000,000	2	1,895,680.00	5,213.29	1,084.94	4,128.35	.....
Sales in excess of $1,000,000	2	2,389,404.00	9,994.07	3,607.85	6,386.22	.....
Totals	20,084	$306,429,614.00	$174,771.24	$90,491.51	$84,279.73	$186,040.99

[fol. 181] Paragraph V

Amending Paragraph XXVIII of the original bill of complaint, plaintiffs repeat the averments therein contained, and in addition thereto, they make the following averments:

For more than ten years past, there has been a constantly increasing deficit in said General Fund, which has been continuously during said period, and is now, wholly insufficient to meet the warrants drawn upon it by the Auditor of Public Accounts in discharge of claims properly allowable against and payable out of it, and by reason thereof, holders of warrants drawn against it have been compelled to hold the same for as much as five years, awaiting the accumulation in the General Fund of funds sufficient to pay such warrants in their proper sequence as provided by law.

In addition thereto, there are many other undisputed claims against the General Fund which have been held up for long periods of time in the office of the Auditor and for which no warrants have been issued by the Auditor although such claims are properly allowable and payable out of the General Fund. Without a prolonged and expensive accounting, it is impossible to state the amount of such claims for which no warrants have been issued, but they aggregate a large sum of money, amounting to many thousands of dollars.

By Sections 4688a-1, a-2 and a-4, Kentucky Statutes, as construed by the Court of Appeals of Kentucky, in the case of Rhea, Treasurer, v. Newman, 153 Ky. 604, and in Bosworth, State Treasurer, v. Shuck, 118 Ky. 458, it is made the duty of the State Treasurer to pay outstanding warrants against the General Fund, in the order in which they were issued and as money appropriated and available for the purpose of the General Fund reaches the treasury.

The effect of this statute, as construed by the Court of Appeals, is to require that unpaid warrants against the General Fund drawn first in point of time shall be paid in [fol. 182] priority to warrants drawn later in point of time, and if the payment thereof exhausts the General Fund, warrants subsequently issued must await their turn in serial order before payment thereof can be compelled by process of law.

By Section 4688a-1, Kentucky Statutes, it is provided

that the State Treasurer shall receive and redeem warrants issued against the Auditor

"if there be sufficient money in the treasury appropriated for that purpose."

If there is no money in the General Fund available for the payment of such warrants in the order prescribed by law, the State Treasurer can not pay such warrants, and the Courts can not by mandamus compel him to pay same, as was held by the Court of Appeals of Kentucky in Bosworth, State Treasurer, v. Shuck, 118 Ky. 458.

The mounting deficit in the General Fund was recognized by the General Assembly of Kentucky at its 1924 session by the enactment of Chapter 122, Acts of 1924, which submitted to a vote of the people a bond issue of $6,000,000 to pay warrants then outstanding against the General Fund. Such bond issue was defeated at the polls.

At its 1926 session, the General Assembly enacted Chapter 13 of the Acts of 1926, submitting to the people of the State, for a vote, a bond issue of $4,000,000 for the purpose of raising money with which to pay warrants against the General Fund then outstanding. This bond issue was likewise defeated at the polls.

At the time the challenged Act was in process of enactment, it was a notorious fact, which was well known to the members of the General Assembly and to the officials of the State, that warrants drawn against the General Fund for the refund of taxes prescribed in said Act could not and would not be paid out of said Fund for several years, and, knowing these facts, the General Assembly made no provision to levy any tax for the augmentation of the General Fund. The only provision made for the payment of war- [fol. 183] rants therefore outstanding was to enact the challenged law and therein to appropriate one-half the taxes exacted thereunder, to the payment of the then existing indebtedness of the Commonwealth, it being already provided by law that such payments should be applied on warrants in sequence according to their respective dates of issue.

At the time these suits were brought, as shown by a monthly financial statement officially issued by the State Treasurer of Kentucky, as of January 1, 1931, the amount of money in the General Fund on January 1, 1931, less

minor accounts, was $12,565.81, as against which fund there were at the time outstanding warrants, theretofore issued, aggregating $9,880,502.76, which had been drawn against the State Treasurer by the Auditor of Public Accounts and had been presented for payment but were not paid for lack of funds.

At its 1932 session, the General Assembly of the Commonwealth of Kentucky again recognized and declared the insolvency of the General Fund and its insufficiency to pay outstanding warrants issued against it by the Auditor of Public Accounts. Accordingly it enacted Chapter 20 of the Session Acts of 1932, the title of which Act reads in part as follows:

> "An Act authorizing the funding of certain indebtedness of the Commonwealth of Kentucky which is evidenced by outstanding state warrants, by the issuing of funding bonds and acknowledging and confirming the validity of such warrants and the indebtedness evidenced thereby."

In the preamble and body of said Act, the General Assembly ascertained and declared the following facts:

(1) That there were then outstanding warrants beginning with warrant No. A 49, dated July 5, 1927, and including all unpaid interest thereon.

(2) That there was then no money in the State treasury available for the payment of such warrants, or any part thereof.

(3) That some of such warrants have been issued and [fol. 184] outstanding for approximately five years.

In State Budget Commission v. Lebus, 244 Ky. 701, 714, the Court of Appeals affirmed a judgment of the Franklin Circuit Court, holding invalid said Chapter 20 of the Session Acts of 1932, on the ground that it did not provide for submitting the proposed bond issue to a vote of the people, as required by the State Constitution.

The facts with respect to the condition of the General Fund are now, and for years past have been, as above declared by the General Assembly in the Acts hereinbefore set forth, excepting that the deficiency in the said General Fund has shown a progressive increase and there is no prospect of such deficiency being reduced.

Since the adjournment of the 1932 session of the General Assembly, the deficiency in the General Fund has constantly increased and, as shown by a monthly financial statement officially issued by the State Treasurer of Kentucky as of November 1, 1932, the amount of the then outstanding warrants drawn by the Auditor of Public Accounts upon the General Fund of the Commonwealth was $14,279,558.11 as of October 31, 1932, and there was no money whatever in the General Fund, but, on the contrary, it had been overdrawn by reason of its indebtedness to other funds of the State in the sum of $275,261.48.

By reason of the facts hereinbefore set forth, a warrant against the General Fund which plaintiffs might obtain under Section 10 of the challenged Act at the end of such litigation as is authorized therein could not, consistently with the law of the State as expounded by the Court of Appeals, be paid out of said General Fund for several years.

By reason of such insolvency of the General Fund, warrants drawn against it cannot be collected with reasonable or any promptness, and they cannot be sold except at a discount of from 10 to 15 per cent of their face value. [fol. 185] This fact has been recognized by the defendants herein, members of the State Tax Commission of Kentucky, who gave their depositions in the Franklin Circuit Court in the suit above referred to, which reached the Court of Appeals of Kentucky as State Budget Commission v. Lebus, 244 Ky. 701, 714.

In said action, the defendant Seldon R. Glenn, under oath, stated in his deposition, given at the State Capitol on May 23, 1932, that he was familiar with the present market for State warrants against the General Fund, and that such warrants on such market were worth 87 to 88 cents on the dollar, but that there was not a ready market for them at any price, and his opinion was that, unless something is done to relieve the situation, such as upholding the validity of the 1932 Funding Act held void by the Courts, before September, 1932, outstanding warrants would sell at 75 per cent of face value.

In like manner, the defendant John B. Lewis, at the same time and place, stated under oath that the last sale of State warrants that he knew of was made at 90 cents on the dollar; and he added that he understood buyers

were not offering 90 then, but were offering a little less than that. He also stated that in the event said Funding Act should be held invalid—as it was held by the Courts—the warrants would go considerably lower, and he believed they would go below 75 cents on the dollar of face value.

Plaintiffs state that it is now extremely difficult to find a purchaser for State warrants drawn by the Auditor of Public Accounts against the General Fund of the State, and that if and when a purchaser can be found it is impossible to realize upon a sale of such warrants a sum in excess of 80 to 90 per cent of their face value.

Plaintiffs say that no State warrants against the General Fund have been called for payment that have been issued since July 31, 1927, and in his deposition, given at the time [fol. 186] and place and in the case above referred to, the defendant Seldon R. Glenn, under oath, stated that the last call of warrants was made as of July 8, 1931, and it called for warrants that had been issued between June 12, 1927, and July 1, 1927, inclusive.

On the average, throughout the last eight or ten years, interest-bearing State warrants drawn against the General Fund have been delayed in payment approximately five years after issue thereof, on account of the lack of funds legally available therefor. The only exceptions to this general rule are those made in disregard of the rule of law prescribing the order of payment, because of special circumstances deemed sufficient to excuse or palliate such disregard.

Had the plaintiffs herein paid the taxes exacted of them under the challenged Act as and when due in February, 1931, and February, 1932, and had the defendants been required to issue warrants for the refund of said taxes as provided in Section 10 of the challenged Act, the plaintiffs herein, under the law of the State as construed and applied by the Court of Appeals, would have been compelled ever since to hold said warrants, and would still be required to hold said warrants for years to come, unpaid, or to endeavor to sell same at a great discount, in addition to the loss of interest on said tax money, and plaintiffs would not have had at the time of filing this bill, and they have not since had, any adequate remedy at law for obtaining a refund thereof under said challenged Act or any other Act of the Commonwealth of Kentucky.

The Commonwealth of Kentucky itself, under the advice of its Attorney General, declines to accept its own warrants in payment of its demands for taxes, even though such warrants may have been issued for necessary governmental purposes, such as the payment of jurors in the Circuit Courts of the State, and in point of fact, the executive officers of the State, in charge of its finances, have recently made public announcement of the fact that they intended, [fol. 187] on behalf of the State, to apply to the Reconstruction Finance Corporation, organized under Act of Congress, for a loan to the State of Kentucky of a large sum of money to enable the State to meet its daily recurring governmental obligations in the matter of salaries of public officials. As a matter of fact, the State Treasurer of Kentucky has only been able to pay salary checks of public officials through the expedient of encroaching upon other funds for the benefit of the General Fund, as shown by the overdraft in the General Fund hereinbefore set forth, as officially reported as of November 1, 1932.

In the opening paragraph of its annual report to the Governor of Kentucky for the year 1931, the State Tax Commission of Kentucky called his attention to the condition of the General Fund, stating that the General Assembly, at its 1930 session, had enacted certain legislation transferring approximately one-half million dollars from the General Fund and providing for large appropriations made in favor of the School Equalization Fund, with no provision to pay same other than to issue warrants against the General Fund, and the Commission emphasized the fact that such legislation

"naturally caused an unprecedented deficit in the General Fund *for the year* of over $2,500,000.00."

thus adding to the deficiency in said fund theretofore existing.

Moreover, in said report, the State Tax Commission criticized

"the utter disregard of the General Assembly in late years for a balanced budget,"

and added:

"Since this law-making body holds the power of appropriating state funds and of fixing the tax rate to be levied

for state purposes, it remains to be seen if any power, however great, can balance a state budget without their cooperation."

[fol. 188] Paragraph VI

Amending Paragraph XXIX of the original bill, plaintiffs repeat the averments therein contained and extend such averments to include and apply to taxes and penalties claimed of plaintiffs on account of their gross sales for the calendar years subsequent to 1930, the amounts of such gross sales and resulting taxes being set forth in Paragraph II of this amendment.

Wherefore, having amended their bill in the respects hereinbefore set forth, plaintiffs pray as in their original bill of complaint, and for all other proper and equitable relief.

Nichols, Morrill, Wood, Marx & Ginter; Trabue, Doolan, Helm & Helm, Solicitors for Plaintiffs.

[fol. 189] In United States District Court

In Equity. No. 610

Answer to Amendment to Bill of Complaint—Filed April 14, 1933

Come the defendants and by leave of court, without waiving their objection heretofore made to the filing of plaintiff's amended bill of complaint, for answer to same plead as follows, to-wit:

Paragraph I

Defendants say that they repeat all of the averments, denials, and statements contained in their answer to Paragraph X of the original bill of complaint, and in addition thereto and in further answer to said paragraph as amended, they say that they have not sufficient information to form a belief, and therefore neither admit nor deny the allegations contained in the second literary paragraph of paragraph I of the amendment to said original paragraph, but require strict proof thereof.

Paragraph II

Defendants repeat all of the averments and denials contained in their answer to Paragraph XIII of the original bill of complaint and in addition thereto and in further answer to said paragraph as amended, they say that they have not sufficient information to form a belief and therefore neither admit nor deny the averments contained in the amendment to said paragraph but require strict proof [fol. 190] thereof.

Paragraph III

Defendants repeat all of the averments and denials contained in their answer to Paragraph XIV of the original bill of complaint and in addition thereto and in further answer to said paragraph as amended, they say that they have not sufficient information to form a belief and therefore neither admit nor deny the averments contained in the amendment to said paragraph but require strict proof thereof.

Paragraph IV

Defendants repeat all of the averments and denials contained in their answer to Paragraph XV of the original bill of complaint and in addition thereto and in further answer to said paragraph as amended, they say that they have not sufficient information to form a belief and therefore neither admit nor deny the averments contained in the amendment to said paragraph but require strict proof thereof.

Paragraph V

Defendants repeat all of the averments and denials contained in their answer to Paragraph XXVIII of the original bill of complaint and in addition thereto and in further answer to said paragraph as amended, they say that they have not sufficient information to form a belief and therefore neither admit nor deny the averments contained in the amendment to said paragraph but require strict proof thereof.

For further answer defendants deny that for more than ten years past, or at all, there has been a constantly increasing deficit in the General Fund of the Commonwealth,

or that same has been continuous during said period or at all, or is now insufficient to meet the warrants drawn upon it by the Auditor of Public Accounts in discharge of claims properly allowable against or payable out of it, or that by reason thereof, holders of warrants drawn against it have been compelled to hold the same for as much as five years or at all, awaiting the accumulation in the General Fund of funds sufficient to pay such warrants in their proper sequence as provided by law.

Defendants deny that in addition thereto or at all there are many other undisputed claims against the General [fol. 191] Fund, or that such claims have been held up for a long period of time in the office of the Auditor of Public Accounts, or that no warrants have been issued by the Auditor although such claims are properly allowable or payable, or are allowable or payable, out of the General Fund. Deny that without a prolonged or expensive accounting, it is impossible to state the amount of such claims for which warrants have been issued, or that they aggregate a large or any sum of money, or that they amount to many thousands of dollars or any dollars.

Deny that by Sections 4688a-1, a-2, or a-4, Kentucky Statutes, as construed by the Court of Appeals of Kentucky, in the case of Rhea, Treasurer v. Newman, 153 Ky., 604, or in Bosworth, State Treasurer v. Shuck, 118 Ky. 458, or that in any case, it is made the duty of the State Treasurer to pay outstanding warrants against the General Fund, in the order in which they were issued or as money appropriated or available for the purposes of the General Fund reaches the treasury.

They further deny that any moneys paid in to the General Fund from the operation of the Act in question will have to be paid out or refunded with regard to other monies in such fund.

Deny that the effect of this statute, as construed by the Court of Appeals, is to require that unpaid warrants against the General Fund drawn first in point of time should be paid in priority to warrants drawn later in point of time, or that if the payment thereof exhausts the General Fund, warrants subsequently issued must await their turn in serial order before payment thereof can be compelled by process of law.

Deny that at the time the challenged act was in process

of enactment, or at any time, that it was a fact, or that such a fact was well known, to the members of the General Assembly or to the officials of the State, or to any one, that warrants drawn against the General Fund for the refund of taxes, as prescribed in said Act, could not and would not be paid out of said fund for several years, or that there was any delay in the payment of said refund, and state that [fol. 192] said refunds were always and have been always promptly paid.

Deny that knowing these facts, or that such were the facts, the General Assembly made no provision to levy any tax for the augmentation of the General Fund, but say that the General Assembly did augment the General Fund by the Act in question. Deny that the only provision for the payment of warrants theretofore outstanding was to enact the challenged law or therein to appropriate one-half the taxes exacted thereunder for the payment of the then existing indebtedness of the Commonwealth, or that there was any existing indebtedness, or that it was only provided by law that such payments should be applied on warrants in sequence according to their respective dates of issue.

They say that other laws were passed which were calculated to and did bring vast sums of revenue, which revenue was paid into the General Fund.

Defendants deny that at the time these suits were brought, or at all, as shown by a monthly financial statement officially issued by the State Treasurer of Kentucky, or at all, as of January 1, 1931, the amount of money in the General Fund on January 1, 1931 less minor accounts, was $12,565.81, or that as against said Fund there was at the time outstanding warrants theretofore issued aggregating $9,880,502.76, which had been drawn against the State Treasurer by the Auditor of Public Accounts, or had been presented for payment, or were not paid for lack of funds.

Deny that the 1932 Session of the General Assembly of Kentucky recognized or declared the insolvency of the General Fund or its insufficiency to pay outstanding warrants issued against the Auditor of Public Accounts, or for that reason it enacted Chapter 20 of the Session Acts of 1932. [fol. 193] . Deny that the facts with respect to the condition of the General Fund are now, or for years past, or at all, have been as above declared by the General Assembly in the Acts hereinbefore set forth, or that the deficit in the

General Fund has shown a progressive increase or there is no prospect of such deficiency being reduced.

Deny that since the adjournment of the 1932 General Assembly, or at all, the deficit in the General Fund has increased, or as shown by a monthly financial statement officially issued by the State Treasurer of Kentucky as of November 1, 1932, the amount of the then outstanding warrants drawn by the Auditor of Public Accounts upon the General Fund of the Commonwealth was $14,279,558.11, or any sum, or that as of October 31, 1932, or there was no money whatever in the General Fund, or that on the contrary, it had been overdrawn by reason of its indebtedness to other funds of the State in the sum of $275,261.48, or at all, or in any sum, or that by reason of the facts above alleged, or at all, upon or against the General Fund which plaintiff might obtain under such intention of the challenged act, at the end of any litigation as authorized therein could not, consistently with the law of the State as expounded by the Court of Appeals, be paid out of said General Fund for several years.

Deny that by reason of such insolvency of the General Fund, Warrants drawn against it can not be collected with reasonable or with promptness, or that they can not be sold except at a discount of 10% or any per cent of their face value.

Deny that said fact has been recognized by the defendants herein, members of the State Tax Commission of Kentucky, who gave their depositions in the Franklin Circuit Court in the suit above referred to, which reached the Court of Appeals of Kentucky as State Budget Commission v. Lebus, 244 Ky. 701, 714.

[fol. 194] Deny that in said action, the defendant, Seldon R. Glenn, under oath, stated in his deposition, given at the State Capitol on May 23, 1932, that he was familiar with the present market for State Warrants against the General Fund, or that such warrants on such market were worth 87 to 88 cents on the dollar, or that there was not a ready market for them at any price, or his opinion was that, unless something is done to relieve the situation, such as upholding the validity of the 1932 Funding Act held void by the Courts, before September, 1932, or at all, outstanding warrants would sell at 75 per cent of face value.

Defendants state that in any event said warrants have

never reached the price above indicated, but now are selling between 95 cents and 100 cents on the dollar.

Deny that in like manner or at all the defendant, John B. Lewis, at the same time and place stated under oath that the last sale of State Warrants that he knew of was made at 90 cents on the dollar; or that he heard they were not offering 90 then, or were offering a little less than that.

Deny that he also stated that in the event said Funding Act should be held invalid, the warrants would go considerably lower, or that he believed they would go below 75 cents on the dollar of face value.

Deny that it is extremely difficult to find a purchaser for State Warrants drawn by the Auditor of Public Accounts against the General Fund of the State, or that if and when a purchaser can be found it is impossible to realize upon a sale of such warrants a sum in excess of 80 to 90 per cent of their face value, but state upon the other hand, such warrants have a ready sale at from 95 cents to par, and the same are regarded as a prime investment.

[fol. 195] Defendants deny that no state warrants against the General Fund have been called for payment that have been issued since July 31, 1927, or that in his deposition, given at the time and place and under oath, stated that the last call of warrants was made as of July 8, 1931, or that it called for warrants that had been issued between June 12, 1927 and July 1, 1927, inclusive.

Deny that on the average, throughout the last eight or ten years, or at all, interest-bearing State warrants drawn against the General Fund have been delayed in payment approximately five years, or at all, after issue thereof, on account of the lack of funds legally available thereof, or the only exceptions are those made in disregard of the rule of law prescribing the order of payment, because of special circumstances deemed sufficient to excuse or palliate such disregard.

Deny that had the plaintiffs herein paid the taxes exacted of it under the challenged act as and when due in February, 1931, and February, 1932, or had the defendants been required to issue warrants for the refund of said taxes as provided in section 10 of the challenged Act, the plaintiffs herein, under the law of the State, as construed or applied by the Court of Appeals, would have been compelled ever

since to hold said warrants for years to come, or at all, unpaid or to endeavor to sell same at a great or any discount, in addition to the loss of interest on said tax money, or that there would be any loss of interest on said tax money, or that plaintiff did not have had at the time of the filing of this bill, or has not since had, any adequate remedy at law for obtaining a refund thereof under said challenged act, or any other Act of the Commonwealth of Kentucky.

Deny that the Commonwealth of Kentucky itself, under the advice of its Attorney General, or at all, declined to accept its own warrants in payment of its demands for taxes, even though such warrants may have been issued for necessary governmental purposes, such as payment of ju-
[fol. 196] rors in the circuit courts of the State, or that in point of fact, the executive officers of the State, in charge of its finances, have recently made public announcement of the fact that they intended, on behalf of the State, to apply to the Reconstruction Finance Corporation, organized under Act of Congress, for a loan to the State of Kentucky of a large sum of money to enable the State to meet its daily recurring governmental obligations in the matter of salaries of public officials.

Deny that the State Treasurer has only been able to pay salary checks of public officials through the expedient of encroaching upon other funds for the benefit of the General Fund, as shown by the overdraft in the General Fund hereinbefore set forth, as officially reported as of November 1, 1932; or that there is any overdraft in the General Fund as of November 1, 1932, or at all.

Deny that in the opening paragraph of its annual report to the Governor of Kentucky for the year 1931, the State Tax Commission of Kentucky called his attention to the condition of the General Fund, stating that the General Assembly, at its 1930 session, had enacted certain legislation transferring approximately one-half million dollars from the General Fund and providing for large appropriations made in favor of the School Equalization Fund, with no provision to pay same other than to issue warrants against the General Fund, or the Commission emphasized the fact that such legislation

"naturally caused an unprecedented deficit in the General Fund for the year of over $2,500,000.00."

thus adding to the deficiency in said fund theretofore existing.

Deny that in said report the State Tax Commission criticized

"the utter disregard of the General Assembly in late years for a balanced budget,"

or added:

"Since this law-making body holds the power of appro- [fol. 197] priating state funds and of fixing the tax rate to be levied for state purposes, it remains to be seen if any power, however great, can balance a state budget without their cooperation."

Paragraph VI

Defendants repeat all of the averments and denials contained in their answer to Paragraph XXIX of the original bill of complaint and in addition thereto and in further answer to said paragraph as amended, they say that they have not sufficient information to form a belief and therefore neither admit nor deny the averments contained in the amendment to said paragraph but require strict proof thereof.

Paragraph VII

Defendants repeat, reiterate, and rely upon each and every defense made in their original action.

Wherefore, defendants pray as in their original answer.

Bailey P. Wootton, Attorney General. S. H. Brown, Assistant Attorney General. Francis M. Burke, Assistant Attorney General.

Batson, Cary & Welch, Louisville, Kentucky; Leslie W. Morris, Frankfort, Kentucky, of Counsel.

[fol. 198] In United States District Court

In Equity. No. 610

Second Amended Answer—Filed July 6, 1933

Come the defendants, by leave of Court, and for further answer to plaintiff's petition, as amended, plead as follows:

Paragraph I

Defendants say that plaintiff has a plain, adequate, complete and speedy remedy at law. That under the provisions of section 10 of the act challenged, as construed by the court of highest resort of Kentucky, plaintiff could sue for and recover any taxes improperly paid under any of the provisions of said act; that in the event of a judgment for the recovery of any such taxes, said judgment could and would be paid from the general expenditure fund of the Commonwealth of Kentucky, within a reasonable time after the rendition thereof.

Defendants state that the receipts in the said general expenditure fund, as shown by the official reports of the Treasurers of the Commonwealth of Kentucky, for each of the fiscal years 1926 to 1932 inclusive, have been as follows:

[fol. 199]

For the fiscal year ending June 30,	1926....	$7,706,538.28
" " " " " " "	1927....	8,059,517.85
" " " " " " "	1928....	9,294,798.97
" " " " " " "	1929....	9,907,769.29
" " " " " " "	1930....	12,949,027.10
" " " " " " "	1931....	11,573,065.01
" " " " " " "	1932....	10,000,000.00 (approximately)
" " " " " " "	1933....	9,000,000.00 (approximately)

(Official Treasurer's report for the fiscal years 1932 and 1933 not yet published.)

Defendants say that there will be collected under the tax laws of this State and paid into the said general expenditure fund approximately Eight Million Dollars for the fiscal year ending June 30, 1934; that a great portion of said sum is already due and in process of collection; that in fact there is approximately Seven Million Dollars now due the general expenditure fund of the Commonwealth of Kentucky against which there are no preferred claims; that money is constantly flowing into the said general expenditure fund from the operation of tax laws in force in this Commonwealth; that any judgment for refund of taxes paid by this plaintiff under the provisions of the challenged act will be a preferred claim against said general fund, under the laws of this Commonwealth as construed by the courts of this State.

Paragraph II

For a separate and distinct defense in point of law arising upon the face of the bill of complaint as amended herein, defendants say that the facts alleged in said bill of complaint as amended are insufficient to constitute a valid cause of action.

Wherefore, defendants pray as in their original answer.

Bailey P. Wootton, Attorney General of Kentucky. S. H. Brown, Assistant Attorney General. Francis M. Burke, Assistant Attorney General.

Batson, Cary & Welch, Louisville, Kentucky; Leslie W. Morris, Frankfort, Kentucky.

[fol. 200] In United States District Court

No. 610

Stipulation as to Hearing—Filed July 24, 1933

In the above-styled case it is stipulated by the parties, plaintiff and defendants, as follows:

(1) Upon the final hearing of this case, the parties, plaintiff and defendants, respectively, may read in evidence, as if they were depositions regularly taken on due notice to the opposing side, any or all of the ex parte affidavits heretofore filed or read in evidence upon the hearing of plaintiff's motion for an interlocutory injunction herein, and may also read in evidence all depositions heretofore read in evidence upon the hearing of plaintiff's motion for an interlocutory injunction herein,

Subject, however, in the case of such affidavits and depositions,

(a) to exceptions for competency and relevancy of the subject-matter or any portion thereof contained in any of said ex parte affidavits, and

(b) to the right of the adverse party, on due notice, to cross-examine orally any witness whose ex parte affidavit is so offered or read in evidence.

(2) The plaintiff shall conclude the taking of proof on its behalf, including the cross-examination of witnesses whose ex parte affidavits have been heretofore filed, on or before June 10, 1933.

[fol. 201] All objections to mere matters of form or to the ex parte character of affidavits heretofore filed on the motion for an interlocutory injunction, and all objections on account of the ex parte character thereof, are waived, and all formalities as to the cross-examination of witnesses giving such affidavits are hereby waived.

(3) Subject to all the provisions of this stipulation, all the evidence offered or heard in this case or in the case of Kroger Grocery and Baking Company v. John B. Lewis, et al., No. 3908, filed in the Eastern District of Kentucky, or in the cases of Fred Levy, et al. v. John B. Lewis, et al., No. 610, and J. C. Penney Company v. John B. Lewis, et al., No. 611, filed in the Western District of Kentucky, may be read in this case or in any one or all of the other three cases.

(4) The defendants shall conclude the taking of depositions or the cross-examination on their behalf of plaintiff's witnesses, on or before June 25, 1933.

(5) On or before the 10th of June, 1933, each party shall give to the adverse party or parties a written notice specifying the ex-parte affidavits proposed to be read by such party upon the final hearing and no ex parte affidavits other than those so specified shall be read on behalf of such party or parties.

(6) It is further stipulated that the following statement made up from the record of the State Treasurer of Kentucky by Jerry King, Bookkeeper in the State Treasurer's Office correctly sets forth as to each of the dates below given

(a) the balance to credit of General Fund, and

(b) outstanding warrants against the General Fund as follows:

[fol. 202]

Date	Balance to credit of general fund	Outstanding warrants against general fund
June 30, 1922	$297,967.85	$4,702,709.11
June 30, 1923	2,590,470.14	5,947,750.40
June 30, 1924	167,535.74	4,089,151.37
June 30, 1925	310,242.68	4,127,746.17
June 30, 1926	10,387.44	4,329,772.33
June 30, 1927	257,566.83*	4,664,820.89
June 30, 1928	440,328.14	6,715,347.99
June 30, 1929	1,880,084.77	8,060,920.69
June 30, 1930	1,826,244.05	8,533,384.79
Dec. 31, 1930	1,250,168.22	9,880,501.76
June 30, 1931	2,440,128.46	11,023,911.53
Dec. 31, 1931	838,269.63	12,637,990.48
June 30, 1932	1,302,267.69	13,851,414.57
Dec. 31, 1932	573,831.32	14,415,503.69
May 25, 1933	1,898,229.25	14,668,744.57

* (Deficit.)

(7) It is understood that neither side shall be required to produce for cross-examination by the adverse party any witness whose ex parte affidavit may be offered or read under this stipulation.

Nichols, Morrill, Wood, Marx & Ginter; Trabue, Doolan, Helm & Helm, Solicitors for Plaintiffs. Bailey P. Wootton, S. H. Brown, Solicitors for Defendants.

[fol. 203] IN UNITED STATES DISTRICT COURT

ORDER SUBSTITUTING PARTY DEFENDANT—Entered August 21, 1933

This day came the parties herein and filed a stipulation noting that the defendant Seldon R. Glenn had resigned as a member of the State Tax Commission of Kentucky and was no longer a member of the said State Tax Commission, and was succeeded therein by Emerson Beauchamp.

And it appearing to the Court that there is a substantial need for continuing and maintaining this cause and obtaining an adjudication of the questions involved,

It is ordered that Emerson Beauchamp, member of the [fol. 204] State Tax Commission of the Commonwealth of Kentucky, be and he is hereby substituted as a defendant herein in lieu of the defendant Selden R. Glenn, and with the same effect as if he had been originally a defendant to the Bill of Complaint herein, and said cause is continued and maintained against the said Emerson Beau-

champ individually and as a member of the State Tax Commission of the Commonwealth of Kentucky.

Xen. Hicks, Circuit Judge. A. M. J. Cochran, District Judge. Chas. I. Dawson, District Judge.

[fol. 205] IN UNITED STATES DISTRICT COURT

ORDER OF SUBMISSION—Entered August 21, 1933

This day the above-styled three cases came on for hearing before Hon. Xenophon Hicks, Circuit Judge, Hon. A. M. J. Cochran, District Judge, and Hon. Chas. I. Dawson, District Judge.

By agreement of parties plaintiff and defendant, the above-styled three cases are heard together, and the same evidence was heard in these cases as in the case of Kroger Grocery & Baking Company against the same defendants pending in the Eastern District of Kentucky, and heard at the same time.

By agreement of parties plaintiff and defendant, the proof heard and all exhibits filed as set out in the order of submission herein, dated February 14, 1931, was likewise read and heard upon the final submission hereof, together with the stipulation filed in these cases in the Clerk's office on or about July 24, 1933, and now filed by order of Court.

In addition to the said evidence, plaintiffs by counsel filed and read the depositions and exhibits therewith of

W. P. Sullivan,
W. R. Robinson,
A. H. Brendel,
Albert H. Morrill,
Harry W. Schacter.

[fol. 206] Plaintiffs likewise read in evidence the following Statutes and Acts of the General Assembly of Kentucky and decisions of the Court of Appeals of Kentucky, as set out in their amended bills herein:

Ky. Stat. Sec. 3688a-1, a-2 and a-4;
Rhea, Treas., v. Newman, 153 Ky. 604;
Bosworth, Treas., v. Shuck, 118 Ky. 458;

Chap. 13 of the Acts of the General Assembly of Ky. of 1926;

Chap. 20 of the Acts of the General Assembly of Ky. of 1932;

State Budget Commission v. Lebus, 244 Ky. 701;

and certain paragraphs of the Report of the State Tax Commission of Kentucky for the year 1931, as set out in the amended bill.

Likewise defendants filed and read the depositions and exhibits therewith of

Jerry King,
James W. Martin,
Clyde William Phelps,
Selden R. Glenn,
R. C. Ilg,
Elam Huddleston.

Thereupon these cases were argued by counsel for the respective plaintiffs and defendants and ordered to be submitted, and the Court not being fully advised takes time.

It is further ordered and adjudged that the interlocutory injunctions heretofore entered in each of the above-styled cases be and the same are hereby continued in full force and effect until the final determination of each of the above-styled cases in this Court.

Aug. 21, 1933.

Xen. Hicks, Circuit Judge. A. M. J. Cochran, District Judge. Chas. I. Dawson, District Judge.

Have seen the foregoing order.

Nichols, Morrill, Wood, Marx & Ginter; Trabue, Doolan, Helm & Helm, Solicitors for Plaintiffs. Bailey P. Wootton, Atty. Gen.; S. H. Brown, Asst. Atty. Gen.; Homer W. Batson, Leslie W. Morris, Solicitors for Defendants.

[fol. 207] IN UNITED STATES DISTRICT COURT

In Equity. No. 610

STIPULATION AS TO STATEMENT OF EVIDENCE—Filed September 20, 1934

This case having been heard with the case of The Stewart Dry Goods Company v. John B. Lewis et al. (simul-

taneously herewith appealed to the Supreme Court of the United States) upon the plaintiffs' motion for an interlocutory injunction, and the same testimony having been read in each case, it is agreed by counsel that the narrative of testimony printed in the record of the said Stewart Dry Goods Company case shall be considered as a part of this record upon appeal without the necessity of duplicating same in this record.

Nichols, Morrill, Wood, Marx & Ginter; Trabue, Doolan, Helm & Helm, Solicitors for Plaintiffs. B. P. Wootton, Atty. Gen.; S. H. Brown, Solicitor for Defendants.

[fol. 208] In United States District Court

Before Hicks, Circuit Judge, and Cochran and Dawson, District Judges

Opinion—Filed December 20, 1933

Dawson, District Judge:

These three cases are before us on final submission and each of them involves the validity of Chapter 149 of the 1930 Acts of the General Assembly of the Commonwealth of Kentucky, commonly known as the Retail Merchants Gross Sales Tax Act. The case of Kroger Grocery & Baking Company v. John B. Lewis, et al., in the Eastern District of Kentucky, and involving the same questions, was heard and considered by us at the same time. On a former hearing of these cases we dismissed the petitions on the ground that the plaintiffs had an adequate remedy at law. An appeal was taken to the Supreme Court, and that court held that, in view of the allegations of the bills as to the condition of the General Expenditure Fund of the State, it could not be said, in the absence of proof controverting the allegations of the bills, that Section 10 of the Act upon its face afforded an adequate remedy at law. In reversing the case, the Court said:

[fol. 209] "The decrees are reversed and the causes remanded to the District Courts, of three judges, for final hearing upon the merits, without prejudice to a determina-

tion upon evidence with respect to the questions of the status of outstanding warrants upon the General Fund in the State Treasury, and whether warrants of the sort contemplated by Section 10 of the Act in question are accorded preference in payment over other warrants, and the basis, if any, for the assurance that such preference will be continued so that in the event of actions by the plaintiffs at law under Section 10 they would be afforded a certain, reasonably prompt and efficacious remedy."

We have interpreted this language of the Court to authorize us to again consider the question of the adequacy of the remedy at law under Section 10 of the Act in the light of such proof as might be offered by the parties on this subject.

Proof has been taken on this question which establishes the fact that the uniform practice of the Treasurer of the Commonwealth of Kentucky has been to pay warrants issued by the Auditor for the refund of taxes when presented, and in advance of outstanding interest-bearing warrants, and that such has been the practice of the present Treasurer of the Commonwealth of Kentucky, whose term of office does not expire until January, 1936. It is further established by the evidence that the present State Treasurer has followed the practice of keeping himself in financial position to refund all taxes which are paid under legal protest, and that he will be in a position to and will do so with reference to the taxes involved in these actions in event it shall be finally determined that such taxes were illegally collected, notwithstanding the fact that there were outstanding as of June 30, 1933, approximately fifteen million dollars of interest-bearing warrants against the General Expenditure Fund, out of which fund Section 10 of the Act directs refunds under the Act to be made. We know of no opinion of the Court of Appeals of Kentucky giving its sanction to this practice, nor does the record disclose that the Attorney General of the State has ever ruled that the practice was authorized by any statute of the State. Certainly the practice is consonant with common justice; but in view of the doubt expressed by the Su- [fol. 210] preme Court as to whether Section 10 of the Act authorizes such preferential treatment, and in view of the further fact that if refunds under the Act are not given

preference it is uncertain when they would be paid, we feel constrained to hold that the remedy at law given by Section 10 of the Act does not afford that certainty necessary to repel equity jurisdiction.

We therefore come to a consideration of the merits of the cases.

The pertinent provisions of the Act are:

"Section 1. The words 'retail merchant,' as used in this act, shall mean and include every person, firm, association, co-partnership or corporation opening, establishing, operating or maintaining any 'store', as defined herein, for the purpose of and selling goods, wares or merchandise at retail in this State, except those actually engaged in gardening or farming and selling garden or farm products raised by them in this State. The term 'store', as used in this act, shall be construed to mean and include any store or stores or any mercantile establishment or establishments in this State which are owned, operated, maintained or controlled by the same 'retail merchant', as defined herein, either domestic or foreign, in which goods, wares or merchandise of any kind are sold at retail. The provisions of this act shall be construed to apply to every 'retail merchant' and 'store', as defined herein, which is controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management.

Section 2. Every retail merchant, as defined herein, shall pay an annual license tax for the opening, establishing, operating or maintaining, of any store or stores, as defined herein, determined by computing the tax on the amount of gross sales as follows:

One-twentieth of one per cent of the gross sales of Four Hundred thousand ($400,000.00) Dollars or less; two-twentieths of one per cent on the excess of the gross sales over Four hundred thousand ($400,000.00) Dollars and not exceeding Five Hundred thousand ($500,000.00) Dollars; five-twentieths of one per cent on the excess of the gross sales over Five hundred thousand ($500,000.00). Dollars and not exceeding Six hundred thousand ($600,000.00) Dollars; eight-twentieths of one per cent on the excess of the gross sales over Six hundred thousand ($600,000.00) Dollars and not exceeding Seven hundred thousand ($700,-

000.00) Dollars; eleven-twentieths of one per cent on the excess of the gross sales over Seven hundred thousand [fol. 211] ($700,000.00) Dollars and not exceeding Eight hundred thousand ($800,000.00) Dollars; fourteen-twentieths of one per cent on the excess of the gross sales over Eight hundred thousand ($800,000.00) and not exceeding Nine hundred thousand ($900,000.00) Dollars; seventeen-twentieths of one per cent on the excess of the gross sales over Nine hundred thousand ($900,000.00) Dollars and not exceeding One million ($1,000,000.00) Dollars; one per cent on the excess of the gross sales over One million ($1,000,000.00) Dollars.

Section 3. Every retail merchant, as defined herein, in order to ascertain the amount of taxes due and payable under the next preceding section, shall file with the State Tax Commission on or before the first day of February each year a written report verified by the affidavit of the owner or chief officer on such forms as it may prescribe, giving the number and location of its store or stores, as defined herein, the name and post office address of its owner or principal officer, the name and address of its officer or agent in charge of its business at each separate store, the nature and kind of business, the total gross sales during the preceding year ending the thirty-first day of December, and such other facts bearing on the proper taxation as the Tax Commission may require.

The State Tax Commission may, in any case, require such additional information as it may deem necessary to enable it to perform its duties herein. It shall be the duty of the State Tax Commission from such reports, and from such additional information as it may obtain, to ascertain the amount of taxes due, and to certify to every such retail merchant the amount of taxes due for the preceding year, based upon such reports and information as it may ascertain. Upon final action by the State Tax Commission, it shall certify to the Auditor of Public Accounts and to the retail merchant the amount of such tax due by each retail merchant, as defined herein, and it shall be the duty of each retail merchant to pay the amount of such tax to the Auditor of Public Accounts not later than thirty days thereafter.

In reporting the gross sales for the year, 1930, retail merchants shall include only those sales made between the

date that this act becomes effective and December 31, 1930, and the license tax due for the year 1930 shall be based on the amount of those sales only.

Section 4. The license or excise tax levied herein, shall not be in lieu of any special state license, excise, occupational or corporation license tax due under the provisions of any law now in force, or that may hereafter be enacted. Should any retail merchant, as defined herein, be liable for and pay any special state license, excise, occupational or corporation license tax under the laws now in force, or that may hereafter be enacted, credit may be taken on the tax [fol. 212] levied in this act for the amount of such special license, excise, occupational or corporation license tax so paid not to exceed the amount of the license or excise tax levied herein."

Plaintiffs contend that the Act violates the Fourteenth Amendment to the Federal Constitution in that it denies them the equal protection of the law and deprives them of their property without due process of law; that it violates the Federal Constitution in that it discriminates against and burdens interstate commerce, and that it violates the Bill of Rights of the State Constitution, which prohibits the exercise of arbitrary power over the lives, liberty and property of citizens and secures to all the inalienable right of acquiring and protecting property, and is so arbitrary and confiscatory as to be unauthorized as an excise or license tax under Section 181 of the Constitution. Some claim is also made that it volates other provisions of the Constitution of Kentucky, but these contentions apparently are not seriously urged, and we shall not notice them.

Does the Act Deny to the Plaintiffs the Equal Protection of the Law?

It is the contention of the plaintiffs that equal protection of the law under the Fourteenth Amendment is denied by the Act because:

(1) The classification of the persons taxed into eight different groups, according to the amount of gross sales, and a corresponding stepping up of the rate, is not justified by any conceivably substantial distinction between the classes, but is wholly arbitrary and discriminatory.

(2) The credits allowed by Section 4 of the Act operate, in most cases, to exempt from the tax those falling in the class having annual gross sales of less than $400,000,000, and that this section also operates to give a preference to [fol. 213] those entitled to such credits over those taxpayers who have no special license or excise taxes upon which to claim the credits authorized by Section 4.

It should always be remembered that the power of the State to tax for public purposes within its constitutional sphere is as unlimited as is the power of the National Government within its sphere, except for the equality clause of the Fourteenth Amendment.

It has often been written that the equal protection provision of the Fourteenth Amendment is not a guarantee of equality of the operation or application of State legislation upon all the citizens of a State. All that it intends to secure to citizens is that the laws of a State shall have equality of operation and application on persons according to their relations. That is to say, it is a guarantee to every citizen that he shall be accorded the same treatment by the laws of his State as is accorded to other citizens in his class and similarly circumstanced. As applied to taxation, it has been repeatedly declared by the Supreme Court that this provision of the Constitution does not prohibit classification further that that the classification must be rested upon some ground of difference having a fair and substantial relation to the object of the legislation. The exemption of certain classes of property from taxation, or the imposition of different rates of taxation upon different classes of property or persons, is not prohibited by the equal protection provision of the Fourteenth Amendment, provided the classification is not unreasonable or arbitrary; and this is true as to excise, license and occupational taxation, as well as property taxation. It is not necessary that the classification shall be one that appeals to the judgment or sense of fairness of courts. It is enough if the classification is reasonably founded on the "purposes and policies [fol. 214] of taxation". Generally speaking, the judgment of the legislative body is conclusive as to classification unless it is based upon so unsubstantial a difference in the classes affected, or is so arbitrary and unreasonable as to preclude the assumption that the classification was made in the good faith exercise of legislative judgment and dis-

cretion. These principles are so well settled that citation of authority is hardly necessary, but among the cases sustaining the principles above enunciated are: Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S. 232; Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283; Campbell v. California, 200 U. S. 87; Royster-Guano Co. v. Virginia, 253 U. S. 412; Watson v. Comptroller, 254 U. S. 122; Stebbins v. Riley, 268 U. S. 137; Quong Wing v. Kirkendall, 223 U. S. 59; McLean v. Arkansas, 211 U. S. 539; Armour Packing Co. v. Lacy, 200 U. S. 226; Connolly v. Union Sewer Pipe Co., 184 U. S. 540; Alaska Fish Co. v. Smith, 255 U. S. 44.

The decisions are equally clear that in order to sustain classified taxation of things or persons the difference between the classes need not be great. We think it safe to say that slight differences, such as in ability to pay, in character of property or circumstances of persons taxed, will sustain State tax classification against attack under the equal protection clause of the Fourteenth Amendment. Further we think it may be laid down as a sound rule that even though the Court may doubt or question the existence of the distinction or difference forming the basis of classification for State Taxation, yet if the matter is one about which reasonable men may disagree, the judgment and discretion of the legislative body should not be interfered with.

Measured by these rules, we are unable to say that the Act in question violates the equal protection clause of the Fourteenth Amendment. It is well settled, and the plaintiffs concede, that classification for taxation based upon [fol. 215] mere volume is not open to attack under the Fourteenth Amendment. Plaintiffs contend, however, that it is a long cry from classification upon volume, by the application of the same rate to all classes, to a classification which steps up the rate on the respective classes determined according to volume. Conceivably there might be some merit in this contention, if the law under attack here imposed increasing rates upon the entire volume of business done by those in the higher classes. But such is not the case here. All those who fall exclusively within the $400,000.00 class have applied to them exactly the same rate, and each taxpayer in each higher classification gets the benefit of exactly the same rate, not only of other taxpayers in his

particular classification, but he and all others in his class likewise get the same rate applied to that portion of their sales which falls within the lower classifications as is exacted of those taxpayers who fall exclusively within such lower classifications.

Therefore, it seems quite clear to us that the rates applied in this Act apply equally to all in the same class. Hence, the claim of the plaintiffs that classification of taxpayers according to volume and the application of different rates to different classes amounts to a denial of equal protection of the law, comes at last to the proposition that such classification is so unreasonable and arbitrary as to preclude the assumption that the classification was made in the good faith exercise of the taxing power of the State.

Having in mind the principles heretofore adverted to, we can not agree to this proposition. The Court judicially knows that there is in the public mind a quite widely accepted theory that taxation may properly be based upon ability to pay, and this theory has often been translated into legislative action. There is a widely accepted theory of economics that, as a general proposition, ability to pay increases with volume of business, because generally speak- [fol. 216] ing, increased volume of business means increased profits. We recognize, of course, that this theory of economics is not universally accepted, but, on the contrary, is vigorously opposed by another school of economic thought. These opposing theories were vigorously advanced in these cases by business men and economists in their testimony. If economists and business men disagree on these propositions, how can it be said that legislative classification in harmony with one of these schools of thought to the exclusion of the other is not reasonably founded in the "purposes and policies of taxation", or that such classification precludes the assumption that it was in the good faith exercise of legislative judgment and discretion?

It is vigorously urged upon us that the provision of Section 4 of the Act which allows a credit to the extent of special license, excise, occupational or corporation license taxes paid by the retail merchant operates to deny equal protection to those taxpayers who are required to pay no such taxes, and as an illegal discrimination in favor of

those taxpayers in the lower brackets whose special taxes paid under other laws of the State are sufficient in amount to almost or entirely liquidate the tax here involved. This view is an entirely superficial one. No individual taxpayer under this law has any vested right in the continuation of a corporation license tax imposed by State law on his corporate competitor, nor in the continuation of any other special license tax any of his competitors has heretofore been required to pay. Certainly the Legislature, in the imposition of the tax here involved, could have repealed all special license taxes which were imposed by law upon those coming within the ambit of the Act under consideration. If there are any retail merchants affected by this Act who, prior to its enactment, were not required to pay any special license [fol. 217] taxes, they had the advantage over their competitors from whom such taxes were exacted. Section 4, to the extent that it allows the payment of such taxes as a credit, simply eliminates a discrimination, though not an illegal one, which theretofore existed. The fact that these credits will substantially liquidate the tax of many of the taxpayers whose sales amount to less than $400,000.00 is simply an incident in the operation of the law. Taxpayers in the higher brackets, where they pay such special taxes, get exactly the same credits. Those who complain of these credits because they are not entitled to like credits put themselves in the anomalous position of complaining because they have not heretofore been subject to special license or other special taxes.

It seems to us that the claim of the department stores, that the law in requiring them to treat the operation of all their departments as one unit, and of the chain stores, that the law in requiring them to similarly treat the operation of all of their stores, amounts to a discrimination against them and in favor of the retail merchant operating a single non-department store, is equally wanting in merit. This unitary classification of department stores and chain stores undoubtedly conduces to simplification in the collection of the tax. The taxation is not based upon the number of stores the taxpayer owns, but upon his gross sales. It is in the nature of a license or excise tax, and we know of no constitutional inhibition which would prohibit the State from requiring each taxpayer to report the result of all of his business in the State and pay taxes on the aggregate

result. The seeming inequality urged because of this feature of the law arises from the taxpayer's method of doing business, and not from any inherent inequality in the law itself.

[fol. 218] Does the Act Deny Due Process under the Fourteenth Amendment?

Oftentimes it is difficult to test State legislation, particularly tax legislation, by the due process clause of the Fourteenth Amendment. As pointed out by Mr. Chief Justice Taft in Truax v. Corrigan, 257 U. S. 312, it is more or less customary to treat the due process and the equal protection clauses of the Fourteenth Amendment together; but, as he observed in that case, "while they overlap, and a violation of one may oftentimes involve a violation of the other, the spheres of the protection they offer are not coterminous." It is conceivable that a State taxing statute may be based on a proper classification and give absolute equality between persons in the same class, so as to make it immune from attack under the equal protection clause, and yet amount to a denial of due process.

In considering the question whether a State taxing law denies due process under the Fourteenth Amendment, a consideration of what amounts to a denial of due process of Congress under the Fifth Amendment is most helpful, because it is well settled that the restraint imposed upon State Legislatures by the due process clause of the Fourteenth Amendment is exactly the same as that imposed upon Congress by the due process clause of the Fifth Amendment. Coolidge v. Long, 282 U. S. 582; Heiner v. Donnan, 285 U. S. 312.

In the case of Brushaber v. Union Pacific Co., 240 U. S. page 1, the Supreme Court, in discussing the limitation of the due process clause of the Fifth Amendment on the taxing power of Congress, said:

"So far as the due process clause of the Fifth Amendment is relied upon, it suffices to say that there is no basis for such reliance since it is equally well settled that such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring upon the one hand a taxing power and taking the same

away on the other by the limitations of the due process clause. * * * And no change in the situation here would arise even if it be conceded, as we think it must be, that this [fol. 219] doctrine would have no application in a case where although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment, or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion."

From this language it seems clear that if congressional legislation, under the guise of taxation, amounts to confiscation of property, or is so foreign to the practices of government in taxation as to shock the sense of justice, it would violate the due process clause of the Fifth Amendment, and this principle is re-affirmed in Heiner v. Donnan, supra, and in Nichols v. Coolidge, 274 U. S. 531. This rule, therefore, furnishes a safe guide for determining if State tax legislation transgresses the due process clause of the Fourteenth Amendment.

In thinking of valid taxation, State or National, we instinctively exclude legislation which, either because of the rate imposed or because of other features, amounts to confiscation of the taxpayer's property, whether that property is tangible effects or his business.

Under the Act here involved the effective tax rate, without allowing for deductions of the special taxes referred to in Section 4 of the Act, applicable to taxpayers with gross sales of $1,300,000.00 is in excess of one-half of one per cent; to taxpayers with sales of $5,000,000.00, in excess of 86/100 of one per cent; to taxpayers with $7,000,000.00 of gross sales, 9/10 of one per cent; and to taxpayers with $11,000,000.00 of sales, in excess of 93/100 of one per cent; and as the volume of sales increases beyond this figure, the effective rate gradually approaches, although it can never quite reach, one per cent, due to the fact that the taxpayer [fol. 220] in the higher brackets gets the benefit of the application of the lower rates to that part of his gross sales which falls within the lower classifications. Therefore, if the proof satisfactorily showed that one per cent of gross

sales represents the net profit normally realized by any branch or subdivision of the retail mercantile industry, we would have no hesitation in holding the tax confiscatory—at least as to that branch or subdivision of the industry. The burden is upon the plaintiffs who are attacking the law to show that it is confiscatory; but this burden is not sustained merely by showing that it is confiscatory when applied to the business of the least efficient members of the industry taxed. The test is: What is its effect generally upon the class taxed, or what is the effect generally upon any branch or subdivision of that class? We think the proof falls far short of showing that one per cent of gross sales represents the net profit normally realized by retail merchants as an entire class, or normally realized by any branch or subdivision of the industry. On the contrary, we think the preponderance of the proof is to the effect that the profit is normally from two to two and one-half per cent of gross sales, after deduction of taxes, and that in many lines of retailing the profit is even higher.

Quite a good deal of proof has been introduced which shows that the tax would have been substantially confiscatory as applied to the business of the Kroger Grocery & Baking Company during the three years of 1930, 1931 and 1932; but the proof further strongly tends to show that there was lack of efficiency in the operation of the business of this concern during those years. The testimony of Mr. Morrill, the new President of that concern, shows that under his administration the efficiency of the operations of that company have been so improved that for the first six months of the year 1933 the net profits amounted to [fol. 221] $2,294,000, as compared to substantially $1,475,000 for the entire year $1930; to $2,199,000 for the entire year 1931, and to $2,441,000 for the entire year 1932; and that the net profits, after deduction of taxes for the first six months of 1933 amounted to 2.49 per cent of gross sales, as compared to a net profit of slightly in excess of one-half of one per cent for 1930, slightly less than one per cent for 1931, and slightly in excess of one per cent for 1932. There is nothing in the record to show that the experience of this company on its business in Kentucky is substantially different from that in its business as a whole.

We feel constrained, therefore, to hold that the proof fails to establish that in its application to those in the

higher brackets the tax amounts to confiscation. We must confess that it appears to us that the tax falls very heavily on those in the higher brackets; but inasmuch as it falls short of confiscation, relief must be secured at the hands of the Legislature—not from the courts.

Does the Tax Discriminate Against Interstate Commerce, or Constitute a Burden on Interstate Commerce?

We think this question is conclusively decided against the contention of the plaintiffs by the opinion of the Court of Appeals of Kentucky in the case of Moore v. State Board of Charities & Corrections, 239 Ky., 729. The plaintiffs vigorously assail the authority of this case, upon the ground that a legal fraud was practiced upon the State Courts, in that there was no real controversy between the parties to that litigation. We can not escape the fact, however, that the validity of the Act was squarely presented to the Court of Appeals in that case. That court had jurisdiction of the subject matter and of the parties, and while the action which led to the opinion in that case originated after these actions had been filed in this court, that fact can have no [fol. 222] effect upon the binding force of the opinion of the State Court, in so far as it deals with the meaning and interpretation of the Act. The opinion of that court as to the meaning and scope of the Act is binding upon all State officials, and is binding upon us. Truax v. Corrigan, 257 U. S. 312. But of course the opinion of that court as to the practical results of the application of the Act so construed involves a finding of fact and is not binding upon us. That court in the opinion referred to specifically held that the Act does not apply to sales made in interstate commerce, and further held that, properly interpreted, Section 1 does not and was not intended to discriminate against farm and garden products raised in other States and sold in this State.

Does the Act Violate the Bill of Rights of the State Constitution, or Is It Unauthorized by Section 181 of That Instrument?

The tax involved here must find its justification in Section 181 of the State Constitution, the pertinent part of which provides:

"The General Assembly may, by general laws only, provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations and professions, or a special or excise tax; and may, by general laws, delegate the power to counties, towns, cities and other municipal corporations to impose and collect license fees on stock used for breeding purposes, on franchises, trades, occupations and professions."

This section has been frequently considered by the Court of Appeals of the State, and it is now well settled that it must be read in connection with the Bill of Rights contained in the State Constitution, which forbids the exercise of arbitrary power over the lives, liberty and property of citizens, and secures to all the inalienable right of acquiring and protecting property, and that, when so read, Section 181 confers no power to prohibit, or substantially prohibit by taxation, a legitimate business or to resort to un- [fol. 223] reasonable classification in taxation. Fiscal Court of Owen County v. Cox, 132 Ky. 738; City of Louisville v. Pooley, 136 Ky. 286; Sperry & Hutchinson v. Owensboro, 151 Ky. 389. Thus, we have presented under the Bill of Rights contained in the State Constitution and under Section 181 of that instrument exactly the same questions we have disposed of in our consideration of the due process and equal protection clauses of the Fourteenth Amendment, and it necessarily follows that the claim of the plaintiffs that the Act violates the State Constitution in the particulars referred to must be denied.

The temporary injunction heretofore issued will be dissolved, and the permanent injunction prayed for denied. Inasmuch as we feel confident the plaintiffs will desire to appeal these cases to the Supreme Court, the temporary injunction will be continued in force for thirty days following the entry of the decree herein directed to be prepared, and if before the expiration of that period steps have been taken to appeal the cases, such temporary injunction will be continued until final disposition of the cases by the Supreme Court.

In view of the unsettled economic condition of the country, and in view of the possibility that after a reasonable trial the law may prove confiscatory as to some branches or subdivisions of the retail mercantile business, we feel

constrained to leave these cases on the docket, without prejudice to the right of the plaintiffs, after such reasonable trial, to apply to this Court to reopen and rehear the causes on the single question of confiscation. See: Opinion of the Supreme Court of December 4, 1933, in Glenn et al. v. Field Packing Company.

Counsel may prepare and present for entry a decree conforming to the views herein expressed.

Xen. Hicks, U. S. Circuit Judge. Chas. I. Dawson, U. S. District Judge.

Judge COCHRAN dissents.

December 20, 1933.

[fol. 224] Trabue, Doolan, Helm & Helm, Louisville, Ky.; Nichols, Morrill, Wood, Marx & Ginter, Cincinnati, Ohio, Attorneys for Plaintiffs.

Bailey P. Wootton, Attorney General, Frankfort, Ky.; S. H. Brown, Assistant Attorney General, Frankfort, Ky.; Batson, Cary & Welch, Louisville, Ky.; Leslie W. Morris, Frankfort, Ky., Attorneys for Defendants.

[fol. 225] IN UNITED STATES DISTRICT COURT

DISSENTING OPINION—Filed May 22, 1934

COCHRAN, J.:

I feel constrained to dissent from the majority opinion of the court.

Certainly the step up in rate of tax as compared with that in volume of sales may be so great as to be arbitrary and unreasonable. It seems to me that such is the case here. The tax imposed for sales amounting to $400,000.00 is $200, and for those amounting to $1,000,000.00 plus is $10,000.00. The percentage of step up in volume was 250—in tax imposed 5,000 per cent, or twenty times as much.

In the case of City of Newport v. Frankel, 192 Ky. 408, it was held that a city ordinance providing that a moving picture theatre charging an admission fee of fifteen cents should pay an annual tax of $450 and one charging twenty cents $5,000 was arbitrary and unreasonable. The step up

[fol. 226] in volume was 33⅓ per cent and in tax 1,000 per cent or thirty times as much. I am unable to make out that legislation providing a step up in tax twenty times as much as the step up in volume is so much less than that providing thirty times as to remove it from being arbitrary and unreasonable. Difference in business may make this decision inapt.

The classification which the Act makes seems to me arbitrary and unreasonable on another ground. There are four distinct classes of retailers, singly operated units, department stores, chain stores and mail-order houses. Their points of difference are many. The chain store has many features and advantages which definitely distinguish it from the singly operated unit. The same is true as to a department store. That such is the case was recognized and held in State Board of Tax Comm'rs vs. Jackson, 283 U. S. 527. It was emphasized in Leggett vs. Lee, 288 U. S. 517. It may be added that a department store has features and advantages definitely distinguishing it from the singly operated unit. The Act ignores this natural and inevitable classification. It classes all retailers of whatever nature together and then reclassifies them according to their volume of sales. Each retailer has to pay the same tax as every other retailer having the same volume of sales. The singly operated unit has to pay the same rate of tax as the chain store or department store having the same volume of sales notwithstanding both have advantages, greater in case of the chain store, which makes for greater profits, over it. Likewise the department store has to pay the same rate as the chain store with the same volume of sales notwithstanding the chain store has advantages, which make for greater profits, over it.

In the Titusville case retailers and wholesalers were treated by the municipality differently in the tax imposed per volume of sales. So here it seems to me that it was arbitrary and unreasonable not to treat singly operated [fol. 227] units, department stores and chain stores differently in the rate of tax imposed per volume. If the rate of tax was to be determined per volume it should have been different as to each class of retailers.

The arbitrary and unreasonable character of the Act seems to me to be demonstrated by the operation of the Act. The returns for the years 1930, 1931, and 1932 are in

the record. Mention will be made only of the returns for 1930, as they are the most complete. 24,163 retail merchants made returns for that year. Their gross sales amounted to $362,848,264 and the tax paid by them to $106,342.94. It is reasonable to assume that these returns cover all retail merchants in the state except plaintiffs and those not plaintiffs but protected by the temporary injunction, twenty-five in number. The gross sales of the plaintiff, Stewart Dry Goods Company, a corporation operating a department store containing seventy-seven departments in Louisville amounted to $3,000,000, the tax upon which is a little over $23,000.00. Those of the plaintiffs, Levy Brothers, a partnership operating a department store in Louisville, amounted to $1,250,000, the tax upon which is almost $5,500.00. The gross sales of the plaintiff, J. C. Penney Co., in this state, a corporation, a chain store operating department stores in and out of this state, twenty-one of which are located in this state, are not before me. The tax thereon seems to be about $10,000.00. And the gross sales in this state of the plaintiff, The Kroger Grocery & Baking Company, a corporation, a chain store operating retail groceries in and out of this state, 263 of which are located in this state, amounted to $14,500,000.00 in round numbers, the tax upon which is approximately $124,000.00. The tax of the Great Atlantic & Pacific Tea Company, one of the twenty-five protected by the injunction, is estimated at approximately $120,000.00 and the taxes of the other merchants so protected is placed at about $50,000.00. This makes the whole tax not over $450,000.00. Of this tax the Kroger Grocery & Baking Company and the [fol. 228] Great Atlantic & Pacific Tea Company pay more than one half though their aggregate gross sales are only 8% of the gross sales in the state. The tax of the Kroger Grocery & Baking Company on $14,500,000.00 gross sales is more than $18,000.00 in excess of that paid by 24,163 merchants on $362,000,000.00 gross sales. The Stewart Dry Goods Company operating a single department store in Louisville pays $23,000.00 taxes on $3,000,000.00 of gross sales, nearly one-fourth as much as the 24,163 merchants making returns upon gross sales amounting to $362,000,000.00, of those 24,163 merchants only 35 of them made gross sales in excess of $400,000.00. The sum yielded by the tax is a measly sum as compared with the needs of the

state and twenty-nine merchants out of over 24,000 pay three-fourths of this sum. In the case of the plaintiff, The Kroger Grocery & Baking Company, its profit in this State was in round numbers $172,000.00. Deducting from this the tax leaves $48,000.00 as net profit, or 1/3 of 1% of the gross sales. The net profit in 1931 would have been less than $40,000.00 and in 1932 there would have been a loss of $9,000.00. The same tax applied to its entire system would turn a profit of $1,400,000.00 into a loss of $700,000.00.

Apparently the sum yielded by the tax is contributed to generally by the retail merchants throughout the state. As a matter of fact, by reason of the credits against the tax, which the act authorizes, and which possibly of itself may render it unconstitutional, more than two-thirds of the retail merchants of the state make no contribution whatever to that sum. The statute is both vindictive and deceptive.

Another particular in which it seems to me that the Act is unconstitutional is that it discriminates against garden and farm products raised in other states, in that it excepts from its provision retail merchants selling garden and farm products raised by them in this state. A retail merchant who sells such products raised elsewhere is subject to the tax. The plaintiff, The Kroger Grocery & Baking Com-
[fol. 229] pany, comes within that category. It operates a farm of 360 acres in Ohio named "Country Club Farm" after the "Country Club" brand, one of its best known brands. On that farm it produces cattle, sheep, hogs, poultry, milk and garden and other farm products which are sold at retail in this state. The language of the exception is "those actually engaged in gardening or farming and selling garden or farm products raised by them in this state". The Court of Appeals of Kentucky in the case of Moore vs. State Board, 239 Ky. 729, construed this exception as follows:

"However, we are of the opinion that the phrase 'in this State' was meant to modify the word 'selling' and not 'raised'. The whole import of the Act is the levy of a tax measured by sales made in this state. It is the sales which count, not the place where the goods sold are produced. It was plainly the purpose of the act to exempt from its operation those engaged in gardening and farming and selling their own products, such sales the Legislature intended to be without the operation of the act and

it was of no moment to that body where the produce sold was raised."

The construction placed on the exception is as if it read "those actually engaged in gardening and farming and selling in this state garden or farm products raised by them." It seems to me that construing it to mean as if it so read is taking unauthorized liberty with the language of the Act. There is one consideration, however, which makes it certain that the legislation had no such meaning. To so read the statute exempts the plaintiff, The Kroger Grocery & Baking Company, from the act. The exemption is not of persons, but of retail merchants so engaged in selling and that plaintiff is such a merchant. It is inconceivable that the legislature intended to make such an exemption. Then, if it be taken that it did, this circumstance of itself would seem to affect the validity of the act. It will hardly do to hold that the plaintiff, The Kroger Grocery & Baking Company, shall not pay the tax and The Great Atlantic & Pacific Tea Company shall. This [fol. 230] is a case, as I see it, where this court is not bound to follow the state court in its construction of the Act. It is governed by the statement on this subject in the case of Edward Hines Trustees v. Martin, 268 U. S. 458, 463.

On the other question involved I think that the plaintiffs have a plain and adequate remedy at law in this court. Where this state levies a tax which the taxpayer claims is illegal and pays under protest, it is exacted from him by duress and the official into whose hands it comes and the state itself hold it in trust to repay to the taxpayer if it is held by the court to have been illegal. It cannot and should not be used for the purpose for which it was levied and collected, at least, until the lapse of a resonable time for the taxpayer to assert his right. Nothing else appearing it is to be taken that this trust will be respected. In this state it has been the invariable practice to so treat taxes so paid and upon its being held that the tax is illegal to repay it at once. This is unaffected by the present wretched financial condition of the state. If the tax paid has not been kept intact so as to enable such repayment to be made there is always enough cash in the general fund sufficient for that purpose. Sections 4688-1 to 4688a-2 and 4689,

Kentucky Statutes, do not relate to warrants drawn by the Auditor on the Treasurer to repay illlegal taxes which have been collected. They relate solely to warrants so drawn in favor of voluntary creditors of the state. Hence they have no bearing here. Section 162, Kentucky Statutes, relates to warrants drawn to pay such taxes. A decision of the Kentucky Court of Appeals is not needed to make good any of these propositions. Their correctness is apparent. A recognition of the invariable practice of the state officials to respect the trust imposed by payment under protest of taxes claimed to be illegal and an indication that the Appellate Court of the state will enforce such trust is to be found in the case of Talbott, Auditor, vs. Childers, Execu- [fol. 231] tor, 247 Ky. 568. It involved the question as to whether a succession tax paid by an executor in order to procure the right to transfer corporate stock could be recovered when it had not been made under protest. The court, in demonstrating the need for such a protest made at the time the tax was paid, said:

"So that the Collector thereof may become forewarned that an effort would be later made to recover the amount, either in whole or in part, and so that the distributors of such tax to said agencies entitled to it might become advised that payments so made are not permanent but only tentative, subject to be refunded by whatever proceeding payor might thereafter take."

See also case of Talbott vs. Urquhart's Exors., 250 Ky. 143.

Section 10 of the act here involved expressly authorized the taxpayer to bring an action to recover the tax which he has paid under protest. This authority is unlimited and amounts to a consent on the part of the state that it may be sued in this court. If judgment is rendered in its favor this court has jurisdiction by mandamus to compel repayment of the tax. If limited to the general fund therefor, there is always sufficient in that fund out of which it can be paid. But it is not to be expected that it will be so limited. It should be taken that the tax paid, if paid under protest, will be kept intact so that it can be repaid upon such adjudication. There is nothing in the act against this.

[fol. 232] IN UNITED STATES DISTRICT COURT

MOTION FOR FINDINGS AND CONCLUSIONS—Filed December 26, 1933

The plaintiff in each of the above-styled cases, by counsel, moves the Court, before entry of a decree herein, to find the facts specially upon which its decree is based and to state separately its conclusions of law thereon, and to enter of record such findings and conclusions, all as provided by Equity Rule 70½ as expounded by the Supreme Court in Pub. Serv. Com. v. Wisconsin Tel. Co., 289 U. S. 67, at page 69; Tax Comm'rs. v. Jackson, 283 U. S. 527, at page 533.

Nichols, Morrill, Wood, Marx & Ginter; Trabue, Doolan, Helm & Helm, Attorneys for Plaintiffs.

Have seen. 12/26/33. H. W. Batson.

[fol. 233] IN UNITED STATES DISTRICT COURT

Findings of Fact and Conclusions of Law—Filed May 21, 1934

Findings of Fact

The court, pursuant to Equity Rule 70½, makes the following findings of fact:

State Warrants

1. The state of the General Fund of Kentucky on the dates set out hereunder is indicated by the figures which appear after the respective dates.

[fol. 234]

Date	Balance to credit of general fund	Outstanding warrants against general fund
6/30/1922	$297,967.85	$4,702,709.11
6/30/1923	2,590,470.14	5,947,750.40
6/30/1924	167,535.74	4,089,151.37
6/30/1925	310,242.68	4,127,746.17
6/30/1926	10,387.44	4,329,772.33
6/30/1927	257,566.83*	4,664,820.89
6/30/1928	440,328.14	6,715,347.99
6/30/1929	1,880,984.77	8,060,920.69
6/30/1930	1,826,244.05	8,533,394.79
12/31/1930	1,250,168.22	9,880,501.76
6/30/1931	2,440,128.46	11,023,911.53
12/31/1931	838,[illegible]9.63	12,637,990.48
6/30/1932	1,302,[illegible]67.69	13,851,414.57
12/31/1932	573,831.32	14,415,403.69
5/25/1933	1,898,229.25	14,668,744.57
7/30/1933	.....	15,197,005.42

*Deficit.

2. Claims against the Commonwealth of Kentucky, whether for refund of taxes or on account of other obligations of the State, are first audited by the Auditor of Public Accounts, and, if found correct, he issues a State warrant for the amount thereof, which is, in effect, an order on the Treasurer for the amount of the claim. These warrants are made payable out of different funds, some out of the General Fund, and others out of other funds set aside by legislative act for specific State purposes. If the Treasurer has on hand in the fund against which the warrant is drawn sufficient funds to pay same at the time it is presented, it is usually paid; otherwise it is stamped interest bearing, and after warrants have been stamped interest bearing, they are called and paid in the order in which they are issued. Due to lack of funds, however, to the credit of the General Fund, no interest bearing warrants against that fund issued since 1927 have been paid.

3. Outstanding interest bearing warrants against the General Fund of the State, during all the time since the passage of the Act in question in these cases, have sold below par, the price at times being as low as eighty-three cents on the dollar.

4. It has been the practice of the State Treasurer in recent years to pay in cash, upon presentation, warrants issued for refund of taxes, and such has been the uniform practice of the Treasurer who has been in office at all [fol. 235] times since the passage of the Act in question, and he has at all times since he has been in office followed the practice of keeping himself in financial position to refund all taxes paid under legal protest when required so to do, and he at all times has been in a position so to do with reference to the taxes involved in these actions. There is no statute in Kentucky, however, specifically authorizing such preferential treatment of tax refund warrants, nor has the Court of Appeals of the State ever held that such practice is authorized by the laws of the State.

5. Unless warrants drawn under Section 10 of the Act were given preferential treatment in payment, they could not be collected within a reasonable time.

Conclusions of Law Based Upon the Above Findings of Fact

Inasmuch as there is doubt of the authority of the Treas-

urer of the State to give preference in payment to warrants issued under Section 10 of the Act, that section fails to afford to the plaintiffs as certain, speedy, complete and efficient a remedy at law as is available to them in equity, and therefore these actions are cognizable in equity.

Facts Relative to Fourteenth Amendment

1. The challenged Act is essentially a revenue measure.

2. The tax imposed by the Act, exclusive of the credits allowed, is as follows:

Sales of first four..	$100,000	rate of	1/20 of 1%,	or a tax of	$200.00
Fifth	$100,000 of sales	" "	2/20 of 1%,	or a tax of	100.00
Sixth	$100,000 of sales	" "	5/20 of 1%,	or a tax of	250.00
Seventh	$100,000 of sales	" "	8/20 of 1%,	or a tax of	400.00
Eighth	$100,000 of sales	" "	11/20 of 1%,	or a tax of	550.00
Ninth	$100,000 of sales	" "	14/20 of 1%,	or a tax of	700.00
Tenth	$100,000 of sales	" "	17/20 of 1%,	or a tax of	850.00
Eleventh	$100,000 of sales	" "	1%,	or a tax of	1,000.00
On each	$100,000 of sales hereafter, 1%.				

[fol. 236] 3. Examples of the special license taxes and corporation taxes allowed as credits under Section 4 of the Act are: the corporation license tax of seventy cents on each one thousand dollars of business transacted by the corporation in the State, or on the value of the capital stock of the corporation; cigarette license tax of $10; soft drink license $2.50; oleomargarine license $3.; playing cards $10.00; pistols $10; bowie knives, dirks, etc. $100, etc.

4. There are approximately 25,000 retail stores in the State of Kentucky.

5. No merchant in Kentucky has an annual sales volume in excess of fifteen million dollars. Without giving effect to the credits authorized by Section 4 of the Act, there is shown below the amount of taxes which are payable by merchants falling in the respective brackets fixed by the Act, and also the effective rate of such tax expressed in percentage of gross sales.

Amount of sales	Total tax payable	Effective rate
$400,000	$200	.05
500,000	300	.06
600,000	550	.0917
700,000	950	.1357
800,000	1,500	.1875
900,000	2,200	.2444
1,000,000	3,050	.305
2,000,000	13,050	.6525
3,000,000	23,050	.7683
4,000,000	33,050	.8263
5,000,000	43,050	.861
10,000,000	93,050	.9305
15,000,000	143,050	.96

6. For the year 1930, 24,163 returns were filed by merchants subject to the Act, and these returns showed an aggregate of gross sales of $362,848,264. 24,128 of these reporting merchants showed gross sales of less than $400,000 each, and the aggregate gross sales of these 24,128 was $340,197,497. 16,413 of the merchants falling in this group, by reason of credits allowed by Section 4, paid no tax. The total tax levied against this group, after the allowance of credits, amounted to $89,220.76 for the year 1930.

[fol. 237] 7. The following is a correct analysis of the report filed by the 24,163 merchants above referred to for the year 1930, showing the number of returns in the various brackets, their gross sales in the same groups, and the net tax after deduction of credits allowed by Section 4, except that there is not shown the effect of the operation of the challenged Act upon the business of those merchants (25 in number), who made no report, having availed themselves of the opportunity afforded by the court to post bond in order to secure the protection of the injunction issued in these cases.

	Number of returns	Gross sales	Net tax
Sales less than $400,000	24,128	$340,197,497	$89,220.76
Sales between $400,000 and $500,000	13	5,866,935	1,261.37
Sales between $500,000 and $600,000	8	4,416,568	1,317.40
Sales between $600,000 and $700,000	5	3,234,563	1,768.56
Sales between $700,000 and $800,000	4	2,989,019	1,383.09
Sales between $800,000 and $900,000	1	814,559	0
Sales between $900,000 and $1,000,000	0	0	0
Sales in excess of $1,000,000	4	5,329,123	11,391.76
Totals	24,163	$362,848,264	$106,342.94

8. The following is a correct analysis of the returns, gross sales and net tax, after the allowance of credits under Section 4, for the year 1931, excluding the operation of the Act on the business of those merchants who have posted bond, made no report and paid no tax.

[fol. 238]

	Number of returns	Gross sales	Net tax
Sales less than $400,000	20,351	$290,824,180	$66,769.82
Sales between $400,000 and $500,000	10	4,520,653	1,007.59
Sales between $500,000 and $600,000	9	4,887,385	1,360.02
Sales between $600,000 and $700,000	3	1,927,791	1,461.17
Sales between $700,000 and $800,000	2	1,472,166	905.08
Sales between $800,000 and $900,000	3	2,549,814	3,118.74
Sales between $900,000 and $1,000,000	1	1,895,680	4,128.35
Sales in excess of $1,000,000	2	2,389,404	6,386.22
Totals	20,382	$310,467,073	$85,136.99

9. Similarly, the following is a correct analysis of the returns of the same class of merchants for the year 1932, which had been filed up to and including April 17, 1933:

	Number of returns	Gross sales	Net tax
Sales less than $400,000	14,582	$178,783,514.26	$35,948.38
Sales between $400,000 and $500,000	4	1,835,261.79	282.28
Sales between $500,000 and $600,000	5	2,764,557.15	1,107.50
Sales between $600,000 and $700,000	1	601,558.29	0
Sales between $700,000 and $800,000	2	1,522,598.66	1,297.06
Sales between $800,000 and $900,000	1	864,205.61	1,534.44
Sales between $900,000 and $1,000,000	1	939,417.13	0
Sales in excess of $1,000,000	2	1,001,903.32	2,747.03
Totals	14,597	$186,313,016.81	$42,916.69

[fol. 239] 10. The evidence fails to show that there is no relation between sales volume and net earnings, nor does it satisfactorily rebut a widely accepted theory of economists that, as a general proposition, increased volume of sales results in increased profits and increased ability to pay. On the contrary, there is substantial evidence supporting the affirmative of each of these propositions.

11. The rate of profit realized from sales at retail generally varies with the character of goods sold.

12. Under the Act goods sold on credit are included in gross sales, whether payment therefor is made or not.

13. The management of a store or stores is one of the fundamental factors in determining whether or not a profit is realized, and the amount of profit.

14. As a general proposition, those merchants doing the largest volume of trade are enabled to secure the highest type of management.

15. In the field of retail merchandising large scale enterprises, properly and prudently managed, enjoy economies in operation, such as the ability to purchase in large quantities and wider spread of overhead, not generally enjoyed by those stores doing a small volume of business. Yet in exceptional instances some retail merchants enjoy a high rate of profit on a small volume of sales, while in other cases the margin of profit is very low, even though the sales volume be very large.

16. Sales made by merchants taxed under any of the brackets of the Act are in competition with sales made by merchants selling the same character of goods who are taxed under other brackets of the Act.

17. The Kroger Grocery & Baking Company operated 5302 stores in the United States in 1930; 4980 stores in 1931, and 4816 stores in 1932. Of this number 289 were [fol. 240] located in Kentucky in 1930; 254 in 1931, and 249 in 1932. The average annual sales per store of the Kroger Grocery & Baking Company in Kentucky over the past few years has been approximately $50,000. Most, if not all, of the stores of this company are in competition with other grocery stores located in the neighborhood, and the sales of some of these competing stores exceed the sales of the Kroger Stores with which they compete. Some of these competitors of the Kroger stores are owned by merchants operating single stores with a relatively small volume of sales, and in some instances are entitled to enough credits under Section 4 of the Act to wipe out the tax liability under the Act, whereas the competing Kroger stores, by reason of the fact that the Kroger tax liability is determined upon the aggregate sales of all of its stores, pay an average annual tax of between $425.00 and $450.00.

18. The retail sales of Kroger in the United States for the years, 1930, 1931 and 1932 have been as follows:

1930	$267,094,345.26
1931	244,371,147.17
1932	213,159,742.69

and the Kentucky sales for this same three year period have been:

1930	$14,653,448
1931	13,496,915
1932	11,447,611

19. The gross sales of the Stewart Dry Goods Company are approximately $3,000,000 per year. Without taking account of the credits to which it is entitled under Section 4 of the Act, its annual tax under the Act is approximately $23,000, which would figure approximately 76/100 of one per cent of gross sales. This company operates seventy departments, each bearing its proportionate part of the expense of the whole establishment. No department has annual sales in excess of $400,000, and in a considerable number of instances the total sales of a particular department of Stewarts are approximately the same as the sales of specialized stores selling the same line of goods, and [fol. 241] in some cases the sales of particular departments do not equal the sales of specialized stores in competition with that particular department. Department stores such as Stewart's do not enjoy any particular advantage over their specialty store competitors in purchasing, but do have over their specialized competitors some advantage, due to the fact that customers who come to purchase one article are attracted to articles and make purchases in other departments.

20. Levy Brothers are individuals, who operate as partners a department store in Louisville, Kentucky with annual gross sales of approximately $1,250,000, on which they are required to pay a tax under the Act of approximately $5,500. Departments in this store compete with one or two chain store organizations which have only one store in the State of Kentucky. They also compete with individual specialized stores, which in some instances, because of the comparatively small volume of business done and credits allowed, pay little or no tax.

21. Byck Brothers operate a department store in Louisville, Kentucky, with annual gross sales of approximately $700,000. They also operate a department by lease in the Wolf-Wile Department Store at Lexington, Kentucky. This department in Lexington is in no way affected by the sale

of goods in Louisville, but does compete directly with stores handling similar merchandise in Lexington, and its annual volume of sales is approximately $50,000. Under the Act, including the sales of this department, the tax of Byck Brothers is approximately 14/100 of one per cent of its gross sales. In a general way, this concern has the same problem of competition with single specialized stores as have Stewart Dry Goods Company and Levy Brothers, with relatively the same advantages.

Conclusions of Law on the Foregoing Findings of Fact

By reason of the foregoing findings of fact, we conclude that the Act does not deny the plaintiffs the equal protec- [fol. 242] tion of the law, within the meaning of the Fourteenth Amendment, in any of the particulars asserted by the plaintiffs.

Findings of Fact with Reference to Interstate Commerce

1. A considerable volume of the trade of the Stewart Dry Goods Company consists of sales made to customers in other States who buy merchandise by telephone, mail or personally from Stewarts, to be delivered at their place of residence in such other State. The record, however, fairly justifies the conclusion that such sales are actually consummated in Kentucky.

2. The Kroger Grocery & Baking Company ships packaged articles from outside the State of Kentucky to its stores in that State, where such articles are sold in the original containers in which they are packed for shipment. The retail sales of such articles, however, are separate and distinct transactions had after the goods have come to rest and become a part of the stock of merchandise of the particular store making the sale, such retail sales being entirely consummated in Kentucky.

3. The Kroger Grocery & Baking Company operates a farm in Ohio, where it raises farm and garden products, a portion of which is placed in some of its stores in Kentucky and sold by retail from such stores. The amount of such farm and garden products, however, is relatively small as compared to the total of such products handled by such stores.

Findings of Fact Relative to the Decision of Moore vs. State Board of Charities & Corrections, 239 Ky. 729

1. The case of Moore v. State Board of Charities & Corrections, supra, was filed on the 22nd day of December, 1930, which was prior to the filing of any of these actions.

2. The D. T. Bohon Company, cross-petitioner in the Forrest Moore case, represented to the State courts of Kentucky in that action that it was a taxpayer under the [fol. 243] act, and the case was decided on the theory that such a statement was true, but the Bohon cross-petition was filed in the Moore case after the institution of these actions and after their submission on plaintiffs' motions for temporary injunctions.

Conclusions of Law Upon the Above Facts

1. The decision in the Moore case by the State court, as to the meaning and scope of the Act in question, is binding upon this court.

2. As the Act has been interpreted and construed by the Court of Appeals of Kentucky in the Moore case, it does not violate the commerce clause of the Federal Constitution in any of the particulars urged by the plaintiffs.

Facts Relative to Claim of Confiscation

1. The evidence fails to show that the tax imposed is generally so burdensome upon those taxed as to deprive them of an opportunity to make a reasonable profit in their business.

2. The Kroger Grocery & Baking Company, for the year 1930, realized a net profit of 55/100 per cent on its entire gross sales; 9/10 per cent for 1931, and 1.15 per cent for 1932. These figures, however, are not typical of the experience of the class taxed, nor of any subdivision of such class; nor do they present a fair picture of the operation of that company under reasonably efficient management. For the first six months of 1933, under the management of Mr. Morrill, who became President of the company in 1930, the net profit of the company was $2,294,000, as compared to approximately $1,475,600 for the entire calendar year 1930; $2,199,000 for the entire year 1931, and $2,441,000 for the

entire year 1932; and the net profit for the first six months of 1933, after deduction of taxes, amounted to 2.49 per cent of gross sales.

[fol. 244] Conclusion of Law Based on the Foregoing Facts

Under the facts found, the tax imposed by the Act is not confiscatory, and therefore does not violate the due process clause of the Fourteenth Amendment, nor does it violate Section 181 of the Constitution of Kentucky or the Bill of Rights of that instrument.

These specific findings of fact are not to be construed as in derogation of any of our conclusions of fact set out in the opinion and not herein enumerated.

Xen. Hicks, U. S. Circuit Judge. Chas. I. Dawson, U. S. District Judge.

— —, 1934.

[fol. 245] In United States District Court

Equity. No. 610

Order and Decree—Entered June 19, 1934

This cause, having been heard on the merits, was submitted on August 21, 1933, upon the stipulations, proof and record set out in the order of submission entered as of that date, and the Court thereafter, to wit, on December 20, 1933, filed its opinion herein, concurred in by a majority of the Judges, Judge Cochran dissenting therefrom as set out in his dissenting opinion filed May 22, 1934, and now made part of the record herein.

Complainant, on December 26, 1933, moved the Court, before entry of any decree herein, to find the facts specially, upon which its decree is based, and to state separately its conclusions of law thereon, and to enter of record such findings and conclusions.

Thereafter, complainant, on March 24, 1934, and defendants on the — day of ——, 1934, by their respective counsel, tendered findings of fact and conclusions of law proposed by them respectively, and moved the Court to adopt same as set forth in their respective motions entered of record.

The Court, having considered this cause in chief and

upon the respective motions made by the complainant and by the defendants as to findings of fact and conclusions of law proposed by them respectively, and being now advised, orders and decrees herein as follows:

I

[fol. 246] (1) Complainants' motion entered herein December 26, 1933, for findings of fact and conclusions of law, is hereby sustained, and the Court, in compliance therewith, now files herein its findings of fact and its conclusions of law and orders same to be entered of record, such findings of fact and conclusions of law being concurred in by a majority of the Court and dissented from in part by the Honorable Andrew M. J. Cochran.

(2) Except to the extent set forth or indicated in the findings of fact and conclusions of law this day filed herein by the Court as a compliance with Equity Rule 70½, the motion of complainant entered herein March 24, 1934, to adopt and enter the findings of fact and conclusions of law tendered with complainants' said motion of that date, is hereby overruled; to which the complainants except.

(3 In like manner, except to the extent set forth or indicated in the findings of fact and conclusions of law this day filed herein by the Court as a compliance with Equity Rule 70½, the motion of defendants entered herein —— —, 1934, to adopt and enter the findings of fact and conclusions of law tendered with defendants' said motion of that date, is hereby overruled: to which the defendants jointly and severally except.

II

Pursuant to its opinion filed herein December 20, 1933, and its findings of fact and conclusions of law filed herein on the 21st day of May, 1934, the Court now adjudges and decrees:

(1) That the complainants are without an adequate remedy at law, and therefore the motion of defendants to dismiss the complaint as amended, for want of jurisdiction in equity, is denied: to which ruling the defendants except.

(2) That complainants take nothing by its bill of complaint as amended herein; that on final hearing upon the

[fol. 247] merits same is dismissed; and that defendants recover of complainants their costs herein expended; to all of which the complainants except.

(3) That complainants having this day stated in Court its intention to appeal from this decree insofar as it denies the relief sought by it and dismisses its bill of complaint as amended, it is, for the reasons set forth in the Court's opinion filed herein December 20, 1933, hereby ordered and adjudged that the interlocutory injunction heretofore granted in this cause shall be continued in effect as to the complainants and as to each retail merchant listed of record (by order entered herein March 30, 1931, and supplemented, as to other intervening taxpayers, by later orders) as included in the same class of taxpayers as complainants, and such interlocutory injunction shall remain in full force as to the complainants and each of said taxpayers so listed, until the final determination of complainants' said appeal; to all of which the defendants except.

Provided, however, that the complainants, for itself only, and each of said taxpayers so listed desiring to avail himself or itself of the benefit of said restraining order pending such appeal, for himself or itself only (and not one for another), in addition to the bonds heretofore given by them respectively, with the approval of the District Judge for this District, shall within thirty (30) days from the entry of this decree execute such bond or make such deposit of money or securities as may be reasonably necessary to secure the Commonwealth of Kentucky against loss of any taxes, interest, court costs, or any other proper charges that may be or may become due from such taxpayer for the calendar year 1933 under the Act assailed herein by complainant, in the event the validity of such Act should be finally established.

The amount of any such additional bond so given, or the amount or value of securities or money deposited by any taxpayer, shall be fixed at an amount equal to the estimated [fol. 248] taxes claimed from such taxpayer for the calendar year 1933.

The parties to this action, through their respective counsel, may by agreement between them determine the amount of any such additional bond to be executed by any taxpayer, and the surety thereon, or the nature, kind and amount of money or securities to be deposited in lieu of bond, and if

the parties, through their counsel, can not agree thereon, same shall be fixed by the District Judge of the District in which this cause is pending.

In the event the complainants or any one of said taxpayers shall fail to execute such bond or to give such security as is required of it or him or them to cover taxes accrued for the calendar year 1933, within thirty (30) days from the entry of this order and decree, said restraining order, as to such taxpayer so failing, shall be thereupon immediately dissolved as to taxes accrued for the calendar year 1933, and shall afford no further protection of such taxpayer as to such taxes for the calendar year 1933, but the taxpayer shall be entitled to the benefit of the injunction as to prior years for which it has executed a bond or made deposit of money or securities under orders heretofore entered in this cause.

The bonds heretofore executed by the complainants or by any taxpayer herein for any of the taxable years prior to the calendar year 1933 shall be continued in full force and effect pending the final determination of this cause on appeal, and in like manner all deposits of securities heretofore made shall be continued in pledge for the purposes for which such deposits respectively were made.

Xen. Hicks, Circuit Judge. Chas. I. Dawson, District Judge.

June 19, 1934.

Have seen: Trabue, Doolan, Helm & Helm, of Counsel for Plaintiff. S. H. Brown, Asst. Atty. Gen. Ky.; H. W. Batson, for Defendants.

[fol. 249] IN UNITED STATES DISTRICT COURT

ORDER APPROVING BONDS—Entered July 17, 1934.

This 17th day of July, 1934, came the parties in the above styled cause, by counsel, and filed of record herein bonds executed by the plaintiffs and other taxpayers hereinafter listed in compliance with the order and decree of this Court entered herein June 19, 1934, conditioned as therein provided to secure the Commonwealth of Kentucky on account of its claim for taxes for the year 1933, together with inter-

est, court costs and all other proper charges that may accrue thereunder.

J. C. Penney Company, in the amount of $13,000.00.
Kaufman-Straus Company, in the amount of $8,000.00.
Levy Bros. in the amount of $2,600.00.
H. P. Selman & Company, in the amount of $1,500.00.
Hook Drug Company, Inc., in the amount of $240.40.
Byck Bros. & Company, Inc., in the amount of $153.35.
J. Bacon & Sons, in the amount of $4,002.33.
Montgomery Ward & Co., Incorporated, in the amount of $2,000.00.
The Stewart Dry Goods Co., in the amount of $20,000.00.
Ben Snyder, Incorporated, in the amount of $5,960.00.
Lerman Brothers, in the amount of $3,600.00.

Chas. I. Dawson, Judge.

Have seen: S. H. Brown, Assistant Attorney General.

July 17, 1934.

[fol. 250] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed September 12, 1934

The plaintiffs, Fred Levy et al., conceiving themselves aggrieved by the order and decree entered herein by this Court on the 19th day of June, 1934, in the above entitled cause, insofar as said order and decree denies the motion of these plaintiffs, after notice and hearing, for an interlocutory injunction restraining the defendants as prayed for in the motion of the plaintiffs for such interlocutory injunction, and insofar as said order and decree dismisses the Bill of Complaint as amended, and denies to the plaintiffs a permanent injunction or any injunctive or other relief, hereby appeal to the Supreme Court of the United States from said order and decree.

The appeal herein prayed for is taken upon the grounds and for the reasons specified in the assignment of errors filed herewith.

Plaintiffs pray that said appeal be alllowed and that [fol. 251] a citation be issued thereon directed to the above named defendants, John B. Lewis, W. P. Sullivan and

Emerson Beauchamp, individually and as Members of the State Tax Commission of the Commonwealth of Kentucky, and J. Dan Talbott, individually and as Auditor of Public Accounts of the Commonwealth of Kentucky, commanding them and each of them to appear before its Supreme Court of the United States, to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record, proceedings and papers upon which said order and decree was entered be duly authenticated and sent to the Supreme Court of the United States.

——— ———, ——— ———, Solicitors for Plaintiffs.

[fol. 252] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed September 12, 1934.

The plaintiffs, by counsel, respectfully represent that in the record and proceedings had in the above-entitled cause and in the rendition of the decree herein appealed from there is manifest error, for which said decree should be reversed, and as cause for such reversal the plaintiffs make the following assignments of error:

1. The Court erred in failing to hold that the challenged Act designedly denies to plaintiffs and to other retail merchants similarly situated the equal protection of the laws, in that by reason of its classifications prescribed in Section 2 thereof, and its exemptions and credits or deductions provided in Section 4 thereof, and its consequent widely-varying rates of taxation, it unjustly and unreasonably discriminates against plaintiffs and other retail merchants having [fol. 253] a large volume of annual gross retail sales and in favor of other retail merchants having gross annual retail sales in smaller volume, through its unreasonable and arbitrary exaction of taxes from plaintiffs and other retail merchants in like situation, at excessive and grossly disproportionate rates arbitrarily levied in the higher brackets of said Act upon gross retail sales of larger volume, as compared with greatly reduced rates levied in its lower brackets upon other retail merchants having gross retail sales of smaller volume and therefore taxed at greatly reduced rates, or not taxed at all, by reason of

credits or deductions allowed them—all in disregard of capital invested by the taxpayer, or of his ability to pay, or of his earnings, income or profits accruing from his business of retail merchant, and likewise in disregard of the fundamental factor of management.

2. The Court erred in failing to hold that the classification of retail merchants for purposes of taxation prescribed in Section 2 of the challenged Act does not rest upon a reasonable basis, and does not have any reasonable relation to the subject matter of the Act, and therefore effects an unjust and unreasonable discrimination against these plaintiffs in the matter of taxation upon their gross annual retail sales as compared with the gross annual retail sales of other retail merchants having a smaller volume of such sales or greater exemptions, and thus denies to plaintiffs the equal protection of the laws guaranteed to them by the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

3. The Court erred in holding that the enactment of the challenged Act might be sustained upon a mere academic [fol. 254] theory of economists in classifying property for taxation, when the facts shown in the record and the actual results in operation of the law demonstrate (a) that such theory is fallacious and (b) that there is no reasonable relationship between the assumed theory and the varying rates of taxation prescribed for the several classifications made under the challenged Act.

4. The Court erred in failing to hold that there was no reasonable relationship between the "step up" or increase in rates of taxation levied by the challenged Act, on the one hand, and the claim tendency of profits to increase with increased sales, regardless of capital investment, management, or other factors, on the other hand.

5. The Court erred in finding that there is a taxable relationship between sales volume and net earnings.

6. The Court erred in failing to hold that the classification of all retail merchants in one general class, including therein Chain Stores, Department Stores, Mail Order Houses and singly-operated units, of whatever character, with subclassifications thereof and varying rates of taxa-

tion thereon, based on volume of sales alone, was arbitrary, unreasonable, vindictive and capricious.

7. The Court erred in failing to hold that the increases in rates imposed and taxes levied by the challenged Act in its higher brackets for taxation were out of all proportion to any actual or claimed increases in percentages of net profits to sales in such brackets respectively, and varied so greatly as to be arbitrary and unreasonable.

8. The Court erred in failing to hold, upon the evidence adduced, that the challenged Act, in its actual operation [fol. 255] and effect, exempts, wholly or substantially so, from the burdens of taxation levied by said Act, retail merchants who compete with plaintiffs in the same or similar lines of business but who have a smaller volume of gross sales than plaintiffs, while at the same time levying upon plaintiffs, with their larger volume of gross sales, excessive and exorbitant rates of taxation, wholly out of arithmetical proportion or any reasonable proportion to the volume of sales of other retail merchants exempted wholly, or substantially so, from the burdens of said Act.

9. The Court erred in failing to hold that the challenged Act denies to the plaintiffs the equal protection of the law in that it unjustly and unreasonably discriminates against the plaintiffs by reason of the facts found by the Court (except the mere computation of plaintiffs' taxes under the Act) as follows: that plaintiffs, for the taxable years of 1930, 1931 and 1932 had gross sales in Kentucky with resulting taxes under the challenged Act as follows:

	Sales	Taxes	Deduction
1930	$1,253,389.07	$5,583.89	$134.61
1931	1,320,075.00	6,250.75	134.61
1932	930,457.40	2,593.50	134.61

whereas for said years respectively a vast number of other retail merchants, many of whom actually and actively compete with plaintiffs, had gross sales in Kentucky with resulting taxes under the challenged Act as follows:

	Number of merchants	Sales	Net tax less deductions
1930	24,163	$362,848,264.00	$106,342.94
1931	20,382	310,467,073.00	85,136.99
1932	14,597	186,313,016.81	42,916.69

10. The Court erred in holding that the decision of Moore v. State Board of Charities and Corrections, re-
[fol. 256] ported in 239 Ky. 729, was binding upon the Court as to the construction of the challenged Act and in then refusing to adopt the construction attributed by that decision to the challenged Act.

11. The Court erred in failing to hold that the challenged Act, according to the construction approved by the Court, denies to the plaintiffs and others similarly situated the equal protection of the law in that, as so construed, it exempts from its operation merchants selling farm products raised by them and therefore exempts The Kroger Grocery & Baking Company, together with other taxpayers, but applies to plaintiffs and others doing a similar business.

12. The Court erred in failing to hold that the classification prescribed by the challenged Act, through deductions or credits allowed in Section 4, is arbitrary and unreasonable, and is unjustly discriminatory against these plaintiffs, and denies to them the equal protection of the law in that such classification allows to retail merchants (other than these plaintiffs) who do business in corporate form a credit or deduction for corporation license taxes paid by them, without allowing to these plaintiffs any such credits or deductions, or any compensating or corresponding credits or deductions.

Prayer for Reversal

Wherefore, for each and all of the reasons set forth in the foregoing assignment of errors, plaintiffs pray that the decree herein appealed from be reversed with directions to the District Court to set aside said decree and in lieu thereof to render a decree in all respects in accordance with the prayer of plaintiffs' Bill of Complaint.

Nichols, Morrill, Wood, Marx & Ginter; Trabue, Doolan, Helm & Helm, Solicitors for Plaintiffs.

[fol. 257] In United States District Court

In Equity. No. 610

Order Allowing Appeal—Entered September 12, 1934

This day came the parties, plaintiffs and defendants, by their counsel, and plaintiff filed herein its petition for ap-

peal to the Supreme Court of the United States from the final decree herein rendered by this court on June 19, 1934, and filed also its assignment of errors in support of said petition.

Therefore, it is ordered by the court

1. That the appeal to the Supreme Court of the United States prayed for by the plaintiff, as set forth in its petition for appeal, be and it hereby is allowed as prayed for in said petition.

2. That a transcript of such parts of the record and proceedings herein as the parties may by praecipe duly designate, be transmitted, duly authenticated, to the Supreme Court of the United States in the manner provided by law.

3. That a citation be issued admonishing the defendants and each of them to be and appear in the Supreme Court [fol. 258] of the United States within thirty days from this date as provided by law.

4. That an appeal bond for costs and damages upon said appeal in the penal sum of $1,000 shall be given by the plaintiff, conditioned as provided by law, and in view of the fact that the plaintiff and all other taxpayers claiming the benefit of the temporary restraining order issued in this case have complied with the order and decree of this court entered June 19, 1934, by giving a bond or other approved security for the payment of estimated taxes that may become due from them respectively for the tax years 1930 to 1933, inclusive, it is now ordered that said appeal bond for costs and damages required herein shall act as a supersedeas bond as well as a bond for costs and damages on appeal.

5. The citation upon appeal shall be issued and the surety thereon herein required shall be approved by the District Judge presiding in the Western District of Kentucky.

Xen. Hicks, United States Circuit Judge. Chas I. Dawson, United States District Judge.

Sept. 12, 1934.

[fols. 259 & 260] Bond on appeal for $1,000.00, approved and filed Sept. 12, 1934, omitted in printing.

[fols. 261 & 262] Citation in usual form showing service on Bailey P. Wooton and S. H. Brown, issued Sept. 12, 1934, omitted in printing.

[fol. 263] IN UNITED STATES DISTRICT COURT

In Equity. No. 610

STIPULATION AS TO TRANSCRIPT OF RECORD—Filed September 20, 1934

It is hereby stipulated and agreed that the record on appeal in this case in the Supreme Court of the United States shall consist of the following, omitting the style of the case, and also omitting certificates of oath or acknowledgment, and substituting therefor the words "duly verified:"

1. The record from this Court as printed for use of the Supreme Court on the former appeal of this case.
2. Mandate from Supreme Court with order filing same.
3. Order entered December 10, 1932.
4. Order amending interlocutory injunction.
5. Amended Bill.
6. Answer to Amended Bill.
7. Second Amended Answer.
8. Stipulation as to evidence on final hearing.
9. Order substituting Emerson Beauchamp as a party defendant.
10. Order of submission.

[fol. 264] 11. Stipulation as to statement of evidence.
12. Opinion of Judge Hicks and Judge Dawson.
13. Dissenting opinion of Judge Cochran.
14. Motion to find facts.
15. Finding of fact and conclusions of law.
16. Decree.
17. Order approving bonds.
18. Petition for appeal.
19. Assignment of errors.
20. Order allowing appeal.
21. Appeal bond.

22. Citation and endorsement of accepted service.
23. This Stipulation.

Nichols, Morrill, Wood, Marx & Ginter; Trabue, Doolan, Helm & Helm, Solicitors for Plaintiffs.
B. P. Wooton, Attorney General; S. H. Brown, Asst. Atty. Gen., Solicitors for Defendants.

[fols. 265-267] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 268] SUPREME COURT OF THE UNITED STATES

Statement of Points to be Relied Upon and Designation as to Printing Record—Filed Oct. 9, 1934

STATEMENT OF POINTS

Come now the appellants in the above entitled cause and state that the points upon which they intend to rely in this Court in this case are that the United States District Court for the Western District of Kentucky erred in the rendition of its final decree and in dismissing appellants' bill of complaint, in the following particulars:

Point 1. In failing to hold that the Challenged Act, Chapter 149 Session Acts of 1930, designedly discriminates against and denies to appellants and to other retail merchants similarly situated the equal protection of the laws, for the reason that the Challenged Act imposes upon the appellants and other retail merchants similarly situated a grossly excessive and disproportionate tax burden and at the same time wholly or partially exempts from the burdens of said Challenged Act the vast majority of other retail merchants competing with appellants and engaged in the same business, and for the further reasons specifically [fol. 269] set forth in appellants' assignment of errors numbered 1, 2 and 9.

Point 2. In failing to hold that the Challenged Act is, by reason of its classifications, exemptions, credits, disproportionate and widely varying rates of taxation, arbitrary, un-

reasonable, vindictive and capricious, as specifically set forth in assignment of errors numbered 3, 4, 5, 6, 7 and 8.

Point 3. In failing to hold that the Challenged Act denies to appellants and other retail merchants similarly situated the equal protection of the laws for the reason that said Act as construed by said Court exempts from its operations merchants selling farm products raised by them but applies to appellants and others similarly situated as specifically set forth in assignment of errors numbered 11.

Point 4. In failing to hold that the classification prescribed by the Challenged Act, through deductions or credits allowed in Section 4, is arbitrary and unreasonable, and is unjustly discriminatory against these appellants and denies to them the equal protection of the law in that such classification allows to retail merchants (other than these appellants) who do business in corporate form a credit or deduction for corporation license taxes paid by them, without allowing to these appellants any such credits or deductions, or any compensating or corresponding credits or deductions.

Fred Levy et al., by Robert S. Marx, Frank E. Wood, John C. Doolan, Harry Kasfir, James W. Stites, Solicitors.

[fol. 270] Service of a copy of the above list of points to be relied upon by appellants in the Supreme Court of the United States of America is hereby acknowledged and accepted on behalf of the several defendants and appellees.

John B. Lewis, W. P. Sullivan and Emerson Beauchamp, individually and as members of the State Tax Commission of the Commonwealth of Kentucky, and J. Dan Talbott, individually and as Auditor of Public Accounts of the Commonwealth of Kentucky, by S. H. Brown, Assistant Attorney General.

[fol. 271] Come now the Appellants in the above-entitled case and state that in their opinion the whole record as filed is necessary for consideration of the case excepting the following, which may be omitted:

1. Opinion of District Court filed December 9, 1931. (Printed Record, page 77.)

2. Order approving bonds. (Printed Record, page 87.)
3. Stipulation re substitution of J. Dan Talbott. (Printed Record, page 88.)
4. Petition for appeal—on first appeal. (Printed Record, page 89.)
5. Assignment of errors—on first appeal. (Printed Record, page 90.)
6. Order allowing appeal—on first appeal. (Printed Record, page 98.)
7. Stipulation re Transcript of Record—on first appeal. (Printed Record, page 100.)
[fol. 272] 8. Statement of points to be relied on—on first appeal. (Printed Record, page 102.)
9. Statement of portion of record to be printed—on first appeal. (Printed Record, page 105.)

Fred Levy et al., Appellants, by Robert S. Marx, Frank E. Wood, John C. Doolan, Harry Kasfir, James W. Stites, Solicitors.

Service of a copy of the above statement of portion of record to be printed by Clerk is hereby accepted and acknowledged on behalf of the several defendants and appellees mentioned hereinabove.

John B. Lewis, W. P. Sullivan and Emerson Beauchamp, individually and as Members of the State Tax Commission of the Commonwealth of Kentucky, and J. Dan Talbott, individually and as Auditor of Public Accounts of the Commonwealth of Kentucky; Bailey P. Wootton, Attorney General, by S. H. Brown, Assistant Attorney General.

[fol. 273] [File endorsement omitted.]

[fol. 274] SUPREME COURT OF THE UNITED STATES

STATEMENT BY APPELLEES OF PORTION OF RECORD TO BE PRINTED BY CLERK—Filed Oct. 9, 1934

Come now the appellees, in the above entitled case, and state that, in their opinion, in addition to those parts of the record designated by the appellants, there should be printed for consideration of the Court:

1. Opinion of the District Court filed December 9, 1931. (Printed Record, page 77.)

[fol. 275] John B. Lewis, W. P. Sullivan and Emerson Beauchamp, Individually and as Members of the State Tax Commission of the Commonwealth of Kentucky, and J. Dan Talbott, Individually and as Auditor of Public Accounts of the Commonwealth of Kentucky; Bailey P. Wootton, Attorney General, by S. H. Brown, Assistant Attorney General.

Service of a copy of the above statement of portion of record to be printed by Clerk is hereby accepted and acknowledged on behalf of the appellants and appellees mentioned hereinabove.

Fred Levy et al., Appellants, by Robert S. Marx, Frank E. Wood, John C. Doolan, Harry Kasfir, James W. Stites, Solicitors.

[fol. 276] [File endorsement omitted.]

Endorsed on cover: File No. 39,083. W. Kentucky, D. C. U. S. Term No. 455. Fred Levy et al., Appellants, vs. John B. Lewis, W. P. Sullivan and Emerson Beauchamp, Individually and as Members of the State Tax Commission of the Commonwealth of Kentucky, et al. Filed October 9, 1934. File No. 455, O. T., 1934.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 456

J. C. PENNEY COMPANY, APPELLANT,

vs.

JOHN B. LEWIS, W. P. SULLIVAN AND EMERSON BEAUCHAMP, INDIVIDUALLY AND AS MEMBERS OF THE STATE TAX COMMISSION OF THE COMMONWEALTH OF KENTUCKY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY

FILED OCTOBER 9, 1934.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 456

J. C. PENNEY COMPANY, APPELLANT,

vs.

JOHN B. LEWIS, W. P. SULLIVAN AND EMERSON BEAUCHAMP, INDIVIDUALLY AND AS MEMBERS OF THE STATE TAX COMMISSION OF THE COMMONWEALTH OF KENTUCKY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 18, 1934.

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[fols. a-1] [Caption omitted]

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF KENTUCKY

J. C. Penney Company, a Delaware Corporation, Plaintiff,

vs.

John B. Lewis, Selden R. Glenn and Henry M. Cline, Individually and as Members of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, Individually and as Auditor of Public Accounts of the Commonwealth of Kentucky, Defendants

Bill of Complaint—Filed Jan. 24, 1931

The plaintiff, J. C. Penney Company, a corporation organized under the laws of the State of Delaware, brings this bill of complaint against the defendants, John B. Lewis, Selden R. Glenn and Henry M. Cline, individually and as members of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, individually and as Auditor of Public Accounts of the Commonwealth of Kentucky, and says:

I

The plaintiff, J. C. Penney Company, is now and at all times herein mentioned it was a corporation duly created, organized and existing under the laws of the State of Delaware, with its principal office and place of business for the State of Delaware in the city of Wilmington, in the State of Delaware, and it is a citizen and a resident of the State of Delaware.

It is authorized to do and it is doing business in the Commonwealth of Kentucky, and since commencing to do business in Kentucky it has continuously complied with all the laws of the Commonwealth of Kentucky relating to foreign corporations authorized to do business therein, and particularly with the requirements of Section 571, Kentucky Statutes, relating to the manner in which foreign [fol. 2] corporations are required to qualify themselves to do business in the Commonwealth of Kentucky.

The defendants, John B. Lewis, Selden R. Glenn and Henry M. Cline, are the duly and legally appointed, qualified and acting members, and the only members, of the State Tax Commission of the Commonwealth of Kentucky, which is a Commission created pursuant to an Act of the General Assembly of the Commonwealth of Kentucky and at all times herein mentioned invested by the law of Kentucky with the duty of administering and enforcing all tax laws of the Commonwealth that are validly or constitutionally enacted.

The defendant, Clell Coleman, is now the duly elected, qualified and acting Auditor of Public Accounts of Kentucky.

Said defendants, John B. Lewis, Selden R. Glenn, Henry M. Cline and Clell Coleman, are all citizens and residents of the Commonwealth or State of Kentucky. The said John B. Lewis and Selden R. Glenn are inhabitants of the Western District of Kentucky, and said defendants, Henry M. Cline and Clell Coleman, are inhabitants of the Eastern District of Kentucky.

II

Under and by virtue of the terms of an Act of the General Assembly of Kentucky at its 1930 session herein referred to, which was approved by the Governor of the Commonwealth of Kentucky on March 17, 1930, but is void for the reasons hereinafter set out (said Act being officially published as Chapter 149 of the Session Acts of 1930, at pages 475 to 482), it is provided that the defendant members of the State Tax Commission of Kentucky shall be, and they are, charged with the duty of preparing blank forms for certain retail merchants operating in Kentucky, stores as defined in said Act, and with the further duty of ascertaining from them information as to the amount and volume of gross sales made by such retail merchants, and of ascertaining and fixing the amount of license taxes due from all such retail merchants operating stores in Kentucky as defined in said Act, and with the further duty of employing clerical and other assistants to carry out the duties attempted to be imposed by said Act upon said State Tax [fol. 3] Commission, and further charged with the duty generally to administer and to enforce the provisions of said Act as therein set out.

It is further provided in said Act that the defendant, Clell Coleman, as Auditor of Public Accounts of Kentucky, shall be, and he is, charged under said Act with the duty of collecting and of directing the disbursement of all taxes that may be levied or assessed or fixed by said State Tax Commission under or pursuant to the terms of said Act.

III

This suit arises under the Constitution or laws of the United States and the amount in controversy herein exceeds the sum or value of $3,000.00, exclusive of interest and costs.

The controversy in this suit is wholly between citizens of different States, to wit, between the plaintiff, which is a citizen of the State of Delaware, and the defendants named in the foregoing caption to this bill, who are all citizens and residents of the Commonwealth or State of Kentucky.

This is a suit of a civil nature and is brought in equity for the purpose of enjoining the defendants and each of them from enforcing or attempting to enforce said Act of the General Assembly of Kentucky, being Chapter 149 of the Session Acts of 1930, approved by the Governor of the Commonwealth on March 17, 1930, and for the purpose of enjoining the defendants or any of them from requiring of the plaintiffs and other taxpayers similarly situated as hereinafter set forth, the reports which said Act purports to require of retail merchants as the term "retail merchant" is defined in said Act, or any information in reference to sales made by the plaintiffs or any of said retail merchants similarly situated, as hereinafter set forth, or from collecting or seeking to collect from the plaintiffs or any of said retail merchants similarly situated any tax purporting to be levied or assessed upon the plaintiffs or any of said retail merchants similarly situated, as hereinafter set forth, or from instituting any prosecution against the plaintiffs or any of said retail merchants similarly situated as hereinafter set forth, to recover any of the penalties sought to be imposed by said Act upon the plaintiffs or any of said retail merchants similarly situated as hereinafter set forth, for a violation of any of the terms of said Act.

[fol. 4] Plaintiff charges that said Act is unconstitutional, null and void because, in the respects hereinafter stated,

it is violative of the various provisions of the Constitution of the United States and of the Fourteenth Amendment thereto, hereinafter more specifically set forth, and also violative of various provisions of the Kentucky Constitution, likewise hereinafter set forth.

IV

At a regular session of the General Assembly of the Commonwealth of Kentucky held at the seat of government of the Commonwealth, beginning January 6, 1930, to-wit, on January 21, 1930, there was introduced into the House of Representatives a bill known as House Bill No. 111, which by its terms provided for a license or excise tax upon each merchant doing business in Kentucky, which term "merchant" was defined in said bill as originally introduced to mean and include every person, association, copartnership or corporation engaged in the buying and selling of goods, wares or merchandise at any store, stand or place in Kentucky occupied for that purpose, said excise or license tax being graduated in said bill as introduced as follows:

For each merchant conducting not more than one store, an annual license tax of $25.00, and

For each merchant conducting his business in more than one store, an annual license tax of $25.00 for the first store; $37.50 for the second store; $50.00 for the third store; and on each additional store so conducted by him, a tax in an amount to be determined by adding $12.50 consecutively for each such additional store so conducted by him.

Said House Bill No. 111 so introduced into the House of Representatives on January 21, 1930, was read on the day of its introduction by the following title as endorsed upon said original bill and as entered upon and shown by the official Journal of the House of Representatives for that day:

"H. B. 111, An Act to restrain the unfair competition of chain stores, and in aid of individual merchants in the Commonwealth."

Immediately upon its introduction in the House of Representatives and its reading by the title above set forth,

[fol. 5] said House Bill No. 111 was referred to the Committee on Kentucky Statutes in the House of Representatives, which Committee, on February 14, 1930, reported said bill with a substitute therefor, which substitute was likewise read, as shown by the Journal of the House of Representatives, in full as "An Act to restrain the unfair competition of chain stores, and in aid of individual merchants in the Commonwealth."

Thereafter a second reading of said bill was had in the House of Representatives on February 18, 1930, and a third reading thereof had on February 19, 1930, and on each of said second and third readings said House Bill No. 111, as shown by the journals of the House of Representatives, was not read in full but was read only by the title above set forth, to-wit: "An Act to restrain the unfair competition of chain stores, and in aid of individual merchants in the Commonwealth."

Upon the third reading of said bill by said title, it was passed by the House of Representatives, and after its passage its title was amended, as shown by the House Journal, and the bill was then sent to the Senate, where it was likewise read the first time in full, and the second and third times only by its title, and thereupon, on its third reading, was passed by the Senate and returned to the House of Representatives, in which it originated, where it was later, on March 7, 1930, as shown by the Journal of the House of Representatives, reported by the Committee on Enrollment, having been examined and found to be correctly enrolled under its title as hereinabove set forth, to wit: "House Bill 111, An Act to restrain unfair competition of chain stores, and in aid of individual merchants in the Commonwealth."

Thereupon the bill, having been enrolled, was signed by the Speaker of the House of Representatives and by the President of the Senate, and sent to the Governor of the Commonwealth, who on March 17, 1930, returned it to the House of Representatives with his approval in writing appended thereto.

By its terms said bill, being thus passed and approved, became effective on March 17, 1930, and it is now officially published in the Session Act of 1930 as Chapter 149 of the Acts of 1930, approved March 17, 1930.

[fol. 6] V

Said House Bill 111 was introduced into the House of Representatives in response to a recommendation made to the General Assembly by the Governor of Kentucky in his annual message of January, 1930, that legislation be enacted to curb the competition of so-called chain stores with owners of so-called independent unit stores individually owned and operated, and in aid of such individually owned and operated stores.

While said House Bill 111 was pending before the House Committee to which it was referred upon its introduction, the case of Jackson v. State Board of Tax Commissioners of Indiana was decided on February 1, 1930, in which a measure similar in legal effect to said House Bill 111 as originally introduced was held violative of the Fourteenth Amendment to the Constitution of the United States and therefore void, as shown by the opinion in that case, reported in 38 Federal (2d) at pages 652-659.

Thereupon the nature, but not the purpose of said House Bill 111 was changed by amendment by the Committee to which it had been referred, and that measure as so amended and passed in the manner hereinbefore set out and approved by the Governor was so framed as to contain the obnoxious and unconstitutional features hereinafter set out.

VI

Said House Bill 111 as finally passed and approved and now published officially as Chapter 149 of the Acts of 1930 provides in full as follows:

"An Act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act.

"Be is enacted by the General Assembly of the Commonwealth of Kentucky:

"§ 1. The words 'retail merchant,' as used in this act,

shall mean and include every person, firm, association, co-[fol. 7] partnership or corporation opening, establishing, operating or maintaining any 'store,' as defined herein, for the purpose of and selling goods, wares or merchandise at retail in this State, except those actually engaged in gardening or farming and selling garden or farm products raised by them in this State. The term 'store,' as used in this act, shall be construed to mean and include any store or stores or any mercantile establishment or establishments in this State which are owned, operated, maintained or controlled by the same 'retail merchant,' as defined herein, either domestic or foreign, in which goods, wares or merchandise of any kind are sold at retail. The provisions of this act shall be construed to apply to every 'retail merchant' and 'store,' as defined herein, which is controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management.

"§ 2. Every retail merchant, as defined herein, shall pay an annual license tax for the opening, establishing, operating or maintaining of any store or stores, as defined herein, determined by computing the tax on the amount of gross sales as follows:

"One-twentieth of one per cent of the gross sales of Four hundred thousand ($400,000.00) Dollars or less; two-twentieths of one per cent on the excess of the gross sales over Four hundred thousand ($400,000.00) Dollars and not exceeding Five hundred thousand ($500,000.00) Dollars; five-twentieths of one per cent on the excess of the gross sales over Five hundred thousand ($500,000.00) Dollars and not exceeding Six hundred thousand ($600,000.00) Dollars; eight-twentieths of one per cent on the excess of the gross sales over Six hundred thousand ($600,000.00) Dollars and not exceeding Seven hundred thousand ($700,000.00) Dollars; eleven-twentieths of one per cent on the excess of the gross sales over Seven hundred thousand ($700,000.00) Dollars and not exceeding Eight hundred thousand ($800,000.00) Dollars; fourteen-twentieths of one per cent on the excess of the gross sales over Eight hundred thousand ($800,000.00) Dollars and not exceeding Nine hundred thousand ($900,000.00) Dollars; seventeen-twentieths of [fol. 8] one per cent on the excess of the gross sales over

Nine hundred thousand ($900,000.00) Dollars and not exceeding One million ($1,000,000.00) Dollars; one per cent on the excess of the gross sales over One million ($1,000,000.00) Dollars.

"§ 3. Every retail merchant, as defined herein, in order to ascertain the amount of taxes due and payable under the next preceding section, shall file with the State Tax Commission on or before the first day of February each year a written report verified by the affidavit of the owner or chief officer on such forms as it may prescribe, giving the number and location of its store or stores, as defined herein, the name and post office address of its owner or principal officer, the name and address of its officer or agent in charge of its business at each separate store, the nature and kind of business, the total gross sales during the preceding year ending the thirty-first day of December, and such other facts bearing on the proper taxation as the Tax Commission may require.

"The State Tax Commission may, in any case, require such additional information as it may deem necessary to enable it to perform its duties herein. It shall be the duty of the State Tax Commission from such reports, and from such additional information, as it may obtain, to ascertain the amount of taxes due, and to certify to every such retail merchant the amount of taxes due for the preceding year, based upon such reports and information as it may ascertain. Upon final action by the State Tax Commission, it shall certify to the Auditor of Public Accounts and to the retail merchant the amount of such tax due by each retail merchant, as defined herein, and it shall be the duty of each retail merchant to pay the amount of such tax to the Auditor of Public Accounts not later than thirty days thereafter.

"In reporting the gross sales for the year, 1930, retail merchants shall include only those sales made between the date that this act becomes effective and December 31, 1930, and the license tax due for the year 1930 shall be based on the amount of those sales only.

"§ 4. The license or excise tax levied herein, shall not be in lieu of any special state license, excise, occupational or corporation license tax due under the provisions of any law now in force, or that may hereafter be enacted. Should [fol. 9] any retail merchant, as defined herein, be liable

for and pay any special state license, excise, occupational or corporation license tax under the laws now in force, or that may hereafter be enacted, credit may be taken on the tax levied in this act for the amount of such special license, excise, occupational or corporation license tax so paid not to exceed the amount of the license or excise tax levied herein.

"§ 5. If any retail merchant, as defined herein, neglects or refuses to file the verified report or pay the tax due at the time herein provided, the amount thereof with an addition of a penalty of twenty per centum thereof, with interest at the rate of six per centum per annum from the date when due until paid, shall be collected on an account settled by the State Tax Commission as other taxes are settled and collected; and if collected by proceedings in any court, an additional penalty of twenty per centum shall be collected, as is authorized to be collected in revenue agent's proceedings under Section 4263-4 of the Kentucky Statutes.

"The said twenty per centum penalty thereon and interest due shall be paid into the State Treasury as part of the tax, and the twenty per centum penalty collected in revenue agent's proceedings shall be distributed as provided in section 4263-4 of the Kentucky Statutes.

"§ 6. The State Tax Commission, or any assistant or representative thereof, appointed in writing by it, is hereby authorized to examine the books, records, papers, files and equipment of any retail merchant, as defined herein, made taxable by this act, and to that end, shall have the power to examine witnesses under oath to verify the accuracy of any return made under the provisions of this act, or to ascertain whether or not any tax is due under the provisions of this act by any retail merchant; and in the collection of said tax, the State Tax Commission shall have the power to institute legal proceedings for the purpose of ascertaining the amount of tax due and the collection thereof with the penalties thereon, and the State Tax Commission shall be vested with all the powers under the law of the State for the collection of taxes. The State Tax Commission may, at or after the commencement of an action [fol. 10] for the purpose of collecting the amount of tax due and penalties and interest due thereon, as set out herein,

have an attachment against the property of the defendant, including garnishees, without the execution of a bond upon the filing of an affidavit showing the nature of the claim, that it is just, the sum which the State Tax Commission believes the plaintiff ought to recover and that the collection of the demand will be endangered by delay in obtaining judgment or a return of no property found. Any information gained by the State Tax Commission, or any assistant, agent or representative thereof, as a result of the reports, investigations or verification herein required to be made, shall be confidential, and any person divulging such information shall be guilty of a misdemeanor, and, upon conviction, shall be fined not exceeding Five Hundred ($500.00) Dollars; provided that, this prohibition shall not extend to information required in prosecutions for making false reports or returns or in the preparation and prosecution of legal proceedings, for the collection of any tax due under the provisions of this act, or any prosecutions for any other infraction of the tax laws of this State.

"§ 7. Any retail merchant, as defined herein, or any officer, director, trustee or agent, who shall fail, neglect or refuse to make the reports and pay the tax herein prescribed, or shall refuse to permit the State Tax Commission, its assistants, agents or representatives appointed by it in writing to examine the books, records, papers, files and equipment of such retail merchant, as defined herein, or who does, or attempts to do, anything whatever to avoid a full disclosure of the amount of business done, or to avoid the payment of the whole or any part of the tax or penalties due, shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding One Thousand ($1,000.00) Dollars, and in case the offender is an individual, he may be imprisoned in the county jail not exceeding six months, or both so fined and imprisoned. Such penalty shall be in addition to the penalty imposed in Section 5 of this act.

"§ 8. It shall be the duty of the State Tax Commission to administer and enforce the provisions of this act, and it is hereby authorized and empowered to prescribe all blanks, forms and reports necessary to carry out the provisions [fol. 11] of this act, and all costs and expenses incurred by the State Tax Commission in the administration of this act shall be paid out of the funds collected hereunder.

"§ 9. All taxes collected under the provisions of this act shall be paid to the Auditor of Public Accounts, and of such amounts so received by the Auditor in any fiscal year, one-half part shall be set aside and credited to the Board of Charities and Corrections for the specific purpose of repairing, maintaining and constructing permanent improvements for the use of the institutions under the control of said board. The remainder of the amounts so collected and received by the Auditor in any fiscal year shall be credited to a fund to be used for the specific purpose of liquidating any indebtedness of the Commonwealth.

"§ 10. No suit shall be maintained in any court to restrain or delay the collection or payment of the tax herein imposed upon any ground whatever, but the aggrieved taxpayer shall pay the tax as and when due, and if paid under protest may at any time within two years from the date of such payment sue the Auditor of Public Accounts in an action at law to recover the tax so paid, with legal interest thereon, from the date of payment. If it is finally determined that said tax, or any part thereof, was wrongfully collected for any reason, it shall be the duty of the Auditor of Public Accounts then in office to issue his warrant on the Treasurer of the Commonwealth of Kentucky for the amount of such tax so adjudged to have been wrongfully collected, together with interest thereon, and the Treasurer shall pay same out of the General Fund of the State. A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made, and which are not barred by the limitation of two years herein imposed.

"§ 11. The provisions of this act are severable and if any of its provisions or any penalty provided by this act shall be held unconstitutional, such provision or the particular penalty held to be invalid may be rejected without affecting the remainder of the act or such part of the penalties as are not held to be invalid and the decisions of the courts [fol. 12] shall not affect or impair the remaining provisions of this act or any of the other penalties anywhere in this act provided. It is hereby declared as a legislative intent that this act would have been adopted had such unconstitutional provisions or such invalid penalties not been included therein.

"§ 12. All laws and parts of laws in conflict herewith are hereby repealed to the extent of such conflict.

"§ 13. Whereas, the present state revenue does not meet the immediate needs for the maintenance and development of the State government and its agencies, an emergency is declared to exist, and this act shall become a law and be effective upon its passage and approval by the Governor.

"Approved March 17, 1930."

VII

Throughout the calendar year 1930, this plaintiff has been engaged in conducting 21 retail stores, one of which has been operated since March 21, 1930, in 21 different cities or towns hereinafter mentioned, in the Commonwealth of Kentucky, where plaintiff sells exclusively at retail Dry Goods, Shoes, Clothing, Notions, Piece Goods, and similar articles of merchandise usually handled in stores of the same general character and hereinafter more specifically set forth in connection with a statement as to the merchandise handled in the several departments into which each of its stores is divided.

It sells exclusively at retail and exclusively for cash—extending no credit—in each of its stores in Kentucky, which are located in the cities or towns hereinafter mentioned, namely:

Maysville,	Mayfield,	Frankfort,
Paducah,	Owensboro,	Hopkinsville,
Richmond,	Bowling Green,	Winchester,
Middlesboro,	Paris,	Henderson,
Madisonville,	Princeton,	Georgetown,
Glasgow,	Lancaster,	Central City,
Mount Sterling,	Lexington,	Corbin,

Gross sales made by plaintiff in said retail stores respectively during the calendar year 1930 and during the period [fol. 13] of said calendar year beginning March 17th and ending December 31st, both dates inclusive, are as follows:

Store number	Gross sales calendar year 1930	Gross sales March 17 to December 31, 1930
1	$104,586.62	$81,782.61
2	114,666.90	93,598.00
3	101,583.71	84,008.18
4	312,449.10	262,149.56
5	244,892.55	198,856.14
6	111,537.69	88,842.16
7	165,120.03	133,643.96
8	129,039.14	108,590.68
9	129,968.63	107,280.25
10	59,920.58	49,457.63
11	89,879.43	72,875.37
12	66,549.75	55,775.04
13	66,228.17	55,819.40
14	59,092.10	48,887.79
15	59,514.91	48,465.65
16	79,206.38	65,854.21
17	39,015.55	31,431.75
18	80,270.84	68,027.16
19	73,463.52	62,355.95
20	64,034.36	51,345.64
21	85,128.10	85,128.10
Total gross sales in all stores in Kentucky	$2,236,148.06	$1,854,174.23

VIII

Plaintiff conducts in each of said retail stores owned or operated by it in Kenutcky what is known as a department store, embracing in a typical store of those above mentioned and in practically every one of its stores so mentioned, separate departments, in which plaintiff sells at retail merchandise of various kinds within the general classification of merchandise sold by it, as follows:

(1) Men's Wear, including dress and work clothing, furnishings, hats, gloves;

(2) Women's Wear, including lingerie, accessories, hosiery and kindred items;

[fol. 14] (3) Women's Ready-to-Wear, including women's and girls' dresses and coats, and millinery;

(4) Shoes, Men's, Women's and Children's shoes and rubber footwear;

(5) Piece goods, including silk and cotton piece goods, and dress goods, draperies, linens, bedding, rugs;

(6) Notions, Infants' Goods, Toilet Goods.

Each of said retail stores is operated by plaintiff separately from its other stores. A complete set of books of accounts is separately kept for each of said stores. These books show all phases of the operation of said store, such as its sales, expenses of operation, rental, taxes, insurance and all other overhead expense, enabling plaintiff to determine, after allocating to each store its proper proportion of plaintiff's overhead, the net results of operation of each and every one of its said retail stores. Through this system of record keeping, plaintiff can determine the wisdom or policy of maintaining or continuing the operation of a given store, or any changes of policy to develop sales in each store.

In the conduct of its general business in each of the Kentucky cities or towns in which its owns and operates a store, plaintiff comes into competition with a large number of other stores selling merchandise of a similar character in the same city and in other near-by cities in Kentucky, and the same is true as to each department operated by plaintiff in each such retail store inasmuch as each of said departments is compelled to and does actively compete with the specialized stores or with stores dealing in similar lines of goods in the same city or town or near-by cities or towns.

Such competition extends not only to the matter of buying power but also to selling and the fixing of prices on goods sold, so as to make them sell in competition with other dealers in similar goods in the same city or town or near-by cities or towns, and such competition applies not only to plaintiff's conduct of each such store as a whole but as to its conduct of each unit or department in each such store.

IX

There is in each Kentucky city or town where this plaintiff conducts a retail store a large number of individuals, co-

[fol. 15] partnerships and corporations which are engaged in the business of a retail merchant and are in active competition with this plaintiff, and which own and/or operate a single store in which a retail business is carried on similar to that carried on in the same city or town by this plaintiff. Said retail merchants competing with the plaintiff conduct their business under similar circumstances and in many instances do a very much larger volume of business and have much larger gross retail sales than the store of this plaintiff located in the same city or town and directly competing therewith.

This plaintiff, in each of its stores, carries on its business as a retail merchant in every way exactly as the business of a retail merchant is carried on by its competitors in stores which are operated by them respectively and which are separately owned and/or operated by one individual, co-partnership or corporation doing business as a retail merchant.

Plaintiff deals in the same character of articles and merchandise and sells to the same public and its business is distinguishable from that of a retail merchant operating only one store in no way whatsoever except that in plaintiff's case it owns and operates more than one store in Kentucky, though at widely-separated points, while in the case of other retail merchants competing with it, such retail merchant owns and/or operates but one store in Kentucky, though in many instances such retail merchant actually owns and operates in other States a large number of retail stores conducting the same general kind of business.

The ownership and/or operation by plaintiff of more than one store in different cities or towns does not increase the fire hazard to property in any of said cities or towns, or injure the health or morals of the community, or require increased or additional public or police protection beyond what may be required in the case of any other store of like character handling a similar class of merchandise, regardless of the number of stores that its owner may elsewhere own and operate.

X

The business conducted by plaintiff as a retail merchant in Kentucky and elsewhere has developed gradually through

constant study and application of efficient broad-gauge [fol. 16] methods of conducting the business of a retail merchant with due regard to the interests of the buying public and a sustained effort to sell merchandise at the lowest possible price consistent with a small percentage of profit on each individual sale and the development of a large volume of sales and a more rapid turn-over of merchandise and capital.

The founder of plaintiff's business was J. C. Penney, who began his business career as clerk in a general store. The proprietor of that store helped him to establish himself in a similar business in another town, where he proved to be a successful merchant and soon developed as much business as that town had to offer, whereupon he invested his savings in a similar store, in another city or town, which he put in charge of his principal clerk; and in time the most competent clerk in that store was put in charge of another store in still another city or town. In this way there grew up a chain of stores, in which every manager was a partner or part owner, at least of the store managed by him. In due time a corporation was organized to take over the business thus jointly owned, and to protect the principle of each manager's partnership or part ownership, an opportunity was afforded them to acquire and practically all did acquire stock in the corporation so organized.

The manager of each of plaintiff's stores in Kentucky has charge of practically all matters relating to his particular store—in many instances to the same extent as a sole proprietor thereof. He determines for the store managed by him what lines of goods are best adapted to the needs of the buying public in that community and can thus be handled or sold to best advantage in that store. He selects all the merchandise to be handled in said store and determines the kind and quality thereof and has sole charge of supplying his store with goods to be stocked therein for sale.

He likewise maintains a local bank account in the city or town in which his store is located, where he deposits all proceeds received from the sale of goods in his store. From this said bank account he pays the salaries of the employees of his store and all other local expenses and, in his own discretion, from said bank account makes donations and sub-

[fol. 17] scriptions to any form of public welfare or civic or cultural organization in his community; and forwards sufficient funds to pay for the merchandise bought for sale in his store to a regional bank to be used in payment thereof.

The manager of each store is expected to and actually does identify himself with the city or town in which said store is located, and in many instances he owns his own home and is connected with various organizations, such as churches, lodges, luncheon clubs, and local organizations of merchants or taxpayers or citizens generally.

Practically every manager of a local store in any city or town is employed under a contract with plaintiff, by virtue of which contract he receives a salary, and in addition thereto, a percentage of the profits of said retail store conducted by him. A successful manager has always been given the privilege of purchasing stock in plaintiff at a price below the current market quotations, with the result that such manager of a store in Kentucky is practically a partner with this plaintiff in the operation of said store, so that the impo-tion of the unjust tax herein complained of directly affects not only the income of this plaintiff but also the income which such manager of plaintiff receives as the direct result of his conduct of his said store in that said tax not only reduces the profits of said retail store but will inevitably reduce the amount of sales which can be made in said store by rendering this plaintiff and its said local manager unable to meet competition with other stores in the same or near-by localities in various highly-competitive lines if plaintiff is to be burdened with the payment of the illegal tax assailed in this case.

XI

As long as it has been doing business in Kentucky, plaintiff has paid all ad valorem taxes levied upon its property by competent State, county or municipal authority, and has likewise paid all valid or legal excise or occupational taxes exacted of it by any such authority.

In addition to the payment of its annual ad valorem taxes, plaintiff has paid to the Commonwealth of Kentucky, during the calendar year 1930, corporation license taxes in the sum of $446.04, and has also paid, during the calendar year [fol. 18] 1930, to various cities or towns in Kentucky, li-

cense or occupation taxes levied by them respectively in sums aggregating $1,053.50.

Plaintiff does not sell in any of its stores in Kentucky any articles upon the sale of which any license or excise tax is levied by the Commonwealth of Kentucky.

XII

There is absolutely nothing in the business conducted or property or merchandise kept in plaintiff's retail store, or in plaintiff's method of conducting or managing same, that is in any degree inimical to the public health, the public welfare, the public morals, or the public safety, or which to any extent whatever increases any fire or police hazard beyond whatever hazard may appertain to other stores handling a similar class of merchandise with one-hundredth part of the annual volume of gross sales made by plaintiff.

Moreover, Chapter 149, Acts of 1930, herein referred to, is purely a tax measure and it does not purport to be an exercise of the police power of the State. It does not relate to the public health or the public welfare, or the public morals or the public safety. It does not attempt to regulate any business that is affected with a public interest. No provision is made therein for regulation supervision or inspection of any retail merchant upon whom or upon whose occupation it attempts to impose a tax. It is not an inspection measure in which fees are prescribed to cover the cost of inspection. No standards are set up for the conduct of the business of a retail merchant.

XIII

As a tax measure, the operation or effect of said Chapter 149, Acts of 1930, is not equal or uniform as applied to the retail merchants therein sought to be taxed, and, as hereinafter more specifically shown, the classification of retail merchants therein attempted to be made is deliberately and designedly so made as to be arbitrary, unreasonable, discriminatory, oppressive and prohibitory as to this plaintiff and all other retail merchants who are thereunder sought to be taxed at rates in excess of one-twentieth of one per cent upon their gross sales respectively, and moreover, in its higher brackets of taxation, confiscatory as to this plaintiff and all others similarly situated.

[fol. 19] XIV

During the calendar year 1930, the total gross retail sales made by plaintiff in all its stores in Kentucky and in all departments conducted by it in its several retail stores, aggregated $2,236,148.06, of which amount, gross retail sales aggregating $1,854,174.23 were made between March 17, 1930 (the date of approval of said Act herein challenged), and December 31, 1930, both dates inclusive.

Applying to said gross sales claimed by defendants to be the proper basis for ascertainment of the taxes to be exacted of plaintiff under Chapter 149, Acts of 1930, the geometrically graduated rates of taxation prescribed by said challenged Act, and deducting all credits allowed plaintiff by Section 4 of said challenged Act, would produce the following result:

1/20 of 1% on first $400,000 of sales		$200.00 Tax
2/20 of 1% on next $100,000 of sales		100.00 Tax
5/20 of 1% on next $100,000 of sales		250.00 Tax
8/20 of 1% on next $100,000 of sales		400.00 Tax
11/20 of 1% on next $100,000 of sales		550.00 Tax
14/20 of 1% on next $100,000 of sales		700.00 Tax
17/20 of 1% on next $100,000 of sales		850.00 Tax
1% of excess over $1,000,000 of sales		8,541.74 Tax
Total tax above computed		$11,591.74
Credits allowed under Section 4 of the Act:		
Corporation license tax paid in 1930	$446.04	
License or occupation taxes paid Kentucky cities or towns	1,053.50	
Total credits allowed under Section 4		1,499.54
Net tax levied upon plaintiff		$10,092.20

XIV

Each separate retail store in Kentucky owned or operated by plaintiff as a retail merchant, and likewise each separate department therein, comes into direct competition with a large number of other specialized individual retail stores in Kentucky, conducted by other retail merchants, which deal mainly and often exclusively in a particular kind or class of goods handled and sold by plaintiff in a particular store in Kentucky, or department therein handling or selling that class or line of goods.

In no single retail store, or single department therein, conducted by plaintiff in any of its retail stores in Kentucky, do the gross sales in any calendar year, or for the [fol. 20] period beginning March 17, 1930, and ending De-

cember 31, 1930, amount to as much as $400,000. Nor do the gross annual sales of any specialized retail store owned or operated by any other retail merchant in Kentucky as a single store in competition with any retail store of plaintiff, or department therein (either for the entire calendar year 1930 or for the period beginning March 17, 1930, and ending December 31, 1930) exceed in any case the sum of $400,000, and each of such competing stores owned and operated by such other retail merchants has gross annual sales not exceeding $400,000 in amount, and in a vast majority of cases not exceeding $100,000 in amount, and in a great many cases not exceeding $50,000 in amount.

It thus results that the challenged Act of 1930, hereinabove set out, designedly, by its terms, works a discrimination against plaintiff and denies to it the equal protection of the law, and imposes upon it a grossly unequal, oppressive, arbitrary and discriminatory burden of taxation in that the specialized single stores competing with any one retail store of plaintiff, or department therein, are in every case taxed, if taxed at all, under said Act in the lowest bracket at 1/20 of one per cent of gross sales, subject to the credits provided by Section 4 of said Act, while, on the other hand, the gross sales of plaintiff's store or department therein competing with said specialized single store are added to their gross sales in all its other stores and departments therein so as to produce an aggregate of gross sales during the taxable period, to be taxed at the highest brackets or rates of taxation provided in said Act, to-wit, at the rate of one per cent, which is 20 times in excess of the rate that in every case is levied under said Act upon the specialized single store competing with one of plaintiff's retail stores or departments in such retail stores, respectively.

XV

Moreover, said challenged Act of 1930 contains in Section 4 thereof a provision which in effect entirely exempts from the payment of any tax thereunder all smaller retail merchants having gross sales for the taxable period under said Act comparable in amount with sales made by plaintiff in each retail store and/or in each of the several separate departments thereof operated in Kentucky by plaintiff in [fol. 21] actual competition with other retail merchants in

the same city or section of Kentucky that have a smaller volume of gross annual sales and are taxed, if at all, under said challenged Act at the minimum rate of 1/20 of one per cent therein provided.

Section 4 of said challenged Act provides, in substance and effect, that while the license tax created and imposed by said Act shall not be in lieu of any special State license, excise, occupational or corporation license tax due under the provisions of any law now in force or that may hereafter be enacted, yet in the case of the retail merchants having smaller volumes of sales, such credits are in actual fact provided as in effect relieve said smaller retail merchants of the payment of any tax whatever under said challenged Act and in effect provide that the special State license, excise, occupational or corporation license tax exacted from them under laws now in force or hereafter enacted shall be a substitute for any license tax otherwise exacted of them under the challenged Act.

The credits allowed under Section 4 of said challenged Act, by way of remission of the tax levied thereunder, are sufficient in practically all cases to offset entirely the relatively small tax levied under said Act on sales of retail merchants as defined therein, whose annual gross sales do not exceed $400,000, and they were known to be sufficient for that purpose at the time of the passage and approval of said Act, and the allowance of said credits by way of remission of the tax levied in the Act and the graduation of said tax were each provided for in said Act as an essential part of a legislative scheme to tax retail merchants having a large volume of gross annual sales and to exempt from taxation retail merchants having a small volume of gross annual sales.

There are very few retail merchants in Kentucky whose gross annual sales in a single or individually-owned store exceed $400,000, and the gross annual sales of practically all such retail merchants are far below $100,000, and in most instances far below $50,000.

In practical effect and operation, only those retail merchants doing business in Kentucky who own or manage more than one department in a single store, or more than two stores, with or without departments, and who have [fol. 22] gross annual sales in all their stores or departments aggregating more than $400,000, are subject to taxa-

tion under said Act, in any appreciable amount and those who are taxed at all constitute a very small class of limited number as compared with the vast number of retail merchants who are wholly exempt from taxation under said Act. There is no just or reasonable basis for the classification of retail merchants on the basis of taxing the limited class subject to taxation under said Act and exempting the overwhelmingly larger class not subject to taxation under said Act.

To illustrate: The average retail merchant conducting a general retail store in Kentucky has invested therein a capital not exceeding $25,000, and has gross annual sales aggregating less than $50,000, and such a retail merchant would, as a rule, pay to the State of Kentucky, upon the kind of stock carried in his general store, special State license or excise taxes aggregating from $10 to $15.

If such retail merchant conducts his business under form of a corporation organized in Kentucky, with an authorized capital stock of $25,000, fully paid in and invested in its single retail store in Kentucky, and has therein gross annual sales of $50,000, it could by no possibility be assessed under said challenged Act of 1930 with a tax exceeding $25, and as a matter of fact, in general practice it would not be assessed with any tax at all, or with a much smaller tax than $25, because its annual corporation license tax, levied under Sections 4189-1 and 4189-2, Kentucky Statutes, at the rate of 70 cents per $1,000 of authorized capital stock or capital invested in Kentucky, plus other State excise or license taxes paid by it, would largely if not completely offset any tax imposed upon it by said challenged Act, and would thus be a complete substitute for any tax so imposed upon it by said Act.

On the other hand, exactly the same volume of annual gross sales made by plaintiff in one of their stores or departments therein in competition with said average retail merchants would be added to all the other gross annual sales made in all plaintiff's other stores or departments therein located in Kentucky and thus a large part of said gross subjected to a tax at the rate of one per cent as compared with a tax of 1/20 of one per cent levied by said Act upon the average retail merchant conducting an average general retail store and competing with plaintiff in [fol. 23] the sale at retail of goods of the same kind and

character. Credits allowed to plaintiff under Section 4 of said Act, when proportionately allocated to each of its stores or departments therein would amount to a very insignificant part of the tax levied upon plaintiff by reason of their annual gross sales in each such store or each department therein.

XVI

Section 1 of said Act provides that it shall be construed to apply to "every retail merchant" and "store" as defined therein, which is controlled or held with others by majority of stock ownership or ultimately controlled or directed by one management or assocation of ultimate management.

The design, intent, practical operation and effect of said provision is to require and compel the owner or management of two or more separate and distinct stores and/or departments as defined in said Act, to aggregate for the purposes of taxation the gross sales of all stores and/or departments controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management without regard to the fact that said stores and/or departments may be separate and distinct enterprises; without regard to their location and without regard to the fact that said stores and/or departments, are each engaged in the sale at retail of wholly different merchandise and commodities unrelated to the merchandise and commodities sold in other stores, and/or departments.

The design, intent and practical operation of said Act is thereby to tax, penalize and, because of the increased rate of taxation in the higher brackets, to prohibit the employment of capital in the acquisition of stock in corporations owning stores, as defined by said Act, which may result in majority stock ownership, and to tax, penalize and in effect prohibit the employment of capital, skill, efficiency and economy in the operation of such stores under one management or co-operatively under an association of management.

XVII

For many years past there have been various voluntary co-operative associations or agencies organized and success-

[fol. 24] fully conducted for the purpose of affording to so-called individual or single-store retail merchants engaged in Kentucky and elsewhere in the business of selling at retail, goods, wares and merchandise of the character handled and sold by plaintiff in its retail stores and by retail merchants generally throughout Kentucky and other States, facilities, services and advice in selecting, buying, advertising and displaying the merchandise handled or sold by them at retail in their respective stores in Kentucky and elsewhere corresponding in all material respects as to price, quality or kind with the merchandise handled or sold by the plaintiff in its retail stores and by other retail merchants similarly situated.

These co-operative associations or agencies, for a comparatively small fee, afford to retail merchants operating individual specialized stores throughout Kentucky and elsewhere, affiliated with them, all the facilities and advantages, in the matter of selection of goods and prices to be paid therefor, that can be obtained by any large organization operating on its own account, and in many cases such co-operative associations or agencies afford to their members or patrons very much better advantages and facilities along such lines.

Likewise such co-operative associations or agencies afford to many retail merchants in Kentucky and elsewhere, affiliated with them, the benefit of their advice and experience and co-operative action in securing increased results in advertising the goods of such retail merchants to the buying public, as well as advice and suggestions as to the most approved and advanced method of selecting goods of the proper style and quality, and for displaying such goods in the retail stores of the various retail merchants affiliated with such co-operative associations and agencies.

Practically all retail merchants owning or operating in Kentucky specialized individual retail stores, who have gross annual sales aggregating as much as $100,000, for some years past, as a part of the economic development of the business of a retail merchant, have availed themselves of the services and facilities thus afforded by said co-operative associations or agencies. In this manner, such retail merchants have as great buying power as the plaintiff or any other retail merchant buying on his or its own account [fol. 25] a stock of merchandise for sale in his or its retail

store or stores, and they can buy goods of as high class and quality, at similar prices, as the plaintiff or any other retail merchant similarly situated, and they can and do get the benefit of similar facilities and services for advertising, displaying and handling their merchandise in their respective stores, and for effecting a rapid turnover thereof, even though the aggregate of their gross sales may be, and in practically every case it is, less than $400,000 per annum in such retail store owned or operated by them in Kentucky.

Hence plaintiff, by reason of its operation of several stores and the larger volume of gross sales made by it therein, has no advantage whatever over the retail merchant operating a specialized individual store in competition with the stores of this plaintiff or any department therein. On the contrary, many of said specialized individual stores have gross annual sales of merchandise handled by them substantially exceeding in volume the gross annual sales of such merchandise handled and sold in plaintiff's store or department competing with such specialized individual retail merchant.

In addition thereto, the specialized individual merchant has the advantage of better facilities for displaying his merchandise, of whatever character it may be, in a smaller store located directly on the ground floor with display windows facing directly upon the street upon which his retail store is located. As a matter of fact, many of said specialized individual retail stores competing with the plaintiff have, by reason of their advantages, made substantial inroads and encroachments upon the trade of plaintiff in their various departments established and conducted prior to the opening or establishing of such specialized individual stores now operating in competition with plaintiff.

Accordingly, there is no just, proper or reasonable basis whatever for discrimination in the matter of taxation against this plaintiff and in favor of the retail merchant conducting a specialized individual store.

XVIII

The classification made, as a basis for the tax imposed by said challenged Act, rests wholly upon gross retail sales [fol. 26] and the percentage of said tax is increased with each one hundred thousand dollars of sales above $400,-

000.00, unequally, disproportionately, arbitrarily, and with the sole design and intent to burden, oppress, prohibit and discriminate against the ownership or ultimate management of all retail stores in Kentucky having a large volume of gross sales (whether in one store or more or in one department or more in the same store), and thus unreasonably, unequally and disproportionately to discriminate against, oppress, burden and penalize the employment of capital, skill, efficiency and the ability of retail merchants in the State of Kentucky to increase their sales above four hundred thousand dollars. The rate of tax is one-twentieth of one per cent on the first four hundred thousand dollars of gross sales. The rate of tax is doubled for the next one hundred thousand dollars of sales. The rate of tax is five times as great for the next one hundred thousand dollars of sales; eight times as great for the next one hundred thousand dollars; eleven times as great for the next one hundred thousand dollars; fourteen times as great for the next one hundred thousand dollars; seventeen times as great for the next one hundred thousand dollars; and twenty times as great for all sales in excess of one million dollars. The practical operation and effect of said unequal and disproportionate increase in the percentage of tax per one hundred thousand dollars of increased sales is that a retail merchant who increases his sales one hundred thousand dollars above four hundred thousand dollars pays as much tax on said one hundred thousand dollars as a retail merchant whose sales are two hundred thousand dollars. For the next one hundred thousand dollar increase, said merchant is required to pay an additional Two Hundred and Fifty Dollars; for the next one hundred thousand dollars increase, an additional four hundred dollars, or a greater tax on said one hundred thousand dollars of increased sales than the entire tax of a retail merchant whose total sales are five hundred thousand dollars; for the next one hundred thousand dollars of sales, five hundred and fifty dollars, which tax on said one hundred thousand dollars of sales is as great as the total tax of a retail merchant having total sales of six hundred thousand dollars; for the next one hundred thousand dollars of sales the tax [fol. 27] is seven hundred dollars; for the next one hundred thousand dollars of sales the tax is eight hundred and fifty dollars; for the next one hundred thousand dollars of sales

and for every one hundred thousand dollars of sales thereafter, a tax is assessed of One Thousand Dollars, which is a greater tax per one hundred thousand dollars of sales than the total tax required of a merchant whose total sales are seven hundred thousand dollars. Under said Act, a retail merchant having gross sales in any amount not exceeding three hundred thousand dollars, who increases said sales by one hundred thousand dollars, is only liable to a maximum increase in taxation of $50.00, less his permitted credits, whereas, the plaintiff is subject to a tax of $1,000.00 on every one hundred thousand dollar increase in its sales. Said classification is unreasonable, unequal, discriminatory, oppressive, arbitrary and confiscatory as to this plaintiff and other retail merchants similarly situated.

XIX

The classification and graduation made as a basis for the tax imposed rests wholly upon the amount of gross retail sales of all stores controlled or held with others by majority stock ownership, or controlled or directed by one management or association of ultimate management. Said classification does not rest in any particular upon the ability of the taxpayer to pay said tax. It does not rest in any particular upon the income or earnings from any store or stores. It has no necessary relation to receipts. It is imposed regardless of whether said sales are made at a profit or loss or the amount of profit or loss therefrom. It has no relation to profits or losses, if any accrue from said sales. It has no relation whatsoever to the capital employed or invested. It does not take into account the type of business. Said Act does not make any provision for the merchandise returned, for the cancellation of sales or resales of merchandise or the net amount of sales, or sales on credits for which payment is not received, but classifies sales solely as to the gross amount thereof by dollars, and strikes at the increase in said gross sales by a geometrical increase in the rate of taxation, as heretofore set forth, per one hundred thousand dollars of increased sales up to one million dollars, after which the increase of [fol. 28] gross sales above one million dollars, and the tax thereon is levied and collected at the highest bracket of one per cent.

Although said Act purports to classify and tax sales by dollars, it taxes the dollar of sales of certain retail merchants upon a rate and basis materially and substantially different from the dollar of sales of other merchants engaged in direct competition and similarly circumstanced, and imposes upon a merchant having gross sales of eight hundred thousand dollars, a tax of fifteen hundred dollars, or seven and one-half times the tax imposed upon his competitor who does exactly one-half the volume, to-wit, four hundred thousand dollars, who is only subject to a tax of two hundred dollars.

Thereby, one retail merchant doing exactly twice the business of his competitor is required to pay seven and one-half times as much tax on his dollar of sales as his competitor, who, in the same class and similarly circumstanced, is required to pay on his dollar of sales. Said classification is unreasonable, without a rational basis, and is arbitrary, unequal, burdensome and oppressive.

XX

Such competitive stores, by reason of connection with co-operative associations, agencies or organizations, although singly or individually owned, enjoy any and all the advantages which may flow from group or co-operative buying on a large scale, the pooling of purchasing power, the ability to contract for buying their goods upon a large scale, and for the scientific and efficient arrangement of stores, window displays and the development of merchandising methods through the employment, co-operatively, of experts and others experienced therein. Said co-operative associations combine co-operatively as great or a greater number of stores and have as great (or greater) purchasing and buying power and have as great (or greater) advertising and merchandising ability as the plaintiff and as other retail merchants who own two or more stores in the Commonwealth of Kentucky, or conduct two or more departments in any retail store so owned or operated by them. However, said singly or individually owned stores and members of co-operative associations, as aforesaid although similarly cir-
[fol. 29] cumstanced and in direct competition with the plaintiff and with other retail merchants owning two or more stores, are not required to aggregate or combine for the purpose of taxation or to report for taxation the total

sales of all stores in Kentucky joined together in the same co-operative association or organization, and hence, said competitive stores, members of said associations or organizations, are not subject to taxation on the same basis, classification or rate as the plaintiff, but in practical operation and effect are practically exempt from any taxation under said Act, whereas, the plaintiff is subject to taxation at the highest rate prescribed in the said Act. By reason thereof, such competitive stores are given undue and unfair economic advantages over the retail store of the plaintiff and other retail merchants similarly situated and are in effect aided, helped and subsidized by said Act in their competition with the plaintiff and other retail merchants similarly situated.

XXI

The efficient and successful method of conducting retail business in the Commonwealth of Kentucky and elsewhere in the United States, at the present time, is to sell merchandise at the lowest possible price, consistent with a small percentage of profit on each individual sale, endeavoring thereby to increase the volume of sales and to secure a more rapid turnover of merchandise and capital. The retail merchant is required by reason of small percentage of profit on a single sale to have a large volume of sales and continuously to increase his sales volume in order to secure a fair return on the capital employed by him in his business. The highly competitive character of the retail business, in which plaintiff is engaged, and other retail business in the Commonwealth of Kentucky and elsewhere in the United States, makes it necessary for each merchant to meet such competition and to conform his business methods therewith. In conformity therewith the plaintiff and other retail merchants similarly situated have built up and developed in Kentucky for themselves respectively a large and valuable business, upon the basis of selling merchandise at retail to the public, at the lowest possible prices, consistent with a small average profit in individual sales. The plaintiff and all other retail merchants similarly situated [fol. 30] are dependent upon a large volume of sales in order to secure a fair, reasonable and adequate return upon invested capital employed in the conduct of their business. Such merchandising methods are the basis of the business of

the plaintiff and all other retail merchants similarly si
uated, are of benefit to the general public of the Commo
wealth of Kentucky and have brought to the plaintiff an
all other retail merchants similarly situated, a large an
valuable good will and a large sales volume.

XXII

The unfair, unjust, unequal, oppressive and discrimina
tory rates of taxation exacted by said challenged Act, o
plaintiff and all other retail merchants similarly situate
not only imposes upon them an unjust and intolerable bu
den for the benefit of other retail merchants engaged in lik
business but having a smaller volume of annual gross sale
but will inevitably destroy or impair, and the purpose o
said challenged Act is to destroy or impair, the good wi
and established trade or business and thereby to reduce th
volume of annual gross sales made by plaintiff and oth
retail merchants similarly situated and, as far as possibl
under said Act, to divert trade and custom from the reta
stores of plaintiff and other retail merchants similarl
situated and taxed in the higher brackets of taxation, t
the more numerous but less progressive and enterprisin
retail merchants who have very much smaller annual gros
sales and therefore, if taxed under said Act at all, are taxe
at rates very much lower than those exacted by said A
of plaintiff and other retail merchants similarly situate

Said challenged Act, in its purpose and effect, is wholl
lacking in uniformity in its application to the persons o
occupations taxed thereunder, and it designedly transfe
to and imposes upon plaintiff and all other retail me
chants similarly situated an undue proportion and pra
tically the entire burden of the license taxes attempted i
said challenged Act to be levied upon retail merchants.

Thus said challenged Act designedly discriminates i
favor of retail merchants having a small or comparativel
small volume of annual gross sales, and in effect levies
subsidy for their benefit to be paid wholly by plaintiff an
[fol. 31] other retail merchants similarly situated, who hav
annual gross sales in larger volume. In so doing, sai
challenged Act denies to plaintiff and other retail me
chants similarly situated the equal protection of the law
guaranteed to it and to them by the Equal Protection Claus
of the Fourteenth Amendment to the Constitution of th

United States and also by the fundamental law of the State of Kentucky.

XXIII

There is a large number of retail merchants lawfully engaged in Kentucky in the operation of one store, either with or without separate departments therein such as plaintiff conducts in its retail stores, or in the operation of two or more stores, either under the same management or controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management, which are in like situation with plaintiff in that, under said challenged Act, each of them is subject to taxation in the higher brackets at the excessive, unjust and discriminatory rates of taxation therein levied upon them by reason of the larger volume of gross annual sales made by them, to the exclusion of an overwhelmingly large number of retail merchants competing with them respectively, who have very much smaller gross annual sales and, by reason of credits allowed under Section 4 of said Act, are required under said Act to pay no tax whatever or a wholly insignificant amount of taxes.

The retail merchants conducting stores in Kentucky who are thus situated similarly to the plaintiff are entirely too numerous to be joined in this suit as parties plaintiff, and the matters and things complained of in this bill and the questions herein raised as to the legality of the tax complained of, are all questions of common or general interest to many persons, as hereinbefore set forth, constituting a class so numerous as to make it impracticable to bring them all before the Court herein, and plaintiff brings this suit on its own behalf and on behalf of all such individuals, firms, associations, copartnerships and corporations hereinbefore mentioned, for the purpose of enjoining the defendants from enforcing or attempting to enforce said challenged Act against plaintiff or any of the other [fol. 32] retail merchants similarly situated, on whose behalf this suit is brought, or from attempting to collect any tax under said Act against plaintiff or any of said other retail merchants on whose behalf this suit is brought.

XXIV

By Section 5 of said challenged Act, any retail merchant who fails to file the report and to pay the tax as required

therein is subject to an added penalty of 20 per cent plus 6 per cent per annum interest, with a further additional penalty of 20 per cent if collected by proceedings in Court.

By Section 7 of said challenged Act, any retail merchant, or any officer, director, trustee, or agent, who fails, in whole or in part, to make the report or to pay the tax required under said Act, is declared to be guilty of a misdemeanor and upon conviction subject to a fine of $1,000 and/or imprisonment in the county jail not exceeding six months—all in addition to the penalties imposed by Section 5 of said Act.

XXV

Section 8 of said Act empowers the defendants, members of the State Tax Commission, to incur expenses and costs for the enforcement and administration of said Act, to be paid out of the funds collected thereunder.

Plaintiff states that the defendants are preparing for the administration and enforcement of said Act, and have already expended monies out of the State Treasury for the purpose of preparing blank forms and reports necessary to carry out the provisions of said Act, and unless enjoined and restrained by this Court, all of the defendants hereto will administer said law and expend funds raised by taxation in an amount in excess of Five Thousand ($5,000.00) Dollars for the enforcement thereof, and will require the plaintiff and all other retail store owners not exempt under the provisions hereinbefore set forth, to pay the taxes prescribed by said Act, and upon the failure of said store owners, including the plaintiff, to make said payments, the said defendants will attempt to enforce against them, including plaintiff, the drastic penalties provided for by Sections 5 and 7 of said Act, and will attempt to enforce against them, including the plaintiff, any other [fol. 33] penalties or causes of action provided for by the statutes or General Laws of the Commonwealth of Kentucky, all to the irreparable injury and damage of plaintiff and other retail merchants similarly situated.

XXVI

By Section 55 of the Kentucky Constitution it is provided that no Act of the General Assembly shall become a law until 90 days after the adjournment of the session at

which it was passed, except in cases of emergency, and the reasons for such emergency must be set out at length in the Journal of each House.

Section 13 of the challenged Act set forth an alleged emergency as the basis for making said Act effective immediately upon its passage and its approval by the Governor, which took place on March 17, 1930. It contains the only assignment of any reason for an emergency justifying the enactment of Section 13 that is set out at length or at all in said Act or in the Journal of either House of the General Assembly.

Section 13, being the emergency clause of said Act, is void in that the so-called emergency therein recited has no connection with or relation to the purposes for which said challenged Act was enacted by the General Assembly, and under the decision of the Kentucky Court of Appeals in McIntyre v. Commonwealth, 221 Kentucky, 16, and other decisions by the same Court, no reason whatever, meeting the requirements of Section 55, Kentucky Constitution, has been assigned for making said Act take effect upon its approval by the Governor on March 17, 1930, instead of according to the constitutional method and time prescribed by Section 55, under which said Act could not and did not become effective prior to June 17, 1930.

The reasons for the emergency assigned in Section 13 deal solely with the inadequacy of the present State revenue to meet the immediate needs for the maintenance and development of the State Government and its agencies. The taxes to be levied and collected under said Act are to be levied and collected, one-half for the purpose of liquidating the indebtedness of the Commonwealth of Kentucky, and the other one-half is to be levied and collected for the [fol. 34] specific purpose of repairing, maintaining and constructing permanent improvements for the use of institutions under the control of the State Board of Charities and Corrections.

Neither of these purposes is related to or connected with the maintenance or development of the State Government or its agencies which are referred to in Section 13 of said Act as the reason for the alleged emergency therein declared.

Plaintiffs say that in no event, under Section 55 of the

Kentucky Constitution, could said challenged Act become effective prior to June 17, 1930.

XXVII

Plaintiff says that said Act, in the various particulars hereinbefore pointed out, is void because it violates the provisions of the Constitution of the United States and of the Fourteenth Amendment thereof, and because it violates the provisions of the Constitution of Kentucky as herein set forth, and plaintiff now specially sets up and claims herein the rights, benefits, privileges, immunities and exemptions secured to it by said provisions of the Fourteenth Amendment to the Constitution of the United States and by said Constitution of the Commonwealth of Kentucky hereinbefore set forth and especially in the following particulars:

(1) Said Act, for the reasons hereinbefore set forth, is void in the several particulars and respects hereinbefore pointed out.

(a) It denies to plaintiff and all other retail merchants similarly situated, due process of law, and is an attempt to levy upon them a tax that is confiscatory of their property, and moreover is an attempt to take their property without due process of law, as an arbitrary exaction, particularly insofar as any tax levied thereunder is measured by gross sales of retail merchants made prior to June 17, 1930.

(b) It denies to plaintiff and other retail merchants similarly situated, the equal protection of the laws in that it exacts of the plaintiff and other retail merchants similarly situated, an unreasonable, unjust, discriminatory, oppressive and prohibitive rate of taxation, based upon a classification that is unreasonable, unjust and discrimina-
[fol. 35] tory against the plaintiff and all other retail merchants similarly situated, and in that it taxes plaintiff and other retail merchants similarly situated, at geometrically increased rates, graduated according to increased volume of gross sales, without reference to any other consideration whatever and without any reasonable basis of classification, and at the same time imposes upon other retail merchants, doing the same kind of business in substan-

tially the same way, a very much lower rate and burden of taxation, and, as to an overwhelming number of such retail merchants, wholly exempts them from any taxation whatever under said Act.

(c) For the reasons hereinbefore set forth, said Act abridges the privileges and immunities guaranteed to plaintiff by the said Fourteenth Amendment, in the particulars hereinbefore set forth, and is therefore illegal and void.

(2) Said Act violates the fundamental principles of uniformity in the matter of taxes levied upon occupations, persons or property upon some reasonable basis of classification as such principles of uniformity are recognized by Sections 171 and 181 of the Constitution of the Commonwealth of Kentucky.

XXVIII

Section 10 of said Act contains provisions designed to deny to plaintiff and other retail merchants attempted to be taxed under said Act, any remedy whatever in advance of the payment of said tax, and likewise to deny any remedy whatever, after the payment of the tax imposed thereunder, except that where the tax is paid under protest, the taxpayer may, within two years after such payment, bring in a court of competent jurisdiction in the Commonwealth of Kentucky an action for mandamus against the Auditor of Public Accounts to compel him to draw his warrant upon the State Treasurer for the amount of such tax as may be adjudged to have been wrongfully collected from such taxpayer.

Such action could only be brought where the tax is paid under protest and after its payment, and could only be brought or prosecuted in the Courts of Kentucky, and a judgment therein in favor of the complaining taxpayer [fol. 36] could only result in obtaining a warrant upon the General Fund of the State in the hands of the State Treasurer, to be paid if and when funds were available for the payment of such warrants in the usual and orderly course.

Plaintiff says that the taxes collected under said Act do not go into the General Fund of the Commonwealth, but are immediately appropriated and applied as provided in said Act; that there are now outstanding many State warrants drawn by the Auditor of Public Accounts upon the

General Fund in the hands of the State Treasurer which have been outstanding since June, 1927, and can not be collected by the owners or holders thereof, for lack of funds in the State treasury during such period, for the payment of such warrants.

Plaintiff says that, as shown by a monthly financial statement officially issued by the State Treasurer of Kentucky as of January 1, 1931, the amount of money in the General Fund on January 1, 1931, less minor accounts, was $12,565.81 as against which there were at the time outstanding warrants aggregating $9,880,502.76 drawn by the Auditor of Public Accounts upon the State Treasurer and presented for payment but not paid for lack of funds.

By reason of the facts herein set forth, the plaintiff has no remedy whatever in the State Courts of Kentucky, and no remedy whatever at law in the courts of the United States.

XXIX

Plaintiff says that the defendants and each of them are threatening to, and unless enjoined or restrained by order of this Court they will take steps, by prosecution of the plaintiff and, through such prosecution, by the infliction of penalties of fines and/or imprisonment, provided by said challenged Act, to enforce against plaintiff the severe penalties provided in said Act, and also to enforce the collection from this plaintiff of said illegal tax, in the sum of $10,092.20 as hereinbefore computed and stated, and also to compel plaintiff, under said void Act, to make reports to the State Tax Commission of Kentucky of all its gross sales as therein provided, and also will attempt to enforce against plaintiff, by prosecution and the infliction of penalties provided in said void Act, the payment of an illegal tax upon the gross sales of this plaintiff amounting *of* [fol. 37] $1,854,174.23, upon which, under said Act, a tax would result against this plaintiff of $10,092.20 as hereinabove set out, and will also proceed to enforce the excessive penalties provided in said Act for failure of a taxpayer assessed thereunder to make prompt payment of the taxes assessed against him as provided therein, and in like manner and with like results will proceed against all other retail merchants similarly situated.

XXX

Unless the defendants, after notice and hearing, are enjoined and restrained from enforcing or attempting to enforce said Act, the plaintiff and all others similarly situated, will sustain irreparable loss and injury for which they have no plain, adequate or complete remedy at law, or any remedy at all in the Courts of Kentucky, in each of the following particulars:

(1) The plaintiff and all others similarly situated, will be compelled to pay taxes pursuant to an invalid and unconstitutional enactment, and for which they are not legally liable.

(2) Upon the failure of the plaintiff, and others similarly situated, to pay said illegal taxes, the drastic penalties provided by said Act will be attempted to be enforced by the defendants against the plaintiff, and others similarly situated, and as a result thereof, plaintiff, and others similarly situated, will be compelled to defend innumerable prosecutions brought to recover said taxes and penalties and criminal proceedings brought to impose the criminal penalties provided in Section 7, of said Act, all at great expense and damage to it and them.

(3) The defendants will expend public funds raised by taxation for the purpose of preparing to enforce and carry out the provisions of said Act to the irreparable injury and damage of the plaintiff as taxpayer of the Commonwealth of Kentucky.

(4) If plaintiff and others similarly situated should pay said taxes under protest and be compelled to commence actions to recover the same as provided in Section 10, of said Act, they would be put to large expense for attorneys' [fol. 38] fees and court costs, and would be required to bring a multiplicity of actions in order to recover said monies, and said Act contains no provisions of any kind for the reimbursement to plaintiff and others similarly situated, of said large sums which it would be required to expend in prosecuting such actions for attorneys' fees, expenses, court costs and other expenses.

(5) No waiver is provided of the right of the Commonwealth of Kentucky to defend any action brought in the

courts of the United States as a suit against a State within the meaning of the Eleventh Amendment to the Constitution of the United States. In consequence whereof, the plaintiff and others similarly situated do not have a plain, adequate and complete remedy in an action at law in the courts of the United States.

The only remedy afforded by said Act, or by any law of the Commonwealth of Kentucky, is a suit at law in the Franklin Circuit Court against the Auditor of Public Accounts for a mandamus to compel him to draw his warrant upon the Treasurer for the amount of taxes erroneously exacted of the taxpayer and paid by him under protest, all of which appears from Section 10, of said challenged Act of 1930, and from Section 162, Kentucky Statutes, these being the only statutes of Commonwealth of Kentucky which afford any remedy in such cases to the taxpayer from whom illegal taxes have been collected by the Commonwealth Kentucky.

By no other statute has the Commonwealth of Kentucky ever consented in any way to be sued itself or through any of its officers for the recovery of taxes illegally exacted from a taxpayer and covered into the Treasury of the State.

(6) Said Act is ambiguous and doubtful as to its application and meaning, and as to the procedure and requirement thereunder, and has never been interpreted by the Court of Appeals of the Commonwealth of Kentucky.

(7) The amount of said annual tax which the plaintiff would be required to pay under the terms of said Act will be a substantial portion of the capital invested by them in their retail stores and needed by them to carry on their business therein. The payment of so large a sum of money [fol. 39] will impair the ability of the plaintiff to operate their business in Kentucky and will give competitors of the plaintiff who are not required to withdraw any money from their respective businesses or who are not required to withdraw a proportionate sum therefrom, an unfair and undue advantage over the plaintiff, and thereby decrease the amount of gross annual sales and of profits therefrom that plaintiff will be able to make in each of its retail stores in Kentucky and for all such wrongs the plaintiff has no plain,

adequate or complete remedy at law, and the same is true as to all other retail merchants similarly situated.

(8) The enforcement of said Act will have the effect of injuring and impairing all lawful business in which the plaintiff and others similarly situated are engaged and in which they have the undoubted right to engage, and which right is guaranteed and protected by the State and Federal constitution-.

Prayer for Relief

Inasmuch, therefore, as the plaintiff is without adequate remedy at law, and can obtain relief only in a Court of equity, the plaintiff prays:

1. That writs of subpœna be issued to each of said defendants, requiring each of them to answer this complaint fully and truthfully, but not under oath, an answer under oath being hereby expressly waived as to each and all of said defendants.

2. That a temporary restraining order be issued, restraining the defendants and each of them, from enforcing said Act against the plaintiff and all others similarly situated, under the provisions of said Act hereinbefore set out, and that each and all of said defendants and their successors in office be enjoined and restrained, after final hearing, from enforcing against the plaintiff and all others similarly situated, the provisions of House Bill No. 111 of the General Assembly of Kentucky (Chapter 149, Acts of 1930, pages 475-482), directly or indirectly; from instituting or maintaining any actions at law or suits in equity to recover of or from the plaintiff, and others similarly situated, the tax complained of, or for the recovery of any of the penalties prescribed in said tax for the nonpayment thereof; [fol. 40] from expending any monies received by taxation or otherwise; from enforcing or preparing for the enforcement of said Act complained of, and from taking any steps looking to the exclusion of the plaintiff and/or other persons similarly situated, from carrying on its and/or their business in the Commonwealth of Kentucky, and from taking any steps looking to the prosecution of the plaintiff, its agents, servants, or employees, or any person, firm or corporation similarly situated in the Commonwealth of Ken-

tucky, and their agents, servants and employees for a violation of said Act, and from in any manner interfering with the carrying on and operation of such business in the Commonwealth of Kentucky.

3. That upon the final hearing of said cause, this Court will order, adjudge and decree that House Bill No. 111 of the General Assembly of Kentucky at a session of 1930 (Chapter 149, Acts of 1930, Pages 475 to 482, entitled: "An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act," be declared unconstitutional, null and void, as violating the Constitution of the United States and of the Commonwealth of Kentucky, in the particulars hereinbefore pointed out, and that the enforcement thereof be perpetually enjoined; and for all other and further and general relief, as may be just and equitable in the premises.

Nichols, Morrill, Wood, Marx & Ginter, Cincinnati, Ohio; Trabue, Doolan, Helm & Helm, Louisville, Ky., Solicitors for Plaintiffs.

IN UNITED STATES DISTRICT COURT

ORDER PERMITTING PLAINTIFF TO SUE AS REPRESENTATIVE OF CLASS—January 24, 1931

On motion of plaintiff, based upon its verified petition herein, it appearing that the issues and questions raised in [fol. 41] plaintiff's Bill of Complaint are of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the Court, it is now ordered, pursuant to Equity Rule 38, that plaintiff may sue on behalf of all other persons similarly situated, as well as on its own behalf, as to any issue or question presented by said Bill of Complaint that is of common or general interest to other taxpayers

similarly situated, who are affected by said Chapter 149 of the Acts of 1930.

Chas. I. Dawson, Judge.

IN UNITED STATES DISTRICT COURT

MOTION FOR TEMPORARY RESTRAINING ORDER—Filed January 24, 1931

The plaintiff, J. C. Penney Company, by counsel comes and moves the court, upon its verified Bill of Complaint herein showing that immediate and irreparable injury, loss or damage will result to plaintiff before notice upon defendants can be served and a hearing had upon its application this day made for an interlocutory injunction, to grant it a temporary restraining order, without notice, enjoining and restraining the defendants herein and each of them, pending the hearing and determination of plaintiff's application for an interlocutory injunction upon notice as required by law for such interlocutory or preliminary injunction,

(1) From enforcing or executing, either directly or indirectly, against this plaintiff and/or other taxpayers similarly situated, the provisions of Chapter 149 of the Acts of the General Assembly of Kentucky at its 1930 session, entitled:

"An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act;"

[fol. 42] on the ground that said Act is unconstitutional, null and void in that it denies to plaintiff and other taxpayers similarly situated, rights, privileges and immunities guaranteed to plaintiff and such other taxpayers by the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and by the Constitution of Kentucky.

(2) From instituting or maintaining against this plaintiff and/or other taxpayers similarly situated, any prosecution or action at law, or any suit or suits in equity, to recover of or from the plaintiff or other taxpayers similarly situated any portion of the alleged tax sought to be exacted of them under said Act, or for the infliction of any of the penalties prescribed in said Act for the nonpayment of such tax or for failure to make or file any reports or returns required thereunder.

(3) From further expending any moneys, received by taxation or otherwise, in the attempted enforcement of said Act, and also from further enforcing or preparing for the enforcement of said Act, or from taking any steps looking to the prosecution of the plaintiff or any of its agents or servants or employes, or any other person, firm or corporation similarly situated, or any of their agents or servants or employes, for a violation of said Act in any of its provisions.

Nichols, Morrill, Wood, Marx & Ginter; Trabue Doolan, Helm & Helm, Solicitors for Complainants.

IN UNITED STATES DISTRICT COURT

MOTION FOR INTERLOCUTORY INJUNCTION—Filed January 24, 1931

The plaintiff, J. C. Penney Company, by counsel, comes and moves the Court, upon its verified Bill of Complaint herein, for an interlocutory injunction, to be granted after notice as required by law, enjoining and restraining the defendants herein and each of them until further order of Court herein:

[fol. 43] (1) From enforcing or executing, either directly or indirectly, against this plaintiff and/or other taxpayers similarly situated, the provisions of Chapter 149 of the Acts of the General Assembly of Kentucky at its 1930 session, entitled:

"An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection

of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act,"

on the ground that said Act is unconstitutional, null and void in that it denies to plaintiff and other taxpayers similarly situated, rights, privileges and immunities guaranteed to plaintiff and such other taxpayers by the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and by the Constitution of Kentucky.

(2) From instituting or maintaining against this plaintiff and/or other taxpayers similarly situated, any prosecution or action at law, or any suits or suits in equity, to recover of or from the plaintiff or other taxpayers similarly situated any portion of the alleged tax sought to be exacted of them under said Act, or for the infliction of any of the penalties prescribed in said Act for the non-payment of such tax or for failure to make or file any reports or returns required thereunder.

(3) From further expending any moneys, received by taxation or otherwise, in the attempted enforcement of said Act, and also from further enforcing or preparing for the enforcement of said Act, or from taking any steps looking to the prosecution of the plaintiff or any of its agents or servants or employes, or any other person, firm or corporation similarly situated, or any of their agents or servants or employes, for a violation of said Act in any of its provisions.

Nichols, Morrill, Wood, Marx & Ginter; Trabue, Doolan, Helm & Helm, Solicitors for Complainant.

[fol. 44] IN UNITED STATES DISTRICT COURT

ORDER GRANTING TEMPORARY RESTRAINING ORDER—January 24, 1931

This day came the plaintiff, J. C. Penney Company, by counsel, and upon its verified Bill of Complaint herein,

entered its motion, without notice thereof to defendants or any of them, for a temporary restraining order pending the hearing of its application herein made for an interlocutory injunction because of immediate and irreparable injury, loss or damage shown by said verified Bill of Complaint to result to the plaintiff before notice of such application for an interlocutory injunction can be served upon defendants and a hearing thereon had, inasmuch as

(1) It is impossible to convene a statutory court of three Judges as required by Section 266 of the Judicial Code as amended (U. S. Code, Title 28, Section 380) until after February 1, 1931, and

(2) Before such statutory court of three Judges can be convened to hear plaintiff's application for an interlocutory injunction,

(a) The penalties prescribed by said Chapter 149 of the Acts of 1930 of the Commonwealth of Kentucky will have accrued, and plaintiff and other taxpayers similarly situated, under said Act assailed herein as unconstitutional and void, will, on and after February 1, 1931, be subject to the fines and penalties in said Act prescribed for failure to make the reports or returns required of it or them under said Act, and will be subject to prosecutions and suits thereunder to recover the fines and penalties thereby imposed for failure to make such reports or returns, and

(b) Any officer, director, trustee or agent of said plaintiff and/or other taxpayers under said Act, similarly situated, will be subject to prosecution or to fine or imprisonment and other penalties denounced by said Act for failure to make such reports or returns, and otherwise will be without remedy for the protection of the constitutional rights of the plaintiff and such other taxpayers similarly situated, or of any officer, director, trustee or agent of plaintiff or such other taxpayers.

Thereupon the Court, being sufficiently advised, now finds that immediate and irreparable injury, loss or damage will [fol. 45] result to plaintiff and/or other taxpayers similarly situated, before notice upon defendants can be served and a hearing had upon said application for an interlocutory injunction, and therefore the Court now sustains said motion for a temporary restraining order without notice, and hereby grants to plaintiff a temporary restraining order without

notice, enjoining and restraining the defendants herein, and each of them, pending the hearing and determination of plaitniff's application for an interlocutory injunction upon notice as required by law for such interlocutory or preliminary injunction,

(1) From enforcing or executing, either directly or indirectly, against plaintiff and/or other taxpayers similarly situated, the provisions of Chapter 149 of the Acts of the General Assembly of Kentucky at its 1930 session, entitled:

"An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act";

on the ground that said Act is unconstitutional, null and void in that it denies to plaintiff and other taxpayers similarly situated, rights, privileges and immunities guaranteed to plaintiff and such other taxpayers by the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and by the Constitution of Kentucky.

(2) From instituting or maintaining against this plaintiff and/or other taxpayers similarly situated, any prosecution or action at law, or any suit or suits in equity, to recover of or from the plaintiff or other taxpayers similarly situated any portion of the alleged tax sought to be exacted of them under said Act, or for the infliction of any of the penalties prescribed in said Act for the non-payment of such tax or for failure to make or file any reports or returns required thereunder.

[fol. 46] (3) From further expending any moneys, received by taxation or otherwise, in the attempted enforcement of said Act, and also from further enforcing or preparing for the enforcement of said Act, or from taking any steps looking to the prosecution of the plaintiff or any of its agents or servants or employes, or any other person,

firm or corporation similarly situated, or any of their agents or servants or employes, for a violation of said Act in any of its provisions.

The temporary restraining order herein granted shall expire in ten (10) days from this date unless, within the time so fixed, said temporary restraining order is extended for a like period, for good cause shown, the reasons for which extension shall be entered of record.

Before such temporary restraining order herein granted shall issue, the plaintiff shall give bond with good security, to be approved by this Court or the Judge thereof, in the penal sum of -2,500.00 conditioned upon the payment of such costs and damages as may be incurred or suffered by the defendants or any of them who may be found to have been wrongfully enjoined or restrained thereby.

Chas. I. Dawson, Judge.

IN UNITED STATES DISTRICT COURT

ORDER POSTPONING HEARING AND CONTINUING RESTRAINING ORDER—January 29, 1931

The above styled three cases having been set for hearing at Louisville on Monday, February 2, 1931, at ten o'clock A. M., upon application of the respective plaintiffs for an interlocutory injunction, and a restraining order in each case having been granted, to continue in effect until said date, and it now appearing that a statutory court of three Judges can not be convened for the hearing of said motions for a preliminary injunction before Saturday, February 7, 1931, at which time the case of Kroger Grocery & Baking Company vs. John B. Lewis et al., now pending in the United States District Court for the Eastern District of Kentucky, will come on for hearing upon a similar motion for injunction against the same defendants, wherein the validity of the same law is assailed, and the Judge of this [fol. 47] Court has been requested by Honorable A. M. J. Cochran, Judge of the District Court for the Eastern District of Kentucky, to sit with him and with the Honorable A. C. Denison, United States Circuit Judge, in the hearing of said motion for an interlocutory injunction in the Kroger Grocery & Baking Company case,

Now come the defendants herein, by Honorable J. W. Cammack, Attorney-General of Kentucky, and Honorable S. H. Brown, Assistant Attorney-General, and enter their appearance herein, and by agreement between parties plaintiff and defendant in each of the above styled cases,

It is now ordered that the hearing of plaintiffs' motion for an interlocutory injunction in each of the above-styled three actions be now postponed from February 2, 1931, to February 7, 1931, and that the hearing thereof on February 7, 1931, shall be held at the Federal Court Hall in Covington, Kentucky, simultaneously with the hearing of a similar motion in the case of Kroger Grocery & Baking Company against the same defendants, now pending in the Eastern District of Kentucky.

By further agreement of parties, it is now ordered that the restraining order heretofore issued in each of the above-style three cases be continued in effect beyond February 2, 1931, and until the motion for an injunction in each such case shall be heard and determined by the statutory court of three Judges to be convened for that purpose at the time and place above stated.

Chas. I. Dawson, Judge.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors for Plaintiffs. J. W. Cammack, Attorney General; S. H. Brown, Assistant Attorney General, Solicitors for All Defendants.

IN UNITED STATES DISTRICT COURT

MOTION TO STRIKE FROM BILL OF COMPLAINT—Filed February 14, 1931

Come now the defendants and move the Court to strike from the Bill of Complaint herein the following:

1. Beginning with the word "immediately" at line 12 from top of page 6, and on page 6, down to and including the figures "1930" on page 7 of the Bill of Complaint.

[fol. 48] All of paragraph 5 on page 8 of the Bill of Complaint.

3. All of paragraph 8 on page 19 of the Bill of Complaint.

4. Beginning with the word "likewise," line 14 from top of page 21, on page 21, down to and including the word "pay" on page 22 of the Bill of Complaint.

5. Beginning with the words "said Act," line 10 from top of page 38, on page 38, down to and including the word "dollars" on line 15 from top of page 38, on page 38, of the Bill of Complaint.

6. All of paragraph 21, on pages 41 and 42 of the Bill of Complaint.

7. All of paragraph 26, on pages 47 and 48 and 49 of the Bill of Complaint.

8. All of paragraph 28, on pages 51 and 52 of the Bill of Complaint.

And, upon this motion, the defendants pray the judgment of the Court.

J. W. Cammack, S. H. Brown, Batson, Cary & Welch, Leslie W. Morris, Howard S. Gentry, Attorneys for Defendants.

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed February 14, 1931.

Now comes the defendants, John B. Lewis, Seldon Glenn and H. M. Cline, members of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, Auditor of Public Accounts of the Commonwealth of Kentucky, and move the Court to dismiss the bill of complaint filed in the above entitled case upon the grounds and reasons therefore as follow-:

1. Because it appears in the bill of complaint filed in this case that this action is prosecuted by a citizen and resident of the State of Kentucky and that no diversity of citizenship exists betwen the parties hereto, and that the bill shows on its face that complainants are being deprived [fol. 49] of no rights guaranteed them under the Constitution or laws of the United States.

2. That there is insufficiency of fact to constitute a valid cause of action in equity against these defendants.

3. Because it appears in the bill of complaint that plaintiffs have plain, adequate and complete remedy at law.

4. Because it appears in the bill of complaint that plaintiffs are, by the act under consideration, prohibited from maintaining any suit in equity to restrain the collection of the tax complained of.

J. W. Cammack, Attorney General; S. H. Brown, Assistant Attorney General; Howard S. Gentry, Solicitors for Defendants. Leslie W. Morris, Batson, Carey & Welch, of Counsel.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed Feb. 14, 1931.

Come the defendants, John B. Lewis, Selden R. Glenn and Henry M. Cline, individually and as members of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, individually and as Auditor of Public Accounts of the Commonwealth of Kentucky, and for their answer to the Bill of Complaint filed in the above styled action plead as follows, to-wit:

I

For answer to paragraph I of plaintiff's bill of complaint, they say that they do not have sufficient information to answer the allegations contained in the first two literary paragraphs thereof relating to the organization of plaintiff and its authority to do business in this State and, therefore, neither admit or deny the same but require strict proof thereof. They admit, however, all the allega-[fol. 50] tions contained in the third, fourth, and fifth literary paragraphs of said paragraph I.

II

For answer to paragraph II, defendants deny that an Act of the General Assembly of Kentucky, 1930 Session,

approved by the Governor of the Commonwealth of Kentucky on March 17, 1930, same being Chapter 149 of the Session Acts of 1930, is void for the reasons set out in the bill of complaint, or at all. Defendants admit all the other allegations contained in said paragraph II.

III

The defendants, for answer to paragraph III of plaintiff's bill of complaint, deny that this action is a suit of a civil nature or should be brought for the purpose of enjoining the defendants, or either of them, from enforcing, or attempting to enforce, said Act, or for the purpose of enjoining the defendants, or either of them, from requiring the plaintiffs, or other tax payers, or tax payer, similarly situated as hereinafter set forth, to make reports which said Act purports to require of retail merchants, or requiring information in reference to sales made by the plaintiffs, or either of them, or all said retail merchants similarly situated as hereinafter set forth, or from collecting or seeking to collect from the plaintiffs or any of said retail merchants similarly situated, and tax purporting to be levied or assesed upon the plaintiffs or any of said retail merchants similarly situated, as hereinafter set forth, or from instituting any prosecution against the plaintiff, or any of said retail merchants similarly situated as hereinafter set forth, or to recover any of the penalties sought to be imposed by said Act upon the plaintiff, or any of said retail merchants similarly situated as hereinafter set forth, because of a violation of any of the terms of said Act.

Defendants deny that said Act is unconstitutional, null or void *because,* in the respects hereinafter stated, or that it is violative of the various provisions, or any provisions of the Constitution of the United States or of the 14th Amendment thereto, or violative of various provisions of the Kentucky Constitution hereinafter set out.

[fol. 51] IV

Defendants, for answer to paragraph IV of the bill of complaint, admit that House Bill 111 was introduced in the House of Representatives on January 31, 1930, with the following title: "An Act to restrain the unfair competition of chain stores, and in aid of individual merchants of the Commonwealth," and then it was so read. They

deny, however, that it was on February 14, 1930, or on any other date, read with the following title: "An Act to restrain the unfair competition of chain stores, and in aid of individual merchants of the Commonwealth," by the Committee on Kentucky Statutes, or that it was ever read on February 18, February 19, or on any other date by said title, or by any other title, except the one shown on the enrolled bill as same appears in the office of the Secretary of State of the Commonwealth of Kentucky, a certified copy of which is filed herewith and made part hereof as if copied herein in full, marked exhibit "A." They deny that it was read, voted on, passed, signed, approved or enrolled by any other title than the one shown by the certified copy above referred to.

V

Defendants, for answer to paragraph V, deny that said House Bill No. 111 was introduced in the House of Representatives in response to the recommendation made by the Governor of Kentucky, in his annual message of January, 1930, for legislation to be enacted to curb the competition of so-called chain stores with owners of so-called independent unit stores individually owned or operated in aid of such individually owned or operated stores. They deny that, while said House Bill No. 111 was pending before the House Committee to which it was referred on its introduction, the case of Jackson v. State Board of Tax Commissioners of Indiana was decided on or about February 1, 1930, in which a measure similar in legal effect to said House Bill No. 111 as originally introduced was held violative of the Fourteenth Amendment to the Constitution of the United States or therefore void. They deny that the purpose of said House Bill 111 was not changed by amendment by the Committee to which it had been referred or that the bill as so amended or passed in [fol. 52] the manner hereinbefore set out or approved by the Governor was so framed as to contain the obnoxious or unconstitutional features hereinafter set out.

VI

Defendants, for answer to paragraph VI of the bill of complaint, admit all the allegations contained in said paragraph VI.

VII

Defendants, for answer to paragraph VII of the bill of complaint, say that they have not sufficient information to answer the allegations contained therein and, therefore, they neither deny or admit the same, but require strict proof thereof.

VIII

The defendants, for answer to paragraph VIII of the bill of complaint, deny that plaintiff conducts in each of said retail stores, owned or operated by it in Kentucky, what is known as a department store, embracing in a typical store of those mentioned above, and in particular every one of its stores so mentioned, separate departments, in which plaintiff sells at retail merchandise of various kinds within the general classification of merchandise sold by it as follows:

(1) Men's Wear, including dress and work clothing, furnishings, hats, gloves;
(2) Women's Wear, including lingerie, accessories, hosiery and kindred items;
(3) Women's Ready-to-Wear, including women's and girls' dresses and coats, and millinery;
(4) Shoes, Men's, Women's and Children's shoes and rubber footwear;
(5) Piece Goods, including silk and cotton piece goods, and dress goods, draperies, linens, bedding, rugs;
(6) Notions, Infants' good-, Toilet Goods.

Defendants deny that each of said retail stores is operated by plaintiff separately from its other stores or that it keeps a complete set of books or accounts separately for each or any of said stores, or that these books show all phases of the operation of said stores such as its sales, [fol. 53] expenses of operation, rental, taxes, insurance or all other overhead expenses enabling plaintiff to determine, after allocating to each store its proper proportion of plaintiff's overhead, the net results of operation of each or every one of its said retail stores.

They deny that plaintiff, through its system of record keeping, can determine the wisdom or policy of maintaining or continuing the operation of a given store, or any changes of policies to develop sales in each store.

The defendants deny that the plaintiff, in the conduct

of its general business in each or any of the Kentucky cities or towns in which it owns or operates a store, comes into competition with a large or any number of other stores selling merchandise of a similar character in the same city or in other cities in Kentucky. They deny that the same is true as to each department operated by plaintiff in each or any such retail store in as much as each of said departments is compelled to or does actively compete with specialized stores or with stores dealing in similar lines of goods in the same city or any city or town or in nearby cities or towns. They deny that such competition, or any competition, extends not only to the matter of buying power but also to selling or the fixing of prices on goods sold so as to make them sell in competition with other dealers in similar goods in the same city or any city or town or nearby cities or towns, or that such competition applies not only to the plaintiff's conduct of each such store as a whole or as to its conduct of each unit or department in each such store.

IX

The defendants, for answer to paragraph IX of the bill of complaint, deny that there is in each Kentucky city or town where this plaintiff conducts a retail store or any store, a large or any number of individuals, co-partnerships or corporations which are engaged in the business of a retail merchant or are in active competition with this plaintiff, or which owns or operates a single store in which a retail business is carried on similar to that carried on in the same city or town or any city or town by this plaintiff. They deny that said retail merchants competing with the plaintiff conduct their business under similar circumstances or in any instances do a larger volume of business or [fol. 54] have a larger gross retail sales than the store of this plaintiff located in the same city or town or directly competing therewith. They deny that this plaintiff, in each or any of its stores, carries on its business as a retail merchant in any way exactly as the business of a retail merchant is carried on by its competitors in stores which are operated by them respectively or which are separately owned or operated by one individual, co-partnership or corporation doing business as a retail merchant.

They deny that the plaintiff deals in the same character

of articles or merchandise or sells to the same public or its business is distinguishable from that of a retail merchant operating only one store in no way whatsoever except that in plaintiff's case it owns or operates more than one store in Kentucky, though at widely separated points. They deny that there are other retail merchants competing with the plaintiff operating but one store in the State of Kentucky, or that such merchants own or operate but one store in Kentucky, or in any instance, operate in other states a large or any number of retail stores conducting the same general kind of business as plaintiff.

X

The defendants, for answer to paragraph X of the bill of complaint herein deny that the business conducted by plaintiff as a retail merchant in Kentucky, or elsewhere, has developed gradually through constant study or application of efficient broad-*guage* methods of conducting the business of a retail merchant with due regard to the interests of the buying public or a sustained effort to sell merchandise at the lowest possible price consistent with a small percentage of profit on each individual sale or the development of a large volume of business or sales or a more rapid turnover of merchandise or capital.

The defendants deny that the founder of plaintiff's business put into operation the chain store business or that the chain store business was established by J. C. Penney, who proved to be a successful merchant and invested his savings in stores of similar kind in different cities, or that he put in charge of any stores his principal or most competent clerks, or that persons who had charge of plain-
[fol. 55] tiff's stores, as managers or employees, all or any acquired stock in his stores. They deny that the manager of each of plaintiff's stores in Kentucky has charge of practically all or any matters relating to his particular store, or that in any instances the manager has charge to the same extent as a sole proprietor thereof. They deny that he determines for the store managed by him what lines of goods are best adapted to the needs of the buying public in that community or what line of goods can thus be handled or sold to the best advantage in that store. They deny that the manager selects all or any of the merchandise to be handled in said store or departments the kind or quality thereof, or has

sole or any charge of supplying his store with goods to be stocked therein for sale. Defendants deny that the manager maintains a local bank account in the city or town in which his store is located where he deposits all or any of the proceeds received from the sale of the goods in his store, or that from said bank account the manager pays the salaries of the employes of his store or any other local expenses or, in his own discretion, from said bank account makes donations or subscriptions to any form of public welfare, civic or cultural organization in this community, or that he forwards sufficient funds to pay for the merchandise bought for sale in his store to a regional bank to be used in payment thereof. They deny that the manager of each or any such stores is expected or actually does identify himself with the city or town in which said store is located or, in any instance, he owns his own home or is connected with various organizations, such as churches, lodges, luncheon clubs or local organizations of merchants or taxpayers or citizens generally. They deny that any manager of a local store in any city or town is employed under a contract with plaintiff, by virtue of which contract he receives a salary or, in addition thereto, a percentage of the profits of said retail store conducted by him. They deny that a successful manager has always been given the privilege of purchasing stock in plaintiff's company at prices below the current market quotations with the result that such manager of a store in Kentucky is practically a partner with this plaintiff in the operation of said store, or that the imposition of any tax herein complained of, directly or indirectly, affects either the income of this plain-
[fol. 56] tiff or the income which such manager of plaintiff receives as the direct result of his conduct of his said store in that said tax either reduces the profits of said retail store or that it will reduce the amount of sales which can be made in said store either by rendering this plaintiff or its local manager unable to meet the competition with other stores in the same or nearby localities in various highly-competitive lines if plaintiff is to be burdened with the payment of the tax assailed in this case.

XI

The defendants, for answer to paragraph XI of the bill of complaint, say that they have no information as to the

allegations contained therein and, therefore, they neither deny or admit the truth of such allegations, but require strict proof thereof.

XII

Defendants, for answer to paragraph XII of the bill of complaint, say that they have no information as to the peculiar methods by which plaintiff conducts its business and, therefore, they neither deny or admit any statement contained in said paragraph relating thereto, but require strict proof thereof.

They further say that, in so far as said Chapter 149 of the Acts of 1930, referred to in said paragraph, they deny that such Act is purely a tax measure or that it is not an exercise of police power or that it does not relate to the public health or public welfare, public morals or the public safety.

XIII

Defendants, for answer to paragraph XIII of the bill of complaint, deny that the operation or effect of said Chapter 149, Acts of 1930, is not equal or uniform as applied to the retail merchants therein sought to be taxed, or, as hereinafter more specifically shown, the classification of retail merchants therein made is deliberately or designedly so made as to be arbitrary, unreasonable, discriminatory, oppressive or prohibitory as to this plaintiff or any other retail merchants who are thereunder sought to be taxed at rates in excess of one-twentieth of one per cent upon their gross sales respectively, or in its higher brackets of taxa-
[fol. 57] tion, is confiscatory as to this plaintiff, or others similarly situated, or at all.

XIV

Defendants say they do not have sufficient information to answer the allegations contained in paragraph XIV of plaintiff's bill of complaint and, therefore, neither deny or admit the same, but require strict proof thereof.

Defendants deny that any retail store in Kentucky owned or operated by plaintiff, as a retail merchant, or any separate deperament therein, comes into direct competion or any competition with a large or any number of other specialized individual retail stores in Kentucky conducted by other retail merchants, which deal at all in a particular kind or class of goods handled or sold by plaintiff in a particular

store in Kentucky, or department therein handling or selling that class or line of goods.

They deny that in no single retail store or single department therein, conducted by plaintiff in any of its retail stores in Kentucky, do the gross sales in any calendar year or for the period beginning March 17, 1930, and ending December 31, 1930, amount to as much as $400,000.00. They deny that the gross annual sales of any specialized retail store owned or operated by any other retail merchant in Kentucky, as a single store, in competition with any retail store of plaintiff, or department therein, did not exceed for the entire calendar year 1930, or for the period beginning March 17, 1930, and ending December 31, 1930, in any case the sum of $400,000.00, or that each of such competing stores owned or operated by such other retail merchants had gross annual sales not exceeding $400,000.00 in amount, or that in a vast majority of or any cases not exceeding in amount $100,000.00, or that in any cases not exceeding $50,000.00 in amount.

Defendants deny that it thus resulted that the Act of 1930 designedly or otherwise, by its terms, worked a discrimination against plaintiff or that said Act denies to plaintiff the equal protection of the law or imposes upon it an unequal, oppressive, arbitrary or discriminatory burden of taxation in that the specialized single stores competing with any one retail store of plaintiff, or department therein, are in any case taxed under said Act in the lowest bracket at 1/20 of one per cent of gross sales, subject to the credits provided [fol. 58] by Section 4 of said Act. They deny that the gross sales of plaintiff's store or department therein competing with said specialized single store are added to their gross sales in all its other stores or departments therein so as to produce an aggregate of gross sales during the taxable period, to be taxed at the highest brackets or rates of taxation provided in said Act. They deny that at the rate of one per cent plaintiff's tax rate is twenty times or any times in excess of the rate that in any case is levied under said Act upon a specialized single store competing with one of plaintiff's retail stores or departments in such retail stores respectively.

XV

Defendants, for answer to paragraph XV of the bill of

complaint, deny that such Act of 1930 contains in Section 4 thereof a provision which in effect, or otherwise exempts from the payment of any tax thereunder all or any retail merchants having gross sales for the taxable period under said Act comparable in amount with sales made by plaintiff in any retail store or in any of the several departments thereof operated in Kentucky by plaintiff in actual competition with other retail merchants in the same city or section of Kentucky that have a smaller volume of gross annual sales or are taxed under said challenged Act at the minimum rate of 1/20 or one per cent therein provided.

Defendants deny that Section 4 of said challenged Act provides in substance or effect, that while the license tax created or imposed by said Act shall not be in lieu of any special State license, excise, occupational or corporation license tax due under the provisions of any law now in force, or that may hereafter be enacted, yet in the case of the retail merchants having smaller volumes of sales, such credits are in actual fact, or at all, provided so as to in effect relieve said smaller retail merchants of the payment of any tax whatever under said challenged Act or in effect provide that the special State license, excise, occupational or corporation license tax exacted from them under the laws now in force, or hereafter enacted, shall be a substitute for any license tax otherwise exacted of them under the Act.

Defendants deny that the credits allowed under Section 4 of said challenged Act, by way of remission of the tax levied [fol. 59] thereunder, are sufficient in practically all cases, or any cases, to offset the tax levied under said Act on sales of retail merchants as defined therein, whose annual gross sales do not exceed $400,000.00, or that they were known to be sufficient for that purpose at the time of the passage and approval of said Act, or the allowance of said credits by way of remission of the tax levied in the Act or the graduation of said tax were each provided for in said Act as a part of a legislative scheme to tax retail merchants having a large volume of gross annual sales or to exempt from taxation retail merchants having a small volume of gross annual sales.

Defendants deny that there are few retail merchants in Kentucky whose gross annual sales, in a single or individually owned store, exceed $400,000.00, or the gross annual

sales of all or any of such retail merchants are below $100,000.00, or in any instances below $50,000.00.

Defendants deny that, in practical effect or operation, only those retail merchants doing business in Kentucky who own or manage more than one department in a single store, or more than two stores, with or without departments, or who have annual sales in all their stores or departments aggregating more than $400,000.00 are subject to taxation under said Act in any appreciable amount or those who are taxed at all constitute a small class or limited number, as compared with the number of retail merchants who are wholly or at all exempt from taxation under said Act. Defendants deny that there is no just or reasonable basis for the classification of retail merchants for the purpose of taxation under said Act..

Defendants deny that the average retail merchant conducting a general retail store in Kentucky has invested therein a capital not exceeding $25,000.00, or has gross annual sales aggregating less than $50,000.00, or such a retail merchant would, as a rule, or at all, pay to the State of Kentucky, upon the kind of stock carried in his general store, special State license or excise taxes aggregating from $10.00 to $15.00.

Defendants deny that, if such retail merchant conducts his business under form of a corporation organized in Kentucky, with an authorized capital stock of $25,000.00, fully paid in or invested in its single retail store in Kentucky, or has therein gross annual sales of $50,000.00, it could not be [fol. 60] assessed under said Act of 1930 with a tax exceeding $25.00, or as a matter of fact, or otherwise, in general practice it would not be assessed with any tax at all, or with a smaller tax than $25.00, because its annual corporation license tax levied under Sections 4189-1 and 4189-2, Kentucky Statutes, at the rate of 70 cents per thousand dollars of authorized capital stock or capital invested in Kentucky, plus other State excise or license taxes paid by it, would at all offset any tax imposed upon it by said Act, or would thus be a substitute for any tax so imposed upon it by said Act.

Defendants deny that the volume of annual gross sales made by plaintiff in one of its stores, or departments therein, in competition with any retail merchant would be added to any other gross annual sales made in any of plaintiff's other stores, or departments therein, located in Ken-

tucky or thus subjected to a tax at the rate of one per cent as compared with the tax of 1/20 of one per cent levied by said Act upon any other retail merchant conducting any retail store or competing with the plaintiff in the sale at retail of goods of the same kind or character. Defendants deny that credits allowed plaintiff under Section 4 of said Act, when proportionately allocated to each of its stores or departments therein, would amount to an insignificant part of the tax levied upon plaintiff by reason of its annual gross sales in each store or each department therein.

XVI

The defendants, for answer to paragraph XVI, deny that the design, intent, practical operation or effect of Section 1 of said Act is to require or compel the owner or management of two or more separate or distinct stores or departments, as defined in said Act, to aggregate for the purposes of taxation the gross sales of stores or departments controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management without regard to the fact that said stores or departments may be separate or distinct enterprises; without regard to their location or without regard to the fact that said stores, or departments, are each engaged in the sale at retail of wholly different merchandise or commodities unrelated to the merchandise or commodities sold in other stores or departments.

[fol. 61] Defendants deny that the design, intent or practical operation of said Act is thereby to tax, penalize or, because of the increased rate of taxation in the higher brackets, to prohibit the employment of capital in the acquisition of stock in corporations owning stores, as defined by said Act, which may result in majority stock ownership, or to tax, penalize or in effect prohibit the employment of capital, skill, efficiency or economy in the operation of such stores under one management or co-operatively under an association of management.

XVII

Defendants, for answer to paragraph XVII, deny that, for many years past, or at all, there have been various or any voluntary co-operative associations or agencies organized or successfully conducted for the purpose of affording

to so called individual or single-store retail merchants engaged in Kentucky, or elsewhere, in the business of selling at retail, goods, wares, or merchandise of the character handled or sold by plaintiff in its retail stores or by retail merchants generally throughout Kentucky, or other States, facilities, services or advice in selecting, buying, advertising or displaying the merchandise handled or sold by them at retail in their respective stores in Kentucky, or elsewhere, corresponding in any material respects as to price, quality or kind with the merchandise handled or sold by plaintiff in its retail stores or by other retail merchants similarly situated.

Defendants deny that these co-operative associations or agencies, for a comparatively small fee or at all, afford to retail merchants operating individual specialized stores throughout Kentucky, or elsewhere, affiliated with them, all or any of the facilities or advantages, in the matter of selection of goods or prices to be paid therefor, that can be obtained by any large organizations operating on its own account, or in any cases such co-operative associations or agencies afford to their members or patrons better advantages or facilities along such lines, or at all.

Defendants deny that such co-operative associations or agencies afford to any retail merchants in Kentucky, or elsewhere, affiliated with them, the benefit of their advice or experience or co-operative action in securing increased results in advertising the goods of such retail merchants to [fol. 62] the buying public, or as advice or suggestions as to the most approved or advanced method of selecting goods of the proper style or quality, or for displaying such goods in the retail stores of the various merchants affiliated with such co-operative association or agency. Defendants deny that practically all, or any, retail merchants owning or operating in Kentucky specialized individual retail stores, who have gross annual sales aggregating as much as $100,000.00, for some years past, as a part of the economic development of the business of a retail merchant, have availed themselves of the services or faciilties thus, or at all, afforded by said co-operative associations or agencies. Defendants deny that, in this manner, or at all, such retail merchants have as great buying power as the plaintiff or any other retail merchant buying on his, or its own, account a stock of merchandise for sale in his or its retail store or stores, or that

they can buy goods of as high class or quality, at similar prices, as the plaintiff or any other retail merchant similarly situated, or that they can or do get the benefit of similar facilities or services for advertising, displaying or handling their merchandise in their respective stores, or for effecting a rapid turnover thereof, even though the aggregate of their gross sales may be, or in practically any case it is, less than $400,000.00 per annum in such retail store owned or operated by them in Kentucky. Defendants deny that plaintiff, by reason of its operation of several stores or the larger volume of gross sales made by it therein, has no advantage whatever over the retail merchant operating a specialized individual store in competition with the stores of this plaintiff or any department therein. Defendants deny that any of such specialized individual stores have gross annual sales of merchandise handled by them exceeding in volume the gross annual sales of such merchandise handled or sold in plaintiff's store, or department, competing with such specialized individual retail merchant.

Defendants deny that the specialized individual merchant has the advantage of better facilities for displaying his merchandise, of whatever character it may be, in a smaller store located directly on the ground floor with display windows facing directly upon the street upon which his retail store is located. Defendants deny that any of such specialized individual retail stores competing with the plaintiff have, by reason of their advantages, or otherwise, made [fol. 63] substantial or any inroads or encroachments upon the trade of plaintiff in any departments established or conducted prior to the opening or establishment of such individual stores now operating in competition with plaintiff.

Defendants deny that there is no just, proper, or reasonable basis for discrimination in the matter of taxation against this plaintiff or in favor of the retail merchant conducting a specialized individual store.

XVIII

Defendants, for answer to paragraph XVIII, deny that the percentage of said tax is increased with each one hundred thousand dollars of sales above $400,000.00, unequally, disproportionately, arbitrarily, or with the sole or any design or intent to burden, oppress, prohibit or discriminate against the ownership or ultimate management of all, or

any, retail stores in Kentucky having a large volume of gross sales (whether in one store or more, or in one department or more in the same store), or thus or at all unreasonably, unequally or disproportionately to discriminate against, oppress, burden or penalize the employment of capital, skill, efficiency or the ability of retail merchants in the State of Kentucky, or in any State, to increase their sales above $400,000.00. Defendants deny that said increase in its practical operation or effect is unequal or disproportionate in the percentage of tax per one thousand dollars of increased sales. Defendants deny that said classification is unreasonable, unequal, discriminatory, oppressive, arbitrary or confiscatory as to the plaintiff or other retail merchants similarly situated.

XIX

Defendants, for answer to paragraph XIX, deny that the classification or graduation made as a basis for the tax imposed rests wholly upon the amount of gross sales of any stores controlled or held with others by a majority stock ownership, or controlled or directed by one management or association of ultimate management; or that said classification does not rest upon the ability of the taxpayer to pay said tax, or upon the income or earnings from any store or stores, or that it has no relation to receipts. They deny that it is imposed regardless of whether said sales [fol. 64] are made at a profit or loss or the amount of profit or loss therefrom; or that it has no relation to profits or losses. They deny that it has no relation to the capital employed or invested, or that said Act does not make any provisions for the merchandise returned; for the cancellation of sales or resales of merchandise or the net amount of sales, or sales on credits for which payment is not received. They deny that it classifies sales as to the gross amount thereof by dollars, or that it strikes at the increase in said gross sales by a geometrical increase in the rate of taxation. They deny that said Act taxes the dollar of sales of any retail merchant upon a rate or basis different from the dollar of sales of other merchants engaged in direct competition or similarly circumstanced. They deny that one retail merchant doing twice the business of his competitor is required to pay seven and one-half times or any times as much on his dollar of sales as his competitor who, in

the same class or similarly circumstanced, is required to pay on his dollar of sales, or that said classification is unreasonable, without a rational basis, or is arbitrary, unequal or oppressive.

XX

Defendants, for answer to paragraph XX of the Bill of Complaint herein, deny that competitive stores, by reason of connection with co-operative associations, agencies or organizations, although singly or individually owned, enjoy any or all the advantages which may flow from group or co-operative buying on a large scale, the pooling of purchasing power, the ability to contract for buying goods upon a large scale or for scientific or efficient arrangements of stores, window displays or the development of merchandising methods through the employment, co-operatively, of experts or others experienced therein. They deny that said co-operative associations combined co-operatively have as great or greater number of stores or have as great, or greater, purchasing or buying power, or have as great, or greater, advertising or merchandising ability as the plaintiff or as other retail merchants who own two or more stores in Kentucky or conduct two or more departments in any retail store so owned or operated by them. They deny that said singly or individually owned stores or [fol. 65] members of co-operative associations, as aforesaid, similarly circumstanced, are in direct competition with the plaintiff or with other retail merchants owning two or more stores, or are required to aggregate or combine for the purpose of taxation or to report for taxation the total sales of all stores in Kentucky joined together in the same co-operative association or organization, or that said competitive stores, members of said associations or organizations, are not subject to taxation on the same basis, classification or rate as the plaintiff. They deny that the practical operation or effect exempts single or individual stores from taxation in said Act. They deny that the plaintiff is subject to taxation at the highest rate prescribed in said Act, or that, by reason thereof, or at all, such competitive stores are given undue or unfair economic advantages over the retail store of the plaintiff, or over other retail merchants similarly situated, or are in effect aided, helped or subsidized by said Act in their competition with the plaintiff or other retail merchants similarly situated.

XXI

The defendants, for answer to paragraph XXI in the Bill of Complaint, deny that this retail merchant is required, by reason of a small percentage of profit on a single sale to have a large volume of sales, or to continuously increase its sales volume, in order to secure a fair return on the capital employed by it in his business. They deny that the highly competitive character of the retail business, in which plaintiff is engaged, or other retail business in the Commonwealth of Kentucky, or elsewhere in the United States, makes it necessary for each merchant to meet such competition or to conform his business methods therewith. They deny that the plaintiff or other retail merchants similarly situated have built up or developed in Kentucky for themselves respectively a large or valuable business upon the basis of selling merchandise at retail to the public at the lowest possible prices, consistent with a small average profit in individual sales. They deny that such merchandising methods are the basis of the business of the plaintiff or any other retail merchants similarly situated or are dependent upon a large volume of [fol. 66] sales in order to secure a fair, reasonable or adequate return upon invested capital employed in the conduct of their business. They deny that such merchandising methods are the basis of the business of the plaintiff or any other retail merchants similarly situated, or are of benefit to the general public of the Commonwealth of Kentucky or have brought to the plaintiff or any other retail merchants similarly situated, a large or valuable good will or a large sales volume.

XXII

The defendants, for answer to paragraph XXII of the Bill of Complaint herein, deny that the rate of taxation, exacted by said Act, of plaintiff or other retail merchants similarly situated are unfair, unjust, unequal, oppressive or discriminatory or that they impose upon them and unjust or intolerable, or any, burden for the benefit or other retail merchants engaged in like business having a smaller volume of annual gross sales, or at all, or that it will destroy or impair, or that the purposes of said Act is to destroy or impair, the good will or established trade or business or

thereby to reduce the volume of annual gross sales made by plaintiff or other retail merchants similarly situated, or to in anywise divert trade or custom from the retail stores of plaintiff or other retail merchants similarly situated, or taxes in the higher brackets of taxation, or taxes other retail merchants having a smaller of greater annual gross sales wholly taxed under the lower rates of said Act.

They deny that said Act, in its purpose or effect, is wholly or at all lacking in uniformity in its application to persons or occupations taxed thereunder, or that the Act designedly or at all transfers to or imposes upon plaintiff or any other retail merchants similarly situated any proportion or practically all or any of the burden of the license taxes in said Act levied upon retail merchants. They deny that the said Act thus designedly, or otherwise, discriminates in favor of retail merchants having a small or comparatively small volume of annual gross sales, or that it in effect levies a subsidy for their benefit to be paid wholly or at all by plaintiff or other retail merchants similarly situated who have annual gross sales in large volumes. They deny that said Act denies to plaintiff or other retail merchants similarly situated the equal pro-
[fol. 67] tection of the laws guarante-d to it or to them by the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States or by the fundamental laws of the State of Kentucky.

XXIII

The defendants, for answer to paragraph XXIII of the Bill of Complaint, deny that there is a large or any number of retail merchants engaged in Kentucky in the operation of one store, either with or without separate departments therein, such as plaintiff conducts in its retail stores, or in the operation of two or more stores, either under the same management or controlled or held with others by majority stock ownership, or ultimately controlled or directed by one management or association of ultimate management, which are in like situation with the plaintiff in that, under said Act, each or any of them is subject to taxation in the higher brackets or that taxes are excessive, unjust, or discriminatory, by reason of the larger volume of gross annual sales made by them or for any reason, to the exclusion of any number of retail merchants competing with

them respectively, who have smaller gross annual sales or, by reason of credits allowed under Section 4, or any other section, of said Act are required under said Act to pay no tax whatever or an insignificant amount of taxes.

XXIV

Defendants for answer to paragraph XXIV of the Bill of of Complaint, admit each and every allegation contained therein.

XXV

Defendants, for answer to paragraph XXV of the Bill of Complaint, admit that they will attempt to enforce said Act according to its several provisions. They deny however, that such enforcement will work irreparable or any injury or damage to the plaintiff or other retail merchants similarly situated.

XXVI

The defendants, for answer to paragraph XXVI of the Bill of Complaint, deny that Section 13 of the emergency [fol. 68] clause of said Act is void for any reason, or for the reason that the emergency therein recited has no connection with or relation to the purposes for which said Act was enacted by the General Assembly, or that under a decision of the Court of Appeals of Kentucky sufficient reasons *to* meeting the requirements of Section 55 of the Kentucky Constitution was not assigned for making said Act take effect upon its approval by the Governor.

XXVII

Defendants, for answer to paragraph XXVII of the Bill of Complaint, deny that said Act, in any of the particulars hereinbefore pointed out, or at all, is void because it violates the provisions of the Constitution of the United States or the Fourteenth Amendment thereof, or because it violates the provisions of the Constitution of Kentucky as herein set forth, or at all.

(1) Deny that said Act, for the reasons hereinbefore set forth, or at all, is void in the several respects and particulars hereinbefore pointed out, or at all.

(a) Defendants state that said Act does not deny to plaintiff, or any other retail merchants similiarly situated,

due process of law, or that it is an attempt to levy upon them a tax that is confiscatory of their property, or is an attempt to take their property without due process of law, as an arbitrary exaction, particularly insofar as any tax levied thereunder by gross sales of retail merchants made prior to June 17, 1930.

(b) Defendants state that said Act does not deny to plaintiff, or other retail merchants similarly situated, the equal protection of the laws in that it exacts of the plaintiff, or other retail merchants similarly situated, any unreasonable, unjust, discriminatory, oppressive or prohibitive rate of taxation, based upon classification that is unreasonable, unjust or discriminatory against the plaintiff or other retail merchants similarly situated. Deny that it taxes this plaintiff, or other retail merchants similarly situated, at geometrically increased rates, graduated according to increased volume of gross sales, without reference to any other consideration whatever or without any [fol. 69] reasonable basis of classification, or at the same time imposes upon other retail merchants, doing the same kind of business in substantially the same way, a lower rate or burden of taxation, or as to an overwhelming number, or any number, of such retail merchants, exempts them from any taxation whatever under said Act.

(c) Deny that, for the reasons hereinbefore set forth, or at all, said Act abridges the privileges or immunities guaranteed to plaintiff by the said Fourteenth Amendment, in the particulars hereinbefore set forth, or at all, or that it is illegal or void.

(2) Deny that said Act violates the fundamental principles of uniformity in the matter of taxes levied upon occupations, persons or property upon some reasonable basis or classification as such principles of uniformity are recognized by Sections 171 and 181 of the Constitution of Kentucky.

XXVIII

Defendants, for answer to paragraph XXVIII of the Bill of Complaint, deny that a mandamus for a refund of taxes wrongfully collected could only be brought where the tax is paid under protest or after its payment, or that it could only be brought or prosecuted in the courts of Ken-

tucky, or that a judgment therein in favor of the complaining tax payer could only result in obtaining a warrant upon the General Fund of the State in the hands of the State Treasurer, to be paid if or when the funds were available for the payment of such warrants in the usual or orderly course.

Defendants deny that the taxes collected under said Act do not go into the General Fund of the Commonwealth or that they are immediately appropriated or applied as provided in said Act, or that there are now outstanding many State warrants drawn by the Auditor of Public Accounts upon the General Fund in the hands of the State Treasurer which have been outstanding since June, 1927, or can not be collected by the owners or holders thereof, for lack of funds in the State treasury during such period, for the payment of such warrants.

Defendants deny that it is shown by the monthly financial statement officially issued by the State Treasurer of [fol. 70] Kentucky as of January 1, 1931, the amount of money in the General Fund on January 1, 1931, less minor accounts, was $12,565.81, or that were at the time outstanding warrants aggregating $9,880,502.76 drawn by the Auditor of Public Accounts upon the State treasury or presented for payment but not paid for lack of funds.

Deny that, by reason of the facts herein set forth, or at all, the plaintiff has no remedy whatever in the courts of the State of Kentucky or any remedy at law whatever in the courts of the United States.

XXIX

Defendants, for answer to paragraph XXIX of the Bill of Complaint, admit that they will attempt to enforce the provisions of this Act, but deny that said Act is illegal or invalid or that the tax which will be exacted from the plaintiff is an illegal tax. They further say that they have no information upon which to answer the allegations in said paragraph as to the amount of tax plaintiff will be compelled to pay and, therefore, neither deny or admit such allegations, but require strict proof thereof.

XXX

Defendants, for answer to paragraph XXX, deny that unless they are restrained from enforcing or attempting

to enforce said Act, the plaintiff or any others similarly situated, will sustain irreparable or any loss or injury for which they have no plain, adequate or complete remedy at law, or any remedy at all in the Courts of Kentucky, in each of the following particulars, or at all:

(1) Deny that the plaintiff, or any others similarly situated, will be compelled to pay taxes pursuant to an invalid or unconstitutional enactment or for which they are not legally liable.

(2) Deny that, upon the failure of the plaintiff or others similarly situated to pay said taxes, the drastic penalties provided by said Act will be enforced by the defendants against the plaintiff or others similarly situated, or as a result thereof, plaintiff, or others similarly situated, will be compelled to defend innumerable prosecutions brought to recover said taxes or penalties or criminal proceedings [fol. 71] brought to impose the criminal penalties provided in Section 7, of said Act, at great expense or damage to it or them.

(3) Deny that the expenditure by the defendants of the public funds raised by taxation for the purpose of trying to enforce and carry out the provisions of said Act will be to the irreparable or any injury or damage of the plaintiff as taxpayers of the commonwealth of Kentucky.

(4) Deny that if the plaintiff, or others similarly situated, should pay said taxes under protest and be compelled to commence actions to recover the same as provided in Section 10, of said Act, they will be put to large expense or any expense, for attorneys' fees or court costs, or be required to bring a multiplicity of actions in order to recover said moneys, or that said Act contains no provisions of any kind for the reimbursement to plaintiff, or others similarly situated, of said large sums or any sums which it would be required to expend in prosecuting such actions for attorneys' fees, court costs or any other expenses, or in any sums for said purposes.

(5) Deny that no waiver is provided of the right of the Commonwealth of Kentucky to defend any action brought in the courts of the United Etates as a suit against a State within the meaning of the Eleventh Amendment to the Constitution of the United States, or that in consequence

thereof, or at all, the plaintiff or others similarly situated, do not have a plain, adequate or complete remedy in an action at law in the courts of the United States. Deny that the only remedy afforded by said Act, or by any law of the Commonwealth of Kentucky, is a suit at law in the Franklin Circuit Court against the Auditor of Public Accounts for a mandamus to compel him to draw his warrant upon the Treasurer for the amount of taxes erroneously exacted of the taxpayer and paid by him, under protest, or that said Section 10 of said Act of 1930 and Section 162 of the Kentucky Statutes, are the only statutes of Kentucky which afford any remedy in such cases to the taxpayer from whom illegal taxes have been collected by the Commonwealth of Kentucky.

Defendants deny that, by no other statute, has the Commonwealth of Kentucky ever consented in any way to be sued itself or through any of its officers for the recovery of [fol. 72] taxes illegally exacted from a taxpayer or covered into the treasury of the State.

(6) Defendants deny that said Act is ambiguous or doubtful as to its application or meaning, or as to the procedure or requirement thereunder, or that it has never been interpreted by the Court of Appeals of the Commonwealth of Kentucky.

(7) Deny that the amount of said annual tax which plaintiff will be required to pay under the terms of said Act will be a substantial portion of the capital invested by them in their retail stores or is needed by them to carry on their business therein. Deny that the payment of such a sum of money will impair the ability of the plaintiff to operate its business in Kentucky or will give competitors of the plaintiff who are not required to withdraw any money from their respective businesses or who are not required to withdraw a proportionate sum therefrom, an unfair or undue advantage over the plaintiff, or thereby decrease the amount of gross annual sales or of profits therefrom that plaintiff will be able to make in each of its retail stores in Kentucky, or that the plaintiff has no plain, adequate or complete remedy at law, or that the same is true as to all or any other retail merchants similarly situated.

(8) Defendants deny that the enforcement of said Act will have the effect of injuring or impairing any lawful

business in which the plaintiff, or others similarly situated, are engaged or in which they have the undoubted right to engage, which right is guaranteed and protected by the State and Federal Constitutions.

XXXI

For further answer herein, defendants deny each and every allegation of the bill of complaint not heretofore specifically admitted, controverted or denied.

For further answer, the defendants aver and allege as follows:

(1) The Act in question (House Bill 111, now Chapter 149 Acts of the General Assembly of 1930) levies a tax graduated progressively as to rate upon all sales of goods, wares and merchandise at retail in this Commonwealth. [fol. 73] Retail merchants are, under the provisions of said Act, classified by amount of annual gross retail sales. The word "merchant," as defined in said Act, includes every person, firm, corporation, association or co-partnership selling at retail in this Commonwealth, and exactly the same rate is levied upon every merchant doing the same amount of annual gross retail business without regard to whether said merchant operates one store or many stores.

(2) The classification made as a basis for the tax imposed by said Act rests not only on the volume of gross sales, but also upon the ability of the merchants affected by the various gradations of the Act to pay the tax imposed. It being a well established economic law of merchandising that the per cent. of income per dollar of investment increases progressively in the same, or approximately the same, ratio to the volume of sales as does the rate levied by said Act, that is to say, those merchants engaged in a retail business in this Commonwealth having gross annual sales of less than $400,000.00 per annum as a class have a net average annual income of only 6.2% upon their investment, and those merchants engaged in a similar retail business having gross annual sales of more than $400,000, or less than $1,000,000, have an average annual income as a class of 7.1% in their invested capital, and retail merchants engaged in a similar business in this Commonwealth having sales of more than $1,000,000.00 per year have an annual income of 9.5-12.1% on their investment.

Defendants further say the examples set out above are illustrative of the progressive increased ratio of earning power of invested capital to volume of sales.

(3) Defendants say that the progressive increase of earning power in invested capital, based on increased volume of sales, as illustrated in the paragraph above, conclusively proves a proportionate increase in ability to pay the amount of tax collected.

Defendants further allege that the plaintiff, J. C. Penney Company, and all others similarly situated, have for many years enjoyed and are now enjoying a large and prosperous retail business in this State, and that their gross annual retail sales have, in many instances, exceeded $3,000,000.00 per annum and they have made and are now making a profit [fol. 74] of more than 4.3% of such gross annual sales and that their net profit on their capital invested in the retail business in this Commonwealth was and is annually more than 9.2%.

(4) Defendants further say that the increased ratio of earning power of capital invested to volume of sales is brought about by the operation of certain well known and well recognized economic laws as follows:

(a) It is a well established and well recognized law of merchandising economics that the greater the volume of sales the greater the buying power, and that goods, wares and merchandising such as sold by this plaintiff and others similarly situated can be purchased at a much lower price in great volume than in small volume and that the purchasing power alone of plaintiff, and others similarly situated, enables them to purchase goods, wares and merchandise at —% less than goods, wares and merchandise of like quality can be purchased by individual retail merchants having a small volume of sales and who are in competition with this plaintiff, and others similarly situated.

(b) It is a well recognized and established rule in this Commonwealth that the ratio of turnover or volume of trade to capital invested increases progressively as the volume increases, that is to say, retail merchants doing an annual retail business comparable to that done by this plaintiff do a very much greater volume in ratio to capital

invested, than do individual merchants having a small volume of annual business.

(c) It is a well established rule of merchandising economics that the cost of marketing decreases per dollar of sales as volume increases and this plaintiff, and others similarly situated, can and do distribute at retail goods, wares and merchandise sold by them at much less expense than a like amount of similar merchandise can be distributed through the stores of other individual competitors.

(d) Defendants further allege that the tax imposed by the Act in question was designed, intended and, in practical operation and effect, does equalize the tax burden heretofore borne by retail merchants in this Commonwealth and [fol. 75] that said equalization is brought about by reason of the fact that the individual merchants in this State, competing with this plaintiff, have heretofore and are now bearing an unjust and disproportionate share of the tax burden and that the imposition of the graduated tax levied by this Act will equalize said burden in that those who are now paying the greatest amount of taxes in ratio to the capital invested will be taxed at the minimum rate under said Act, while those merchants having a great volume of sales and paying a small percentage of taxes on invested capital will be taxed at the higher rates under said Act.

(e) Defendants further say that the above result is brought about in part by the fact that property is assessed for ad valorem taxes in this State on July 1st in each year, and that the amount of goods, wares and merchandise on hand in this State on that date determines the amount of taxes to be paid for State purposes. They say that this plaintiff and others similarly situated, by reason of the fact that they do a maximum amount of business on a minimum stock of goods, are enabled to and do pay a much smaller tax rate, based on volume of retail business, than that paid by merchants having a small annual gross business who are forced to compete directly with this plaintiff and others similarly situated; that this plaintiff and others similarly situated, are enjoying a great volume of business in this Commonwealth and are not now paying and have never paid their just and due proportion of the taxes levied upon retail merchants, and are not now paying and have never paid for State purposes taxes at a greater rate than 0.45%

upon their volume of sales, while their smaller competitors have been forced to pay .7% on their volume of sales.

(5) Defendants say that House Bill 111, Chapter 149 of the Acts of the General Assembly of 1930, was introduced, passed, enrolled, and signed in the manner shown by the certified copies of the entries in both House and Senate Journal relating to said bill, such certified copies are filed herewith and made a part hereof as if copied in full, marked for identification "Exhibit A."

[fol. 76] Defendants further say that said bill was introduced, passed, enrolled, and filed in exact conformity with the Constitution and laws of the State of Kentucky.

(6) For a separate and distinct defense in point of law arising upon the face of the Bill of Complaint herein, the defendants say that the facts alleged in said Bill of Complaint are insufficient to constitute a valid cause of action.

Wherefore defendants pray judgment that the Bill of Complaint be dismissed and held for naught; and the prayer thereof denied; for all costs about this action expended, and for all proper relief.

J. W. Cammack, Attorney General; S. H. Brown, Assistant Attorney General; Howard Smith Gentry, Frankfort, Kentucky, Solicitors for Defendants. Batson, Cary & Welsh, Louisville, Kentucky; Leslie W. Morris, Frankfort, Kentucky, of Counsel.

IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO STATEMENT OF EVIDENCE—Filed March 23, 1932

This case having been heard with the case of Stewart Dry Goods Company v. John B. Lewis, et al., (simultaneously herewith appealed to the Supreme Court of the United States) upon the plaintiff's motion for an interlocutory injunction, and the same testimony having been read in each case, it is agreed by counsel that the narrative of testimony printed in the record of the said Stewart Dry Goods Company case shall be considered as a part of this record upon

appeal without the necessity of duplicating same in this record.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors for Appellant.
Bailey P. Wootton, Atty. Gen. Ky.; S. H. Brown, Asst. Atty. Gen. Ky.; H. W. Batson, J. Whitcomb Welch, Leslie W. Morris, Solicitors for Appellees.

[fol. 77] IN UNITED STATES DISTRICT COURT

ORDER OF SUBMISSION—February 14, 1931

This day the above-styled three cases came on for hearing before Hon. Charles H. Moorman, Circuit Judge, Hon. Charles I. Dawson, District Judge, and Hon. A. M. J. Cochran, District Judge, on motion of the respective plaintiffs for an interlocutory injunction.

By agreement of parties plaintiff and defendant, the above-styled three cases are heard together upon the pending motions for an interlocutory injunction, and the same evidence was heard in these cases as in the case of Kroger Grocery & Baking Company against the same defendants, pending in the Eastern District of Kentucky and heard at the same time.

The plaintiffs by counsel filed and read the deposition of Shirley E. Haas and exhibits therewith and the affidavits of the following persons:

Robert W. Lyons,	John B. Bonham,	W. A. Steiden,
D. T. Petty,	Gilbert J. Schneider,	Albert Berger,
John E. Donahue,	John Scanlan,	Chris Schumann,
Louie J. Jones,	Brack M. Ferrill,	Arch B. Davis,
M. R. Anderson,	C. J. Henry,	Harmon Noe,
R. W. Owens,	Crawford Lee,	Robert J. McKim,
Fred Levy,	Dann Byck,	C. R. Turley,
N. A. Bash,	G. H. Parker,	James R. Karibo,
B. E. Van Antwerp,	C. R. Leininger,	E. R. Probasco,
M. S. Gesley,	W. G. Howell,	E. C. Purvis,
W. T. Morgan,	A. C. Miller,	O. A. Rhodes,
H. H. Craven,	W. G. Jenkins,	Robert Wright,
C. W. Gowin,	T. B. Jones,	P. O. Wolverson,
J. A. Gude,	B. E. Willis,	J. D. Delano,

L. M. Ross,	B. A. Aistrop,	H. C. Amstutz,
Milton Marx,	Dolph Wile,	C. H. Parsons,
Paul H. Nystrom,	Daniel M. Cohen,	James W. Stites.

[fol. 78] and a synopsis and analysis of reports concerning the Gross Sales Tax in controversy, signed by Joseph Martin, supervisor of the Gross Sales Tax Department, and A. H. Brendel, Certified Public Accountant.

Came the defendants by counsel and entered a motion to dismiss the bill of complaint in each of the above-styled three cases, and, not waiving same entered motion to strike out certain parts of the bill of complaint in each case, and, not waiving same, filed an answer in each case.

Likewise defendants filed and read evidence upon the hearing of plaintiffs' motion for interlocutory injunction in each of the above cases the affidavits of Henry F. Walradt, together with Exhibits A, B, C, D, E, F, G, H, I, and J; the affidavit of James W. Martin, together with Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16; the affidavit of Clyde W. Phelps; the affidavit of B. T. Brewer; and a certified copy of the House and Senate Journal relating to the introduction, passage, approval, and enrollment of House Bill No. 111 of the 1930 Session; and a certified copy of the Gross Retail Sales Tax Law; the deposition of Walter Burr and a paper dated Feb. 13, 1931, in regard to retail gross sales tax reports audited.

Thereupon these cases were argued by counsel for the respective plaintiffs and defendants and ordered to be submitted upon plaintiffs' pending motions for an interlocutory injunction, and the Court, not being fully advised, takes time.

Leave is given to plaintiffs to February 28, 1931, and to defendants to March 10, 1931, within which to file briefs.

It is further ordered and adjudged that the temporary restraining order heretofore entered in each of the above-styled cases be and the same is hereby continued in full force and effect until the determination of plaintiffs' motion for an interlocutory injunction entered therein respectively.

Chas. H. Moorman, Circuit Judge. A. M. J. Cochran, District Judge. Chas. I. Dawson, District Judge.

[fol. 79] IN UNITED STATES DISTRICT COURT

KROGER GROCERY & BAKING COMPANY, Plaintiffs,

vs.

JOHN B. LEWIS, SELDEN GLENN, and HENRY M. CLINE, as Member of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, Auditor of Public Accounts of the Commonwealth of Kentucky, Defendants

Before Moorman, Circuit Judge, and Cochran and Dawson, District Judges

OPINION—Filed December 9, 1931

In this action plaintiff, an Ohio corporation, owning and operating a chain of retail grocery stores in the United States, two hundred and sixty-three of which are located in different parts of the Commonwealth of Kentucky, attacks Chapter 149 of the 1930 Acts of the General Assembly of the Commonwealth of Kentucky, commonly known as the Retail Merchants' Gross Sales Tax Act, as violative of the Federal and State Constitutions. The case is now before us on application of the plaintiff for an interlocutory injunction, under Section 266 of the Judicial Code (28 U. S. C. A., Section 380).

At the threshold of the case we are met with the contention of the defendants that a Federal court of equity is without power to grant the relief sought, for the reason that the law of Kentucky affords plaintiff an adequate remedy at law for any injury sustained by it resulting from its enforced compliance with the terms of the Act. A decision of this question involves a construction of Section 10 of the Act, which reads as follows:

"No suit shall be maintained in any court to restrain or delay the collection or payment of the tax herein imposed upon any ground whatever, but the aggrieved taxpayer shall pay the tax as and when due, and if paid under protest may at any time within two years from the date of such payment sue the Auditor of Public Accounts in an action at law to recover the tax so paid, with legal interest thereon from the date of payment. If it is finally determined that

[fol. 80] said tax, or any part thereof, was wrongfully collected for any reason, it shall be the duty of the Auditor of Public Accounts then in office to issue his warrant on the Treasurer of the Commonwealth of Kentucky for the amount of such tax so adjudged to have been wrongfully collected, together with interest thereon, and the Treasurer shall pay same out of the General Fund of the State. A separate suit ned not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made, and which are not barred by the limitation of two years herein imposed."

If this section of the Act affords to the aggrieved taxpayer a remedy as certain, complete, practicable and efficient as is available in equity, and if the remedy thus afforded is available in the Federal courts, other jurisdictional requirements appearing, then this action must be dismissed. The declared purpose of Section 10 is to prevent injunctive interference with the operation of the law. It is quite apparent from a reading of this section that its draftsman was familiar with the rule, that in order to make effective the prohibition against injunctive interference, the statute must furnish an adequate remedy at law in lieu thereof. The effort in Section 10 is to afford such adequate remedy at law, and, in view of the well settled rule that such a remedy must be available in the Federal Courts, if the necessary jurisdictional facts exist, it will not be presumed that the legal remedy provided was intended to be confined to the State courts, unless the language of the Act requires such construction. On the contrary, the statute will be construed to render effective the evident legislative intent, if such construction is not inconsistent with the plain language of the Act. Of course, the common law action authorized by Section 10 against the Auditor of Public Accounts is, in reality, an action against the State. The section does not contemplate that the Auditor shall personally satisfy any judgment obtained under its provisions. By its express terms the ultimate liability is that of the State, and the Auditor is simply designated as a convenient alter ego of the State in suits for the recovery of taxes and interest claimed to have been illegally collected under the Act in question. Highway Commission of

[fol. 81] Wyoming v. Utah Construction Co., 278 U. S. 194. So we must regard Section 10 as the standing consent of the State, subject to the conditions therein imposed, to be sued for the recovery of taxes exacted under the provisions of the Act in question. Of course, when a sovereign consents to be sued, it may fix the conditions under which such suit may be maintained. It may even name the court in which such suit may be maintained, and the State's consent to be sued in its own courts can not be enlarged into a consent to be sued in a Federal court. Chandler v. Dix, 194 U. S. 590; Murray v. Wilson Distilling Co., 213 U. S. 151.

We are unable, however, to agree with the suggestion of the plaintiff that Section 10 limits the common law action therein provided for to State courts. The section contains no language, expressly or by implication, so limiting the cause of action. The language is certainly broad enough to authorize actions in the Federal courts, and having in mind the evident purpose of the General Assembly to provide an adequate remedy at law for all taxpayers under the Act, we conclude that the legal remedy provided by Section 10 was intended to be available in the Federal courts, as well as in the State courts. Such being the case, Section 10 operates as a waiver—the immunity against suits in Federal Courts granted to States by the Eleventh Amendment to the Federal Constitution.

The plaintiff contends that even conceding that it is the purpose of Section 10 to make the legal remedy provided by that section available in the Federal courts, such purpose is aborted by reason of the fact that the suit at law authorized by that section is a mandamus proceeding, of which United States District Courts have no original jurisdiction. If the premise thus advanced is sound, the conclusion necessarily follows, as it is well settled that Federal courts are without jurisdiction to issue a writ of mandamus in an original action brought for the sole purpose of securing relief by such writ. Marbury v. Madison, 1 Cranch, 137; Covington Bridge Co. v. Hager, 203 U. S. 109; Knapp v. Lake Shore & Michigan Southern Ry. Co., 197 U. S. 536. But we can not agree with the premise. The common law suit authorized by Section 10 is not an original mandamus proceeding. It is an ordinary common law action against the Auditor of Public Accounts in his official

[fol. 82] capacity as the agent and representative of the State for a money judgment for the amount of taxes paid under the Act under protest, and interest thereon. The suit has none of the characteristics of an original mandamus proceeding. If, after judgment is obtained, the Auditor then in office declines to issue a warrant for the amount of such judgment and interest, the Federal court which rendered the judgment could issue a mandamus to compel the issual of such a warrant. Such a writ, however, would not be one issued in an original mandamus proceeding, but would be one issued in aid of the court's jurisdiction, which had already attached in the common law action for a money judgment. The issual of the writ in such a situation is authorized by Section 262 of the Judicial Code (Title 28, Section 377, U. S. C. A.) and is fully justified by the authorities. County of Green v. Daniel, 102 U. S. 187; Davenport v. County of Dodge, 105 U. S. 237.

We do not agree with the suggestion of the plaintiff that the settled and approved practice under Section 162 of Kentucky Statutes fixes the nature of the proceeding under Section 10 of the Act in question. Section 162 is, in part, as follows:

"When it shall appear to the Auditor that money has been paid into the treasury for taxes when no such taxes were in fact due, he shall issue his warrant on the Treasurer for such money so improperly paid in behalf of the person who paid the same."

This section makes no provision whatever for a common law action against the Auditor for a money judgment. It simply lays upon the Auditor the duty in a proper case of issuing his warrant for the taxes illegally or improperly collected. If he fails in the performance of this statutory duty, then mandamus in the State court is the only remedy against him, and in such proceeding the court must determine if he wrongfully refused to issue warrant for the amount claimed. Under Section 10 of the Act under consideration, however, the statutory duty of the Auditor to issue his warrant never arises until the amount for which the warrant is to be issued has been fixed by a money judgment in a common law suit. The difference between the two provisions of the statute is obvious. Furthermore, if

the remedy under Section 10 is the same remedy granted [fol. 83] by Section 162 of Kentucky Statutes, there would have been no occasion for the incorporation of Section 10 in the Act under consideration. We must and do regard Section 10 as a specific remedy at law, intended to apply only to the recovery of taxes exacted under the Gross Sales Tax Act.

The plaintiff suggests that conceding that Section 10 gives a right of action in Federal courts, still the remedy at law is not adequate, for the reason that the General Fund of the State, out of which Section 10 directs the warrants to be paid, is not in such condition as to enable these warrants to be paid within a reasonable time after they are issued. In support of this argument plaintiff has introduced proof, showing that there are now outstanding nearly ten million dollars of warrants against the General Fund, and that this fund is usually over two years behind in the redemption of warrants drawn against it. It may be conceded that if taxpayers obtaining judgments under Section 10 were compelled to wait an unreasonable length of time for their money, the remedy at law given by this section would not be adequate; but no such unreasonable delay is indicated. The fair and reasonable meaning of that part of Section 10 which provides for the payment of warrants issued in satisfaction of judgments obtained under that section is that such warrants shall be paid when presented, if there is sufficient money in the General Fund to do so, even though there may be outstanding other and prior warrants against this fund. The general law of Kentucky contains no express direction to the Treasurer to pay warrants drawn on the treasury in the order of their issue, although such is probably the fair inference to be drawn from language used in Section 4688a-4, Kentucky Statutes, Carroll's 1930 Edition, and the Court of Appeals in the case of Rhea v. Newman, 153 Ky., 604, held that the Treasurer should pay them in the order issued, for the purpose of insuring fair treatment to all. Bearing in mind, however, that the purpose of Section 10 is to afford the taxpayers entitled to its provisions a full and complete remedy at law, and that this remedy would not be full and complete unless the holders of judgments obtained under its provisions could secure the reasonably prompt payment thereof, it seems entirely consistent to

hold that it was the purpose of the General Assembly to give warrants issued in satisfaction of judgments obtained [fol. 84] under Section 10 priority of payment over other outstanding warrants against the General Fund, and to that extent to make an exception to the general rule as to the order of payment of State warrants. Such a construction of the section does no violence to its language and works no impairment of any contract obligation of the State to holders of prior warrants, as such outstanding warrants do not pledge the State to redeem them by any particular time. Even if we should be mistaken in this construction of Section 10, and if warrants issued under its provisions enjoy no priority of payment, we would not be justified in holding that taxpayers recovering judgments under Section 10 would be required to wait an unreasonable length of time to realize on such judgments.

Under the general law of Kentucky, when a warrant against the General Fund is presented for payment, and the fund is not sufficient to satisfy same, the Treasurer must stamp same as interest bearing, and it thereafter draws interest at the rate of five per cent per annum, payable semi-annually, until called for redemption. (Section 4688a-2, Kentucky Statutes, Carroll's 1930 Edition.) Such warrants by the law of Kentucky are made negotiable instruments and are exempt from State and local taxation. (Section 4688a-8, Kentucky Statutes, Carroll's 1930 Edition.) It appears that these warrants are readily salable, and the record fails to disclose that any concession in the way of discount must be made to effect their sale. It will be observed that Section 10 not only provides for the recovery of the taxes paid, but for interest thereon as well. So far as we are advised, the Supreme Court has never held that the recovery of interest on taxes paid is necessary in order to make the remedy at law adequate. On the contrary, it is fairly deducible from the cases that the remedy at law is adequate, even though no recovery of interest is allowed. In the cases of Shelton v. Platt, 139 U. S. 591, and Allen v. Pullman Palace Car Co., 139 U. S. 658, the Supreme Court held that a law of Tennessee which permitted a taxpayer to recover from the State taxes paid under protest if they were wrongfully collected, but which made no provision for the recovery of interest, afforded an adequate remedy at law. Inasmuch as it is a settled prin-

ciple of law that interest can not be collected from a sov-
[fol. 85] ereign State unless its recovery is specifically authorized by a State statute, we can not presume that the Supreme Court in the cases referred to went on the assumption that interest as a matter of right followed the judgment. So we think it may be safely said that in permitting the recovery of interest under Section 10, the Commonwealth has bound itself to return more than was necessary in order to meet the test of an adequate remedy at law. Therefore, even if it appeared as a fact that some discount must be accepted by those who sell warrants issued under Section 10, it is probable that such discount would not exceed the interest which had accumulated on the tax from the date of its payment to the date of the rendition of the judgment. Furthermore, the State of Kentucky has no bonded indebtedness and is entirely solvent. Subject to the requirement of uniformity, the power of the General Assembly to tax for public purposes of the State is unlimited, and with this unlimited power residing in the General Assembly, this court will not assume that under Section 10 an aggrieved taxpayer can not recover within a reasonable time the full amount of the taxes paid.

Neither are we impressed with the contention of the plaintiff that Section 10 does not afford an adequate remedy at law, because under it a taxpayer would be compelled to resort to a multiplicity of suits to recover the various payments made under the Act. There is no necessity for a multiplicity of suits under Section 10. That section specifically provides that—

"A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made, and which are not barred by the limitation of two years herein imposed."

This is the law even though such a provision had not been incorporated in Section 10. Therefore, the plaintiff may unite in one suit its claims growing out of each payment of taxes made under the Act up to the time of filing its suit, and that action would fully determine every question which could be determined in an equitable action. There would be no necessity for other suits, except possibly to avoid the running of the statute of limitations pending the final de-

[fol. 86] termination of the suit already filed. A court of equity will not interfere on the ground of multiplicity of suits, where such multiplicity consists of suits by the same plaintiff against the same defendant for causes of action arising out of the same facts and legal principles. A multiplicity of suits in such a situation would be a multiplicity of the plaintiff's own making, and would afford no ground for equitable intervention. Boise Artesian Water Co. v. Boise City, 213 U. S. 276; Standard Oil Co. v. Atlantic Coast Line Co., 13 Fed. (2d) 653. We will not assume that after the validity of the tax has been once definitely settled in an action at law, the State will make any attempt to enforce further collections.

Finally, the fact that the Act imposes drastic penalties for failure to comply with its terms, and pay the tax when due, affords no basis for equitable intervention. The Act visits these penalties upon the taxpayer only in event of failure to comply with its terms and pay the tax. To test the validity of this Act in an action at law, it is not necessary for the plaintiff to refuse to pay the tax and take the hazard of the courts deciding against him when the State undertakes in a legal action to enforce the penalties. All the taxpayer is required to do is to pay the tax, and when he has done this, he not only avoids the imposition of penalities, but has open to him a simple and direct way in a common law suit of attacking the validity of the law and of recovering the taxes paid, with interest thereon.

We therefore conclude that the remedy afforded by Section 10 of the Act is an adequate one within the Federal rule, and the motion to dismiss for want of equitable jurisdiction must be sustained.

November 6, 1931.

Chas. H. Moorman, U. S. Circuit Judge. A. M. J. Cochran, U. S. District Judge. Chas. I. Dawson, U. S. District Judge.

Nichols, Morrill, Wood, Marx & Ginter, Cincinnati, O.; Trabue, Doolan, Helm & Helm, Louisville, Ky., Attorneys for Plaintiff.

J. W. Cammack, Attorney General, Frankfort, Ky.; S. H. Brown, Asst. Attorney General, Frankfort, Ky.; H. S. Gentry, Batson, Cary & Welch, Louisville, Ky.; Leslie W. Morris, Frankfort, Ky., Attorneys for Defendants.

[fol. 87] IN UNITED STATES DISTRICT COURT

ORDER AND DECREE—December 9, 1931

This cause having been heard by consent of parties, together with the causes of The Stewart Dry Goods Company against the same defendants, and Fred Levy, et al., against the same defendants, pending in this court, and the cause of The Kroger Grocery & Baking Company against the same defendants, pending in the United States District Court for the Eastern District of Kentucky, and having been submitted with them on February 14, 1931, upon plaintiff's motion for an interlocutory injunction heard by the court upon the depositions, affidavits and exhibits referred to in the order of submission as having been introduced by plaintiffs and defendants respectively, this Court, being advised, on November 6, 1931, delivered its written opinion entitled in the cause of The Kroger Grocery and Baking Company against John B. Lewis, et al., a copy of which opinion is now filed in this cause as a part of the record herein and as equally applicable to this cause, and pursuant thereto, and solely for the reasons stated in said opinion, plaintiff's said motion for an interlocutory injunction herein is hereby denied, to which the plaintiff excepts.

It is further ordered by the Court that this cause be and it is hereby submitted upon motion of the defendants to dismiss the bill, and the Court, being of opinion that there is a plain, adequate and complete remedy at law, afforded to the plaintiff for the reasons set forth in its said opinion, declines to consider any issue or question raised herein except the single question as to the adequacy of the remedy at law, and, solely for the reasons stated in its said opinion, sustains the motion of defendants to dismiss the bill, and denies to the plaintiff a permanent injunction or any injunctive or other relief prayed by it.

It is therefore adjudged and decreed that the plaintiff's bill herein be dismissed, and that the defendants recover of the plaintiff their costs herein expended: to all of which the plaintiff excepts.

The plaintiff having this day stated in Court its intention to appeal from this Order and Decree, denying plaintiff's motion for an interlocutory injunction, and denying its application for a permanent injunction and dismissing its bill

[fol. 88] of complaint, it is hereby further ordered and adjudged that the Temporary Restraining Order heretofore issued in this cause shall be continued in effect as to the plaintiff, and as to each retail merchant listed of record (by Order entered herein March 30, 1931, and supplemented as to Ben Snyder, Incorporated, by later Order) as included in the same class of taxpayers as plaintiff, and shall remain in full force and effect as to the plaintiff and each of said taxpayers so listed, until the final determination of plaintiff's said appeal, to all of which defendants except and object; Provided, however, that the plaintiff, for itself only, and each of said taxpayers so listed desiring to avail himself or itself of the benefit of said restraining order pending such appeal, for himself or itself only (and not one for another), shall within thirty (30) days from the entry of this Decree execute such bond or make such deposit of money or securities as required herein and as may be reasonably necessary to secure the Commonwealth of Kentucky against loss of any taxes, interest, court costs, and all other proper charges that may be or become due from such taxpayer under the Act assailed herein by plaintiff, in the event the validity of such Act should be finally established.

The amount of any such bond given and the amount or value of securities or money deposited by any taxpayer, shall be fixed at an amount equal to the estimated taxes claimed from said taxpayer for the taxable period of 1930 and 1931, and said bond shall be secured by corporate surety or the pledge and deposit of negotiable securities acceptable to the Attorney General of Kentucky.

In the event the plaintiff or any one of said taxpayers shall fail to execute such bond or give such security as required of it or him or them, within thirty (30) days from the entry of this Order and Decree, said restraining order as to such taxpayer so failing shall be thereupon immediately dissolved and shall afford no further protection to such taxpayer.

Upon the execution by the plaintiff herein of a bond secured as herein provided, the bond or bonds heretofore executed by the plaintiff in this cause shall be cancelled as to all future liability, and the like order is made as to the bond heretofore executed herein by Ben Snyder, Inc., [fol. 89] upon its compliance, within thirty (30) days, with

the provisions of this Order by the execution of a new bond or the deposit of securities as herein required.

Chas. H. Moorman, Circuit Judge. Chas. I. Dawson, District Judge. A. M. J. Cochran, District Judge.

[fols. 90-100] In United States District Court

Order Substituting Auditor of Public Accounts, etc.— March 1, 1932

This day came the parties herein and filed a stipulation noting that the term of office of the defendant, Clell Coleman, has expired within six months of the date hereof, and the said defendant has retired from said office and was thereupon succeeded therein by J. Dan Talbot,

And it appearing to the Court that there is a substantial need for continuing and maintaining this cause and obtaining an adjudication of the questions involved,

It is ordered that J. Dan Talbot, Auditor of Public Accounts of the Commonwealth of Kentucky, be and he is hereby substituted as a defendant herein in lieu of the defendant, Clell Coleman, and with the same effect as if he had been an original defendant to the bill of complaint herein, and said cause is continued and maintained against the said J. Dan Talbot, Auditor of Public Accounts of the Commonwealth of Kentucky.

Chas. H. Moorman, Circuit Judge. A. M. J. Cochran, District Judge. Chas. I. Dawson, District Judge.

[fols. 101-107] Bond on appeal for $1,000.00, approved and filed March 1, 1932, omitted in printing.

Citation, in usual form, showing service on John B. Lewis et al., omitted in printing.

[fol. 108] IN UNITED STATES DISTRICT COURT

MANDATE OF UNITED STATES SUPREME COURT

UNITED STATES OF AMERICA, ss:

(Seal.)

The President of the United States of America, to the Honorable the Judges of the District Court of the United States for the Western District of Kentucky, Greeting:

Whereas, lately in the District Court of the United States for the Western District of Kentucky, before you, or some of you, in a cause between J. C. Penney Company, Plaintiff, and John B. Lewis, Selden R. Glenn, and Henry M. Cline, individually and as Members of the State Tax Commission of the Commonwealth of Kentucky, et al., etc., Defendants, wherein the decree of the said District Court, in favor of the said defendants, was duly entered in said cause on the 9th day of December, A. D. 1931, which decree is fully set out in the record of said cause in the office of the clerk of said District Court and is incorporated herein by reference thereto; as by the inspection of the transcript of the record of the said District Court, which was brought into the Supreme Court of the United States by virtue of an appeal agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and thirty-two, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court, in this cause be, and the same is hereby, [fol. 109] reversed with costs; and that the said Plaintiff, J. C. Penney Company, recover against the said Defendants Two Hundred and Ninety-nine Dollars and Sixty Cents for its costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the said District Court for final hearing upon the merits, without prejudice to a de-

termination upon evidence with respect to the questions of the status of outstanding warrants upon the General Fund in the State Treasury, and whether warrants of the sort contemplated by section 10 of the Act in question are accorded preference in payment over other warrants and the basis, if any, for the assurance that such preference will be continued so that in the event of actions by the plaintiffs at law under section 10 they would be afforded a certain, reasonably prompt and efficacious remedy.

October 24, 1932.

You, therefore, are hereby commanded that such execution and further proceedings be had in such cause, in conformity with the opinion and decree of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Charles Evans Hughes, Chief Justice of the United States, the nineteenth day of November, in the year of our Lord one thousand nine hundred and thirty-two.

Charles Elmore Cropley, Clerk of the Supreme Court of the United States.

[fol. 110] IN UNITED STATES DISTRICT COURT

ORDER FILING MANDATE—Entered December 10, 1932

This day came the parties, plaintiff- and defendants, by their respective counsel, and on motion of plaintiffs, the mandate and opinion of the Supreme Court of the United States, reversing the orders and the final decree entered herein December 11, 1931, are filed of record, and pursuant to such mandate, it is now ordered and adjudged that the order and decree herein entered on December 11, 1931, be and every part thereof is hereby set aside, vacated and held for naught, and this cause is now reinstated upon the docket of the court for further proceedings in accordance with said mandate and the opinion of the Supreme Court.

By consent of parties, J. Dan Talbott, the present duly elected, qualified and acting Auditor of Public Accounts, is made defendant, individually and as such Auditor, in substitution for Clell Coleman, whose term of office has

expired; and in like manner, W. P. Sullivan, at present a duly appointed, qualified and acting member of the State Tax Commission, in succession to Henry M. Cline, whose [fol. 111] term of office has expired, is made a party defendant, individually and as such member of the State Tax Commission, in substitution for said Henry M. Cline.

Chas. H. Moorman, A. M. J. Cochran, Chas. I. Dawson.

Trabue, Doolan, Helm & Helm; Nichol, Morrill, Wood, Marx & Ginter, Solicitors for Plff. Bailey P. Wootton, Attorney General.

Dec. 10, 1932.

[fol. 112] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING INTERLOCUTORY INJUNCTION—Entered December 10, 1932

This day came the parties, plaintiffs and defendants, by their respective counsel, and the plaintiffs renewed their motion for an interlocutory injunction, made herein January 24, 1931.

Said motion having been heretofore heard and submitted, and the Court being sufficiently advised, it is considered, ordered and adjudged that said motion be sustained and that the defendants and each of them be, and each of them is hereby, enjoined and restrained, until the further order of court herein:

(1) From enforcing or executing, either directly or indirectly, against these plaintiffs and/or other taxpayers similarly situated, the provisions of Chapter 149 of the Acts of the General Assembly of Kentucky at its 1930 session, entitled:

"An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this act."

[fol. 113] (2) From instituting or maintaining against the plaintiffs and/or other taxpayers similarly situated, any prosecution or action at law, or any suit or suits in equity, to recover of or from the plaintiffs or other taxpayers similarly situated any portion of the alleged tax sought to be exacted of them under said Act, or for the infliction of any of the penalties prescribed in said Act for the non-payment of such tax or for failure to make or file any reports or returns required thereunder, or from taking any steps looking to the prosecution of the plaintiffs or any of their agents or servants or employes, or any other person, firm or corporation similarly situated, or any of their agents or servants or employes, for a violation of said Act in any of its provisions.

The interlocutory injunction herein granted shall, until further order of court herein, continue in effect as to the plaintiffs and as to each retail merchant listed of record (by order entered herein March 30, 1931, and supplemented as to Ben Snyder, Incorporated, by later order) as included in the same class of taxpayers as plaintiffs, and shall remain in full force and effect as to the plaintiffs and each of said taxpayers so listed, until the final determination of this cause by this Court, or until further order of Court herein.

To all of which the defendants and each of them object and except.

Provided, however, that the plaintiffs, for themselves only, and each of said taxpayers so listed, desiring to avail himself or itself of the benefit of said interlocutory injunction pending the final determination of this cause, for himself or itself only (and not one for another), shall within thirty (30) days from the entry of this order execute such bond or make such deposit of money or securities as required herein and as may be reasonably necessary to secure the Commonwealth of Kentucky against loss of any taxes accruing for the calendar years 1930, 1931 and 1932 under the Act assailed herein by plaintiffs, in the event [fol. 114] the validity of said Act should be finally established, and also against the loss of any interest or court costs or other proper charges that may be or become due from each such taxpayer under said Act.

The amount of any such bond given and the amount or value of securities or money deposited by the plaintiffs or by any taxpayer entitled hereunder to the benefit of the

interlocutory injunction herein granted, shall be fixed at an amount equal to the estimated taxes claimed from said taxpayer for the taxable period of the years 1930, 1931 and 1932, and said bond shall be secured by corporate surety or by a pledge and deposit of negotiable securities acceptable to the Attorney General of Kentucky, and if the parties can not agree upon the amount of such bond or the amount or character of such negotiable securities, then the amount of such bond or the amount and character of negotiable securities, and the pledge and deposit thereof, shall be as prescribed by the regular Judge of this Court, without the necessity of calling in the other two Judges for that purpose.

In the event the plaintiffs or any one of said taxpayers entitled hereunder to the benefit of the interlocutory injunction herein granted shall fail to execute such bond or to give such security as may be required of it or him or them, within thirty (30) days from the entry of this order, said interlocutory injunction as to such taxpayer so failing shall be thereupon immediately dissolved and it shall afford no further protection herein to such taxpayer.

Upon the execution by the plaintiffs or by any one of said listed taxpayers entitled hereunder to the benefit of the interlocutory injunction herein granted, of a bond secured as herein provided, or the making by the plaintiffs or such taxpayer of a pledge or deposit of securities as herein provided, the bond or bonds heretofore executed by the plaintiffs in this cause shall be canceled as to all future liability, and any such pledge or deposit released as to all future liability, and all deposits of securities theretofore made by [fol. 115] the plaintiffs or by any such taxpayer shall be released, and such deposited securities shall be redelivered to the persons respectively depositing same.

December 10, 1932.

Chas. I. Dawson, Judge.

Have seen.

Trabue, Doolan, Helm & Helm; Nichol, Morrill, Wood, Marx & Ginter, Solicitors for Plaintiffs. Bailey P. Wootton, Atty. General. S. H. Brown, Assist. Atty. Gen. Francis M. Burke, Assist. Atty. Gen. Batson, Carey & Welch; Leslie W. Morris, Solicitors for Defts.

[fol. 116] IN UNITED STATES DISTRICT COURT

AGREED ORDER AMENDING ORDER ALLOWING INJUNCTION—
Entered December 20, 1932

By agreement of parties, it is now ordered that the order entered herein on December 10, 1932, granting an interlocutory injunction, be amended in the following particulars only:

(1) Plaintiffs or those taxpayers herein who have hitherto given bond for the payment of taxes accruing from sales for the calendar years 1930 and 1931 may, if they, or any of them, so elect, continue said bonds in force, and may give an additional bond for the estimated taxes accruing from sales made in the year 1932, said additional bond to be in all respects as required in said order of December 10, 1932, except as herein limited.

(2) Said bonds for the taxes accruing from sales for the calendar years 1930 and 1931 shall, in the event the taxpayer so elects, be and remain in full force and effect unless substituted bonds for the three years' taxes be filed in lieu thereof.

Dec. 20, 1932.

Chas. H. Moorman, Circuit Judge; A. M. J. Cochran, District Judge; Chas. I. Dawson, District Judge.

Bailey P. Wootton, Attorneys for Defendants. Nichols, Morrill, Wood, Marx & Ginter; Trabue, Doolan, Helm & Helm, Attorneys for Plaintiffs.

[fol. 117] IN UNITED STATES DISTRICT COURT

In Equity. No. 611.

Amendment to Bill of Complaint—Filed February 18, 1933.

The plaintiff, by leave of Court, amends its Bill of Complaint herein in respect to the amounts hereinafter set out, and by way of amendment now makes the following averments:

Paragraph I

Amending Paragraph XI of the original Bill, plaintiff repeats the averments contained therein and in addition thereto states that in addition to paying its annual ad valorem taxes it has paid to the State of Kentucky corporation license taxes in the following additional sums:

$462.65 for the calendar year 1931
$512.15 for the calendar year 1932

Paragraph II

Amending and adding to the averments contained in Paragraph XIV of the original Bill, plaintiff states:

That during the calendar year 1931, the total gross retail sales made by the plaintiff in all its retail stores in Kentucky aggregated $2,169,523.59.

Applying thereto the rates of taxation prescribed by the challenged Act, and taking the credits allowed by said Act, would produce the following result in taxes claimed of the [fol. 118] plaintiff for the calendar year 1931:

1/20 of one per cent on first $400,000 of sales	$ 200.00 tax
2/20 of one per cent on next 100,000 of sales	100.00 tax
5/20 of one per cent on next 100,000 of sales	250.00 tax
8/20 of one per cent on next 100,000 of sales	400.00 tax
11/20 of one per cent on next 100,000 of sales	550.00 tax
14/20 of one per cent on next 100,000 of sales	700.00 tax
17/20 of one per cent on next 100,000 of sales	850.00 tax
One per cent on excess over $1,000,000 of sales	1,695.24 tax
Total tax above computed	$4,745.24
Credits allowed under Section 4 of Act, as per Paragraph I of this amendment	462.65
Next tax demanded of plaintiff for the year 1931	$4,282.59

That during the calendar year 1932, the total gross retail sales made by plaintiff in all its retail stores in Kentucky aggregated $1,924,550.86.

Applying thereto the rates of taxation prescribed by the challenged Act, and taking the credits allowed thereby, would produce the following result in taxes claimed of the plaintiff doing business as a partnership, for the calendar year 1932:

1/20 of one per cent on first $400,000 of sales	$ 200.00 tax
2/20 of one per cent on next $100,000 of sales	100.00 tax
5/20 of one per cent on next $100,000 of sales	250.00 tax

8/20 of one per cent on next $100,000 of sales	400.00	tax
11/20 of one per cent on next $100,000 of sales	550.00	tax
14/20 of one per cent on next $100,000 of sales	700.00	tax
17/20 of one per cent on next $100,000 of sales	850.00	tax
One per cent on excess over $1,000,000 of sales	9,245.51	tax
Total tax above computed	$12,295.51	
Credits allowed under Section 4 of Act, as per Paragraph I of this amendment	512.15	
Net tax demanded of plaintiff for the year 1932	$11,783.36	

Paragraph III

Amending Paragraph XIV of the original bill, plaintiff states that the same averments apply with full force and effect and are hereby restated with respect to the gross sales by plaintiff in each of the calendar years 1931 and 1932, and with respect to the taxes exacted of plaintiff for each of said years 1930, 1931 and 1932 under the chal-
[fol. 119] lenged Act.

Paragraph IV

Amending Paragraph XIV (second) and XV of the original bill, plaintiff reiterates and extends all the averments therein contained, to include and apply to the operation of said challenged Act during each of the calendar years 1930, 1931 and 1932, and likewise reiterates all of said averments with respect to the unjust and unequal discrimination effected by said Act between the plaintiff and the 25 other taxpayers listed of record as similarly situated and as protected by orders of the Court herein, on the one hand, and from 20,000 to 25,000 other competing retail merchants conducting a general retail store in Kentucky, on the other hand.

In addition thereto, plaintiff states that in its actual operation for the years 1930 and 1931, said challenged Act of 1930 has in fact produced the following results, as disclosed by the records of the State Tax Commission of Kentucky, which afford complete returns from all taxpayers with the exception of plaintiff and others listed by order of Court herein as entitled to the benefits of this litigation and of the restraining order heretofore granted herein:

Aside from the plaintiff and the 25 other taxpayers in the several classes represented in this litigation and pro-

tected by the restraining orders issued herein, it appears from records of the State Tax Commission that there are or were in the State of Kentucky 24,096 retail merchants who were required to and did make reports to said Commission for the calendar year 1930, and 20,084 retail merchants who were required to and did make reports to said Commission for the calendar year 1931.

The following summaries show the actual operation and effect of said challenged Act as to the taxpayers who have made the reports required of them under said Act, down to and including December 2, 1932:

Summary of Reports to Kentucky State Tax Commission Relative to Gross Retail Sales in Calendar Year 1930

[fol. 120]

Number of reports filed by retail merchants showing—	Number filed	Number indicating tax	Number indicating no tax
Retail sales less than $400,000	24,061	16,374	7,687
Retail sales between $400,000 and $500,000	13	7	6
Retail sales between $500,000 and $600,000	8	5	3
Retail sales between $600,000 and $700,000	5	4	1
Retail sales between $700,000 and $800,000	4	2	2
Retail sales between $800,000 and $900,000	1	0	1
Retail sales between $900,000 and $1,000,000	0	0	0
Retail sales in excess of $1,000,000	4	3	1
Totals	24,096	16,395	7,701

Statement Showing Number of Retail Merchants Reporting for the Year 1930, Classified by Amounts of Tax Paid Pursuant to Reports

Number of taxpayers reporting tax less than 50¢	2,630
Number of taxpayers reporting tax 50¢ to $1.00	2,187

[fol. 121]

Number of taxpayers reporting tax $1.00 to $2.00	2,743
Number of taxpayers reporting tax $2.00 to $3.00	1,750
Number of taxpayers reporting tax $3.00 to $4.00	1,186
Number of taxpayers reporting tax $4.00 to $5.00	889
Number of taxpayers reporting tax $5.00 to $10.00	2,046
Number of taxpayers reporting tax $10.00 to $15.00	816
Number of taxpayers reporting tax $15.00 to $20.00	429
Number of taxpayers reporting tax $20.00 to $25.00	342
Number of taxpayers reporting tax $25.00 to $50.00	495
Number of taxpayers reporting tax $50.00 to $100.00	175
Number of taxpayers reporting tax $100.00 to $200.00	60
Number of taxpayers reporting tax $200.00 to $300.00	6
Number of taxpayers reporting tax $300.00 to $400.00	4
Number of taxpayers reporting tax $400.00 to $500.00	1
Number of taxpayers reporting tax $500.00 to $600.00	0
Number of taxpayers reporting tax $600.00 to $700.00	2
Number of taxpayers reporting tax $700.00 to $800.00	1
Number of taxpayers reporting tax over $1,000.00	3
Total	15,765
Undetermined and unclassified	630
Total	16,395

Number of merchants reporting sales of—	Showing tax liability	Showing no tax liability
Less than $10,000.00	8,784	5,353
$10,000.00 and under $25,000.00	4,431	1,553
$25,000.00 and under $50,000.00	1,905	507
$50,000.00 and under $75,000.00	596	148
$75,000.00 and under $100,000.00	241	45
$100,000.00 and under $150,000.00	216	40
$150,000.00 and under $200,000.00	90	19
$200,000.00 and under $250,000.00	48	12
$250,000.00 and under $300,000.00	27	3
$300,000.00 and under $400,000.00	36	7
Over $400,000.00	21	14
Total	16,395	7,701

Analysis of Reports Showing Tax Liability

	Number of returns	Gross sales	Gross tax	Credits allowed	Net tax	Credits shown in excess of tax liability
Sales less than $400,000	24,061	$338,870,755.00	$167,214.07	$78,211.02	$89,003.05	$222,674.01
Sales between $400,000 and $500,000	13	5,866,935.00	3,454.81	2,193.44	1,261.37	6,709.42
Sales between $500,000 and $600,000	8	4,416,568.00	3,440.42	2,123.02	1,317.40	5,306.50
Sales between $600,000 and $700,000	5	3,234,563.00	3,266.68	1,498.12	1,768.56	177.20
Sales between $700,000 and $800,000	4	2,989,019.00	4,110.66	2,727.57	1,383.09	2,298.47
Sales between $800,000 and $900,000	1	814,559.00	636.15	636.15	0	1,755.24
Sales between $900,000 and $1,000,000	0	0	0	0	0	0
Sales in excess of $1,000,000	4	5,329,123.00	25,491.24	14,099.48	11,391.76	4,593.15
Total	24,096	$361,521,522.00	$207,614.03	$101,488.80	$106,125.23	$243,513.99

[fol. 122] Summary of Reports to Kentucky State Tax Commission Relative to Gross Retail Sales in Calendar Year 1931

Number of reports filed by retail merchants showing—	Number filed	Number indicating tax	Number indicating no tax
Retail sales less than $400,000	20,053	11,992	8,061
Retail sales between $400,000 and $500,000	10	6	4
Retail sales between $500,000 and $600,000	9	6	3
Retail sales between $600,000 and $700,000	3	3	0
Retail sales between $700,000 and $800,000	2	1	1
Retail sales between $800,000 and $900,000	3	2	1
Retail sales between $900,000 and $1,000,000	2	2	0
Retail sales in excess of $1,000,000	2	2	0
Totals	20,084	12,014	8,070

Analysis of Reports Showing Tax Liability

	Number of returns	Gross sales	Gross tax	Credits allowed	Net tax	Credits shown on reports in excess of tax liability
Sales less than $400,000	20,053	$286,786,721.00	$143,464.51	$77,551.95	$65,912.56	$173,735.79
Sales between $400,000 and $500,000	10	4,520,653.00	2,520.64	1,513.05	1,007.59	3,260.06
Sales between $500,000 and $600,000	9	4,887,385.00	3,572.59	2,212.57	1,360.02	5,699.06
Sales between $600,000 and $700,000	3	1,927,791.00	2,161.17	700.00	1,461.17	.....
Sales between $700,000 and $800,000	2	1,472,166.00	2,296.25	1,391.17	905.08	3,109.00
Sales between $800,000 and $900,000	3	2,549,814.00	5,548.72	2,429.98	3,118.74	237.08
Sales between $900,000 and $1,000,000	2	1,895,680.00	5,213.29	1,084.94	4,128.35	.....
Sales in excess of $1,000,000	2	2,389,404.00	9,994.07	3,607.85	6,386.22	.....
Totals	20,084	$306,429,614.00	$174,771.24	$90,491.51	$84,279.73	$186,040.99

[fol. 123] Paragraph V

Amending Paragraph XXVIII of its original bill of complaint, plaintiff repeats the averments therein contained, and in addition thereto, it makes the following averments:

For more than ten years past, there has been a constantly increasing deficit in said General Fund, which has been continuously during said period, and is now, wholly insufficient to meet the warrants drawn upon it by the Auditor of Public Accounts in discharge of claims properly allowable against and payable out of it, and by reason thereof, holders of warrants drawn against it have been compelled to hold the same for as much as five years, awaiting the accumulation in the General Fund of funds sufficient to pay such warrants in their proper sequence as provided by law.

In addition thereto, there are many other undisputed claims against the General Fund which have been held up for long periods of time in the office of the Auditor and for which no warrants have been issued by the Auditor although such claims are properly allowable and payable out of the General Fund. Without a prolonged and expensive accounting, it is impossible to state the amount of such claims for which no warrants have been issued, but they aggregate a large sum of money, amounting to many thousands of dollars.

By Sections 4688a-1, a-2 and 2-4, Kentucky Statutes, as construed by the Court of Appeals of Kentucky, in the case of Rhea, Treasurer, v. Newman, 153 Ky. 604, and in Bosworth, State Treasurer, v. Shuck, 118 Ky. 458, it is made the duty of the State Treasurer to pay outstanding warrants against the General Fund, in the order in which they were issued and as money appropriated and available for the purposes of the General Fund reaches the treasury.

The effect of this statute, as construed by the Court of Appeals, is to require that unpaid warrants against the General Fund drawn first in point of time shall be paid in priority to warrants drawn later in point of time, and if the payment thereof exhausts the General Fund, warrants [fol. 124] subsequently issued must await their turn in serial order before payment thereof can be compelled by process of law.

By Section 4688a-1, Kentucky Statutes, it is provided

that the State Treasurer shall receive and redeem warrants issued against the Auditor

"if there be sufficient money in the treasury appropriated for that purpose."

If there is no money in the General Fund available for the payment of such warrants in the order prescribed by law, the State Treasurer can not pay such warrants, and the Courts can not by mandamus compel him to pay same, as was held by the Court of Appeals of Kentucky in Bosworth, State Treasurer, v. Shuck, 118 Ky. 458.

The mounting deficit in the General Fund was recognized by the General Assembly of Kentucky at its 1924 session by the enactment of Chapter 122, Acts of 1924, which submitted to a vote of the people a bond issue of $6,000,000 to pay warrants then outstanding against the General Fund. Such bond issue was defeated at the polls.

At its 1926 session, the General Assembly enacted Chapter 13 of the Acts of 1926, submitting to the people of the State, for a vote, a bond issue of $4,000,000 for the purpose of raising money with which to pay warrants against the General Fund then outstanding. This bond issue was likewise defeated at the polls.

At the time the challenged Act was in process of enactment, it was a notorious fact, which was well known to the members of the General Assembly and to the officials of the State, that warrants drawn against the General Fund for the refund of taxes prescribed in said Act could not and would not be paid out of said Fund for several years, and, knowing these facts, the General Assembly made no provision to levy any tax for the augmentation of the General Fund. The only provision made for the payment of warrants theretofore outstanding was to enact the challenged law and therein to appropriate one-half the taxes exacted [fol. 125] thereunder, to the payment of the then existing indebtedness of the Commonwealth, it being already provided by law that such payments should be applied on warrants in sequence according to their respective dates of issue.

At the time these suits were brought, as shown by a monthly financial statement officially issued by the State Treasurer of Kentucky, as of January 1, 1931, the amount of money in the General Fund on January 1, 1931, less

minor accounts, was $12,565.81, as against which fund there were at the time outstanding warrants, theretofore issued, aggregating $9,880,502.76, which had been drawn against the State Treasurer by the Auditor of Public Accounts and had been presented for payment but were not paid for lack of funds.

At its 1932 session, the General Assembly of the Commonwealth of Kentucky again recognized and declared the insolvency of the General Fund and its insufficiency to pay outstanding warrants issued against it by the Auditor of Public Accounts. Accordingly it enacted Chapter 20 of the Session Acts of 1932, the title of which Act reads in part as follows:

"An Act authorizing the funding of certain indebtedness of the Commonwealth of Kentucky which is evidenced by outstanding state warrants, by the issuing of funding bonds and acknowledging and confirming the validity of such warrants and the indebtedness evidenced thereby."

In the preamble and body of said Act, the General Assembly ascertained and declared the following facts:

(1) That there were then outstanding warrants beginning with warrant No. A 49, dated July 5, 1927, and including all unpaid interest thereon.

(2) That there was then no money in the State treasury available for the payment of such warrants, or any part thereof.

(3) That some of such warrants have been issued and outstanding for approximately five years.

In State Budget Commission v. Lebus, 244 Ky. 701, 714, [fol. 126] the Court of Appeals affirmed a judgment of the Franklin Circuit Court, holding invalid said Chapter 20 of the Session Acts of 1932, on the ground that it did not provide for submitting the proposed bond issue to a vote of the people, as required by the State Constitution.

The facts with respect to the condition of the General Fund are now, and for years past have been, as above declared by the General Assembly in the Acts hereinbefore set forth, excepting that the deficiency in the said General Fund has shown a progressive increase and there is no prospect of such deficiency being reduced.

Since the adjournment of the 1932 session of the General Assembly, the deficiency in the General Fund has constantly increased and, as shown by a monthly financial statement officially issued by the State Treasurer of Kentucky as of November 1, 1932, the amount of then outstanding warrants drawn by the Auditor of Public Accounts upon the General Fund of the Commonwealth was $14,279,558.11 as of October 31, 1932, and there was no money whatever in the General Fund, but, on the contrary, it had been overdrawn by reason of its indebtedness to other funds of the State in the sum of $275,261.48.

By reason of the facts hereinbefore set forth, a warrant against the General Fund which plaintiff might obtain under Section 10 of the challenged Act at the end of such litigation as is authorized therein could not, consistently with the law of the State as expounded by the Court of Appeals, be paid out of said General Fund for several years.

By reason of such insolvency of the General Fund, warrants drawn against it cannot be collected with reasonable or any promptness, and they cannot be sold except at a discount of from 10 to 15 per cent of their face value.

This fact has been recognized by the defendants herein, members of the State Tax Commission of Kentucky, who [fol. 127] gave their depositions in the Franklin Circuit Court in the suit above referred to, which reached the Court of Appeals of Kentucky as State Budget Commission v. Lebus, 244 Ky. 701, 714.

In said action, the defendant Seldon R. Glenn, under oath, stated in his deposition, given at the State Capitol on May 23, 1932, that he was familiar with the present market for State warrants against the General Fund, that such warrants on such market were worth 87 to 88 cents on the dollar, but that there was not a ready market for them at any price, and his opinion was that, unless something is done to relieve the situation, such as upholding the validity of the 1932 Funding Act held void by the Courts, before September, 1932, outstanding warrants would sell at 75 per cent of face value.

In like manner, the defendant John B. Lewis, at the same time and place, stated under oath that the last sale of State warrants that he knew of was made at 90 cents on the dollar; and he added that he understood buyers

were not offering 90 then, but were offering a little less than that. He also stated that in the event said Funding Act should be held invalid—as it was held by the Courts—the warrants would go considerably lower, and he believed they would go below 75 cents on the dollar of face value.

Plaintiff states that it is now extremely difficult to find a purchaser for State warrants drawn by the Auditor of Public Accounts against the General Fund of the State, and that if and when a purchaser can be found it is impossible to realize upon a sale of such warrants a sum in excess of 80 to 90 per cent of their face value.

Plaintiff says that no State warrants against the General Fund have been called for payment that have been issued since July 31, 1927, and in his deposition, given at the time and place and in the case above referred to, the defendant Seldon R. Glenn, under oath, stated that the last call of warrants was made as of July 8, 1931, and it called for warrants that had been issued between June 12, 1927, and [fol. 128] July 1, 1927, inclusive.

On the average, throughout the last eight or ten years, interest-bearing State warrants drawn against the General Fund have been delayed in payment approximately five years after issue thereof, on account of the lack of funds legally available therefor. The only exceptions to this general rule are those made in disregard of the rule of law prescribing the order of payment, because of special circumstances deemed sufficient to excuse or palliate such disregard.

Had the plaintiff herein paid the taxes exacted of it under the challenged Act as and when due in February, 1931, and February, 1932, and had the defendants been required to issue warrants for the refund of said taxes as provided in Section 10 of the challenged Act, the plaintiff herein, under the law of the State as construed and applied by the Court of Appeals, would have been compelled ever since to hold said warrants, and would still be required to hold said warrants for years to come, unpaid, or to endeavor to sell same at a great discount, in addition to the loss of interest on said tax money, and plaintiff would not have had at the time of filing this bill, and it has not since had, any adequate remedy at law for obtaining a refund thereof under said challenged Act or any other Act of the Commonwealth of Kentucky.

The Commonwealth of Kentucky itself, under the advice of its Attorney General, declines to accept its own warrants in payment of its demands for taxes, even though such warrants may have been issued for necessary governmental purposes, such as the payment of jurors in the Circuit Courts of the State, and in point of fact, the executive officers of the State, in charge of its finances, have recently made public announcement of the fact that they intended, on behalf of the State, to apply to the Reconstruction Finance Corporation, organized under Act of Congress, for [fol. 129] a loan to the State of Kentucky of a large sum of money to enable the State to meet its daily recurring governmental obligations in the matter of salaries of public officials. As a matter of fact, the State Treasurer of Kentucky has only been able to pay salary checks of public officials through the expedient of encroaching upon other funds for the benefit of the General Fund, as shown by the overdraft in the General Fund hereinbefore set forth, as officially reported as of November 1, 1932.

In the opening paragraph of its annual report to the Governor of Kentucky for the year 1931, the State Tax Commission of Kentucky called his attention to the condition of the General Fund, stating that the General Assembly, at its 1930 session, had enacted certain legislation transferring approximately one-half million dollars from the General Fund and providing for large appropriations made in favor of the School Equalization Fund, with no provision to pay same other than to issue warrants against the General Fund, and the Commission emphasized the fact that such legislation

"naturally caused an unprecedented deficit in the General Fund *for the year* of over $2,500,000.00."

thus adding to the deficiency in said fund theretofore existing.

Moreover, in said report, the State Tax Commission criticized

"the utter disregard of the General Assembly in late years for a balanced budget",

and added:

"Since this law-making body holds the power of appropriating state funds and of fixing the tax rate to be levied

for state purposes, it remains to be seen if any power, however great, can balance a state budget without their cooperation."

Paragraph VI

Amending Paragraph XXIX of its original bill, plaintiff repeats the averments therein contained and extends such averments to include and apply to taxes and penalties claimed of plaintiff on account of its gross sales for the calendar years subsequent to 1930, the amounts of such [fol. 130] gross sales and resulting taxes being set forth in Paragraph II of this amendment.

Wherefore, having amended its bill in the respects hereinbefore set forth, plaintiff prays as in its original bill of complaint, and for all other proper and equitable relief.

Nichols, Morrill, Wood, Marx & Ginter; Trabue, Doolan, Helm & Helm, Solicitors for Plaintiff.

[fol. 131] In United States District Court

In Equity. No. 611

Answer to Amendment to Bill of Complaint—Filed April 14, 1933

Come the defendants and by leave of court, without waiving their objection heretofore made to the filing of plaintiff's amended bill of complaint, for answer to same plead as follows, to-wit:

Paragraph I

Defendants say that they repeat all of the averments, denials, and statements contained in their answer to Paragraph X of the original bill of complaint, and in addition thereto and in further answer to said paragraph as amended, they say that they have not sufficient information to form a belief, and therefore neither admit nor deny the allegations contained in the second literary paragraph of paragraph I of the amendment to said original paragraph, but require strict proof thereof.

Paragraph II

Defendants repeat all of the averments and denials contained in their answer to Paragraph XIII of the original bill of complaint and in addition thereto and in further answer to said paragraph as amended, they say that they have not sufficient information to form a belief and therefore neither admit nor deny the averments contained in the amendment to said paragraph but require strict proof [fol. 132] thereof.

Paragraph III

Defendants repeat all of the averments and denials contained in their answer to Paragraph XIV of the original bill of complaint and in addition thereto and in further answer to said paragraph as amended, they say that they have not sufficient information to form a belief and therefore neither admit nor deny the averments contained in the amendment to said paragraph but require strict proof thereof.

Paragraph IV

Defendants repeat all of the averments and denials contained in their answer to Paragraph XV of the original bill of complaint and in addition thereto and in further answer to said paragraph as amended, they say that they have not sufficient information to form a belief and therefore neither admit nor deny the averments contained in the amendment to said paragraph but require strict proof thereof.

Paragraph V

Defendants repeat all of the averments and denials contained in their answer to Paragraph XXVIII of the original bill of complaint and in addition thereto and in further answer to said paragraph as amended, they say that they have not sufficient information to form a belief and therefore neither admit nor deny the averments contained in the amendment to said paragraph but require strict proof thereof.

For further answer defendants deny that for more than ten years past, or at all, there has been a constantly increasing deficit in the General Fund of the Commonwealth,

or that same has been continuous during said period or at all, or is now insufficient to meet the warrants drawn upon it by the Auditor of Public Accounts in discharge of claims properly allowable against or payable out of it, or that by reason thereof, holders of warrants drawn against it have been compelled to hold the same for as much as five years or at all, awaiting the accumulation in the General Fund of funds sufficient to pay such warrants in their proper sequence as provided by law.

Defendants deny that in addition thereto or at all there are many other undisputed claims against the General [fol. 133] Fund, or that such claims have been held up for a long period of time in the office of the Auditor of Public Accounts, or that no warrants have been issued by the Auditor although such claims are properly allowable or payable, or are allowable or payable, out of the General Fund. Deny that without a prolonged or expensive accounting, it is impossible to state the amount of such claims for which warrants have been issued, or that they aggregate a large or any sum of money, or that they amount to many thousands of dollars or any dollars.

Deny that by Sections 4688a-1, a-2, or a-4, Kentucky Statutes, as construed by the Court of Appeals of Kentucky, in the case of Rhea Treasurer v. Newman, 153 Ky. 604, or in Bosworth, State Treasurer v. Shuck, 118 Ky. 458, or that in any case, it is made the duty of the State Treasurer to pay outstanding warrants against the General Fund, in the order in which they were issued or as money appropriated or available for the purposes of the General Fund reaches the treasury.

They further deny that any moneys paid in to the General Fund from the operation of the Act in question will have to be paid out or refunded with regard to other monies in such fund.

Deny that the effect of this statute, as construed by the Court of Appeals, is to require that unpaid warrants against the General Fund drawn first in point of time should be paid in priority to warrants drawn later in point of time, or that if the payment thereof exhausts the General Fund, warrants subsequently issued must await their turn in serial order before payment thereof can be compelled by process of law.

Deny that at the time the challenged act was in process

of enactment, or at any time, that it was a fact, or that such a fact was well known, to the members of the General Assembly or to the officials of the State, or to any one, that warrants drawn against the General Fund for the refund of taxes, as prescribed in said Act, could not and would not be paid out of said fund for several years, or that there was any delay in the payment of said refund, and state that [fol. 134] said refunds were always and have been always promptly paid.

Deny that knowing these facts, or that such were the facts, the General Assembly made no provision to levy any tax for the augmentation of the General Fund, but say that the General Assembly did augment the General Fund by the Act in question. Deny that the only provision for the payment of warrants theretofore outstanding was to enact the challenged law or therein to appropriate one-half the taxes exacted thereunder for the payment of the then existing indebtedness of the Commonwealth, or that there was any existing indebtedness, or that it was only provided by law that such payments should be applied on warrants in sequence according to their respective dates of issue.

They say that other laws were passed which were calculated to and did bring vast sums of revenue, which revenue was paid into the General Fund.

Defendants deny that at the time these suits were brought, or at all, as shown by a monthly financial statement officially issued by the State Treasurer of Kentucky, or at all, as of January 1, 1931, the amount of money in the General Fund on January 1, 1931 less minor accounts, was $12,565.81, or that as against said Fund there was at the time outstanding warrants theretofore issued aggregating $9,880,502.76, which had been drawn against the State Treasurer by the Auditor of Public Accounts, or had been presented for payment, or were not paid for lack of funds.

Deny that the 1932 Session of the General Assembly of Kentucky recognized or declared the insolvency of the General Fund or its insufficiency to pay outstanding warrants issued against the Auditor of Public Accounts, or for that reason it enacted Chapter 20 of the Session Acts of 1932. [fol. 135] Deny that the facts with respect to the condition of the General Fund are now, or for years past, or at all, have been as above declared by the General Assembly in the Acts hereinbefore set forth, or that the deficit in the

General Fund has shown a progressive increase or there is no prospect of such deficiency being reduced.

Deny that since the adjournment of the 1932 General Assembly, or at all, the deficit in the General Fund has increased, or as shown by a monthly financial statement officially issued by the State Treasurer of Kentucky as of November 1, 1932, the amount of the then outstanding warrants drawn by the Auditor of Public Accounts upon the General Fund of the Commonwealth was $14,279,558.11, or any sum, or that as of October 31, 1932, or there was no money whatever in the General Fund, or that on the contrary, it had been overdrawn by reason of its indebtedness to other funds of the State in the sum of $275,261.48, or at all, or in any sum, or that by reason of the facts above alleged, or at all, upon or against the General Fund which plaintiff might obtain under such intention of the challenged act, at the end of any litigation as authorized therein could not, consistently with the law of the State as expounded by the Court of Appeals, be paid out of said General Fund for several years.

Deny that by reason of such insolvency of the General Fund, Warrants drawn against it can not be collected with reasonable or with promptness, or that they can not be sold except at a discount of 10% or any per cent of their face value.

Deny that said fact has been recognized by the defendants herein, members of the State Tax Commission of Kentucky, who gave their depositions in the Franklin Circuit Court in the suit above referred to, which reached the Court of Appeals of Kentucky as State Budget Commission v. Lebus, 244 Ky. 701, 714.

[fol. 136] Deny that in said action, the defendant, Seldon R. Glenn, under oath, stated in his deposition, given at the State Capitol on May 23, 1932, that he was familiar with the present market for State Warrants against the General Fund, or that such warrants on such market were worth 87 to 88 cents on the dollar, or that there was not a ready market for them at any price, or his opinion was that, unless something is done to relieve the situation, such as upholding the validity of the 1932 Funding Act held void by the Courts, before September, 1932, or at all, outstanding warrants would sell at 75 per cent of face value.

Defendants state that in any event said warrants have

never reached the price above indicated, but now are selling between 95 cents and 100 cents on the dollar.

Deny that in like manner or at all the defendant, John B. Lewis, at the same time and place stated under oath that the last sale of State Warrants that he knew of was made at 90 cents on the dollar; or that he heard they were not offering 90 then, or were offering a little less than that.

Deny that he also stated that in the event said Funding Act should be held invalid, the warrants would go considerably lower, or that he believed they would go below 75 cents on the dollar of face value.

Deny that it is extremely difficult to find a purchaser for State Warrants drawn by the Auditor of Public Accounts against the General Fund of the State, or that if and when a purchaser can be found it is impossible to realize upon a sale of such warrants a sum in excess of 80 to 90 per cent of their face value, but state upon the other hand, such warrants have a ready sale at from 95 cents to par, and the same are regarded as a prime investment.

[fol. 137] Defendants deny that no state warrants against the General Fund have been called for payment that have been issued since July 31, 1927, or that in his deposition, given at the time and place and under oath, stated that the last call of warrants was made as of July 8, 1931, or that it called for warrants that had been issued between June 12, 1927 and July 1, 1927, inclusive.

Deny that on the average, throughout the last eight or ten years, or at all, interest-bearing State warrants drawn against the General Fund have been delayed in payment approximately five years, or at all, after issue thereof, on account of the lack of funds legally available thereof, or the only exceptions are those made in disregard of the rule of law prescribing the order of payment, because of special circumstances deemed sufficient to excuse or palliate such disregard.

Deny that had the plaintiff herein paid the taxes exacted of it under the challenged act as and when due in February, 1931, and February, 1932, or had the defendants been required to issue warrants for the refund of said taxes as provided in section 10 of the challenged Act, the plaintiff herein, under the law of the State, as construed or applied by the Court of Appeals, would have been compelled ever

since to hold said warrants for years to come, or at all, unpaid or to endeavor to sell same at a great or any discount, in addition to the loss of interest on said tax money, or that there would be any loss of interest on said tax money, or that plaintiff did not have had at the time of the filing of this bill, or has not since had, any adequate remedy at law for obtaining a refund thereof under said challenged act, or any other Act of the Commonwealth of Kentucky.

Deny that the Commonwealth of Kentucky itself, under the advice of its Attorney General, or at all, declined to accept its own warrants in payment of its demands for taxes, even though such warrants may have been issued for necessary governmental purposes, such as payment of ju- [fol. 138] rors in the circuit courts of the State, or that in point of fact, the executive officers of the State, in charge of its finances, have recently made public announcement of the fact that they intended, on behalf of the State, to apply to the Reconstruction Finance Corporation, organized under Act of Congress, for a loan to the State of Kentucky of a large sum of money to enable the State to meet its daily recurring governmental obligations in the matter of salaries of public officials.

Deny that the State Treasurer has only been able to pay salary checks of public officials through the expedient of encroaching upon other funds for the benefit of the General Fund, as shown by the overdraft in the General Fund hereinbefore set forth, as officially reported as of November 1, 1932; or that there is any overdraft in the General Fund as of November 1, 1932, or at all.

Deny that in the opening paragraph of its annual report to the Governor of Kentucky for the year 1931, the State Tax Commission of Kentucky called his attention to the condition of the General Fund, stating that the General Assembly, at its 1930 session, had enacted certain legislation transferring approximately one-half million dollars from the General Fund and providing for large appropriations made in favor of the School Equalization Fund, with no provision to pay same other than to issue warrants against the General Fund, or the Commission emphasized the fact that such legislation

"naturally caused an unprecedented deficit in the General Fund for the year of over $2,500,000.00."

thus adding to the deficiency in said fund theretofore existing.

Deny that in said report the State Tax Commission criticized

"the utter disregard of the General Assembly in late years for a balanced budget,"

or added:

"Since this law-making body holds the power of appro- [fol. 139] priating state funds and of fixing the tax rate to be levied for state purposes, it remains to be seen if any power, however great, can balance a state budget without their cooperation."

Paragraph VI

Defendants repeat all of the averments and denials contained in their answer to Paragraph XXIX of the original bill of complaint and in addition thereto and in further answer to said paragraph as amended, they say that they have not sufficient information to form a belief and therefore neither admit nor deny the averments contained in the amendment to said paragraph but require strict proof thereof.

Paragraph VII

Defendants repeat, reiterate, and rely upon each and every defense made in their original action.

Wherefore, defendants pray as in their original answer.

Bailey P. Wootton, Attorney General. S. H. Brown, Assistant Attorney General. Francis M. Burke, Assistant Attorney General.

Batson, Cary & Welch, Louisville, Kentucky; Leslie W. Morris, Frankfort, Kentucky, of Counsel.

[fol. 140] In United States District Court

In Equity. No. 611

Second Amended Answer—Filed July 6, 1933

Come the defendants, by leave of Court, and for further answer to plaintiff's petition, as amended, plead as follows:

Paragraph I

Defendants say that plaintiff has a plain, adequate, complete and speedy remedy at law. That under the provisions of section 10 of the act challenged, as construed by the court of highest resort of Kentucky, plaintiff could sue for and recover any taxes improperly paid under any of the provisions of said act; that in the event of a judgment for the recovery of any such taxes, said judgment could and would be paid from the general expenditure fund of the Commonwealth of Kentucky, within a reasonable time after the rendition thereof.

Defendants state that the receipts in the said general expenditure fund, as shown by the official reports of the Treasurers of the Commonwealth of Kentucky, for each of the fiscal years 1926 to 1932 inclusive, have been as follows:

[fol. 141]

For	the	fiscal	year	ending	June	30,	1926....	$7,706,538.28	
"	"	"	"	"	"	"	1927....	8,059,517.85	
"	"	"	"	"	"	"	1928....	9,294,798.97	
"	"	"	"	"	"	"	1929....	9,907,769.29	
"	"	"	"	"	"	"	1930....	12,949,027.10	
"	"	"	"	"	"	"	1931....	11,573,065.01	
"	"	"	"	"	"	"	1932....	10,000,000.00	(approximately)
"	"	"	"	"	"	"	1933....	9,000,000.00	(approximately)

(Official Treasurer's report for the fiscal years 1932 and 1933 not yet published.)

Defendants say that there will be collected under the tax laws of this State and paid into the said general expenditure fund approximately Eight Million Dollars for the fiscal year ending June 30, 1934; that a great portion of said sum is already due and in process of collection; that in fact there is approximately Seven Million Dollars now due the general expenditure fund of the Commonwealth of Kentucky against which there are no preferred claims; that money is constantly flowing into the said general expenditure fund from the operation of tax laws in force in this Commonwealth; that any judgment for refund of taxes paid by this plaintiff under the provisions of the challenged act will be a preferred claim against said general fund, under the laws of this Commonwealth as construed by the courts of this State.

Paragraph II

For a separate and distinct defense in point of law arising upon the face of the bill of complaint as amended herein, defendants say that the facts alleged in said bill of complaint as amended are insufficient to constitute a valid cause of action.

Wherefore, defendants pray as in their original answer.
Bailey P. Wootton, Attorney General of Kentucky. S. H. Brown, Assistant Attorney General. Francis M. Burke, Assistant Attorney General.

Batson, Cary & Welch, Louisville, Kentucky; Leslie W. Morris, Frankfort, Kentucky.

[fol. 142] In United States District Court

No. 611

Stipulation as to Hearing—Filed July 24, 1933

In the above-styled case it is stipulated by the parties, plaintiff and defendants, as follows:

(1) Upon the final hearing of this case, the parties, plaintiff and defendants, respectively, may read in evidence, as if they were depositions regularly taken on due notice to the opposing side, any or all of the ex parte affidavits heretofore filed or read in evidence upon the hearing of plaintiff's motion for an interlocutory injunction herein, and may also read in evidence all depositions heretofore taken and filed and heretofore read in evidence upon the hearing of plaintiff's motion for an interlocutory injunction herein,

Subject, however, in the case of such affidavits and depositions,

(a) to exceptions for competency and relevancy of the subject-matter or any portion thereof contained in any of said ex parte affidavits, and

(b) to the right of the adverse party, on due notice, to cross-examine orally any witness whose ex parte affidavit is so offered or read in evidence.

(2) The plaintiff shall conclude the taking of proof on its behalf, including the cross-examination of witnesses whose ex parte affidavits have been heretofore filed, on or before June 10, 1933.

[fol. 143] All objections to mere matters of form or to the ex parte character of affidavits heretofore filed on the motion for an interlocutory injunction, and all objections on account of the ex parte character thereof, are waived, and all formalities as to the cross-examination of witnesses giving such affidavits are hereby waived.

(3) Subject to all the provisions of this stipulation, all the evidence offered or heard in this case or in the case of Kroger Grocery and Baking Company v. John B. Lewis, et al., No. 3908, filed in the Eastern District of Kentucky, or in the cases of Fred Levy, et al. v. John B. Lewis, et al., No. 610, and J. C. Penney Company v. John B. Lewis, et al., No. 611, filed in the Western District of Kentucky, may be read in this case or in any one or all of the other three cases.

(4) The defendants shall conclude the taking of depositions or the cross-examination on their behalf of plaintiff's witnesses, on or before June 25, 1933.

(5) On or before the 10th of June, 1933, each party shall give to the adverse party or parties a written notice specifying the ex-parte affidavits proposed to be read by such party upon the final hearing and no ex parte affidavits other than those so specified shall be read on behalf of such party or parties.

(6) It is further stipulated that the following statement made up from the record of the State Treasurer of Kentucky by Jerry King, Bookkeeper in the State Treasurer's Office correctly sets forth as to each of the dates below given

(a) the balance to credit of General Fund, and

(b) outstanding warrants against the General Fund as follows:

[fol. 144]

Date	Balance to credit of general fund	Outstanding warrants against general fund
June 30, 1922	$297,967.85	$4,702,709.11
June 30, 1923	2,590,470.14	5,947,750.40
June 30, 1924	167,535.74	4,089,151.37
June 30, 1925	310,242.68	4,127,746.17
June 30, 1926	10,387.44	4,329,772.33
June 30, 1927	257,566.83*	4,664,820.89
June 30, 1928	440,328.14	6,715,347.99
June 30, 1929	1,880,084.77	8,060,920.69
June 30, 1930	1,826,244.05	8,533,384.79
Dec. 31, 1930	1,250,168.22	9,880,501.76
June 30, 1931	2,440,128.36	11,023,911.53
Dec. 31, 1931	838,269.63	12,637,990.48
June 30, 1932	1,302,267.69	13,851,414.57
Dec. 31, 1932	573,831.32	14,415,503.69
May 25, 1933	1,898,229.25	14,668,744.57

* (Deficit.)

(7) It is understood that neither side shall be required to produce for cross-examination by the adverse party any witness whose ex parte affidavit may be offered or read under this stipulation.

Nichols, Morrill, Wood, Marx & Ginter; Trabue, Doolan, Helm & Helm, Solicitors for Plaintiffs. Bailey P. Wootton, S. H. Brown, Solicitors for Defendants.

[fol. 145] IN UNITED STATES DISTRICT COURT

ORDER SUBSTITUTING PARTY DEFENDANT—Entered August 21, 1933

This day came the parties herein and filed a stipulation noting that the defendant Selden R. Glenn had resigned as a member of the State Tax Commission of Kentucky and was no longer a member of the said State Tax Commission, and was succeeded therein by Emerson Beauchamp.

And it appearing to the Court that there is a substantial need for continuing and maintaining this cause and obtaining an adjudication of the questions involved,

It is ordered that Emerson Beauchamp, member of the [fol. 146] State Tax Commission of the Commonwealth of Kentucky, be and he is hereby substituted as a defendant herein in lieu of the defendant Selden R. Glenn, and with the same effect as if he had been originally a defendant to the Bill of Complaint herein, and said cause is continued and maintained against the said Emerson Beau-

champ individually and as a member of the State Tax Commission of the Commonwealth of Kentucky.

Xen. Hicks, Circuit Judge. A. M. J. Cochran, District Judge. Chas. I. Dawson, District Judge.

[fol. 147] IN UNITED STATES DISTRICT COURT

ORDER OF SUBMISSION—Entered August 21, 1933

This day the above-styled three cases came on for hearing before Hon. Xenophon Hicks, Circuit Judge, Hon. A. M. J. Cochran, District Judge, and Hon. Chas. I. Dawson, District Judge.

By agreement of parties plaintiff and defendant, the above-styled three cases are heard together, and the same evidence was heard in these cases as in the case of Kroger Grocery & Baking Company against the same defendants pending in the Eastern District of Kentucky, and heard at the same time.

By agreement of parties plaintiff and defendant, the proof heard and all exhibits filed as set out in the order of submission herein, dated February 14, 1931, was likewise read and heard upon the final submission hereof, together with the stipulation filed in these cases in the Clerk's office on or about July 24, 1933, and now filed by order of Court.

In addition to the said evidence, plaintiffs by counsel filed and read the depositions and exhibits therewith of

W. P. Sullivan,
W. R. Robinson,
A. H. Brendel,
Albert H. Morrill,
Harry W. Schacter.

[fol. 148] Plaintiffs likewise read in evidence the following Statutes and Acts of the General Assembly of Kentucky and decisions of the Court of Appeals of Kentucky, as set out in their amended bills herein:

Ky. Stat. Sec. 3688a-1, a-2 and a-4;
Rhea, Treas., v. Newman, 153 Ky. 604;
Bosworth, Treas., v. Shuck, 118 Ky. 458;

Chap. 13 of the Acts of the General Assembly of Ky. of 1926;

Chap. 20 of the Acts of the General Assembly of Ky. of 1932;

State Budget Commission v. Lebus, 244 Ky. 701;

and certain paragraphs of the Report of the State Tax Commission of Kentucky for the year 1931, as set out in the amended bill.

Likewise defendants filed and read the depositions and exhibits therewith of

Jerry King,
James W. Martin,
Clyde William Phelps,
Selden R. Glenn,
R. C. Ilg,
Elam Huddleston.

Thereupon these cases were argued by counsel for the respective plaintiffs and defendants and ordered to be submitted, and the Court not being fully advised takes time.

It is further ordered and adjudged that the interlocutory injunctions heretofore entered in each of the above-styled cases be and the same are hereby continued in full force and effect until the final determination of each of the above-styled cases in this Court.

Aug. 21, 1933.

Xen. Hicks, Circuit Judge. A. M. J. Cochran, District Judge. Chas. I. Dawson, District Judge.

Have seen the foregoing order.

Nichols, Morrill, Wood, Marx & Ginter; Trabue, Doolan, Helm & Helm, Solicitors for Plaintiffs. Bailey P. Wootton, Atty. Gen.; S. H. Brown, Asst. Atty. Gen.; Homer W. Batson, Leslie W. Morris, Solicitors for Defendants.

[fol. 149] IN UNITED STATES DISTRICT COURT

In Equity. No. 611

STIPULATION AS TO STATEMENT OF EVIDENCE—Filed September 20, 1934

This case having been heard with the case of The Stewart

Dry Goods Company v. John B. Lewis et al. (simultaneously herewith appealed to the Supreme Court of the United States) upon the plaintiffs' motion for an interlocutory injunction, and the same testimony having been read in each case, it is agreed by counsel that the narrative of testimony printed in the record of the said Stewart Dry Goods Company case shall be considered as a part of this record upon appeal without the necessity of duplicating same in this record.

Nichols, Morrill, Wood, Marx & Ginter; Trabue, Doolan, Helm & Helm, Solicitors for Plaintiff. B. P. Wootton, Atty. Gen.; S. H. Brown, Solicitor for Defendants.

[fol. 150] IN UNITED STATES DISTRICT COURT

Before Hicks, Circuit Judge, and Cochran and Dawson, District Judges

OPINION—Filed December 20, 1934

DAWSON, District Judge:

These three cases are before us on final submission and each of them involves the validity of Chapter 149 of the 1930 Acts of the General Assembly of the Commonwealth of Kentucky, commonly known as the Retail Merchants Gross Sales Tax Act. The case of Kroger Grocery & Baking Company v. John B. Lewis, et al., in the Eastern District of Kentucky, and involving the same questions, was heard and considered by us at the same time. On a former hearing of these cases we dismissed the petitions on the ground that the plaintiffs had an adequate remedy at law. An appeal was taken to the Supreme Court, and that court held that, in view of the allegations of the bills as to the condition of the General Expenditure Fund of the State, it could not be said, in the absence of proof controverting the allegations of the bills, that Section 10 of the Act upon its face afforded an adequate remedy at law. In reversing the case, the Court said:

[fol. 151] "The decrees are reversed and the causes remanded to the District Courts, of three judges, for final

hearing upon the merits, without prejudice to a determination upon evidence with respect to the questions of the status of outstanding warrants upon the General Fund in the State Treasury, and whether warrants of the sort contemplated by Section 10 of the Act in question are accorded preference in payment over other warrants, and the basis, if any, for the assurance that such preference will be continued so that in the event of actions by the plaintiffs at law under Section 10 they would be afforded a certain, reasonably prompt and efficacious remedy."

We have interpreted this language of the Court to authorize us to again consider the question of the adequacy of the remedy at law under Section 10 of the Act in the light of such proof as might be offered by the parties on this subject.

Proof has been taken on this question which establishes the fact that the uniform practice of the Treasurer of the Commonwealth of Kentucky has been to pay warrants issued by the Auditor for the refund of taxes when presented, and in advance of outstanding interest-bearing warrants, and that such has been the practice of the present Treasurer of the Commonwealth of Kentucky, whose term of office does not expire until January, 1936. It is further established by the evidence that the present State Treasurer has followed the practice of keeping himself in financial position to refund all taxes which are paid under legal protest, and that he will be in a position to and will do so with reference to the taxes involved in these actions in event it shall be finally determined that such taxes were illegally collected, notwithstanding the fact that there were outstanding as of June 30, 1933, approximately fifteen million dollars of interest-bearing warrants against the General Expenditure Fund, out of which fund Section 10 of the Act directs refunds under the Act to be made. We know of no opinion of the Court of Appeals of Kentucky giving its sanction to this practice, nor does the record disclose that the Attorney General of the State has ever ruled that the practice was authorized by any statute of the State. Certainly the practice is consonant with common justice; but in view of the doubt expressed by the Su- [fol. 152] preme Court as to whether Section 10 of the Act authorizes such preferential treatment, and in view of

the further fact that if refunds under the Act are not given preference it is uncertain when they would be paid, we feel constrained to hold that the remedy at law given by Section 10 of the Act does not afford that certainty necessary to repel equity jurisdiction.

We therefore come to a consideration of the merits of the cases.

The pertinent provisions of the Act are:

"Section 1. The words 'retail merchant,' as used in this act, shall mean and include every person, firm, association, co-partnership or corporation opening, establishing, operating or maintaining any 'store', as defined herein, for the purpose of and selling goods, wares or merchandise at retail in this State, except those actually engaged in gardening or farming and selling garden or farm products raised by them in this State. The term 'store', as used in this act, shall be construed to mean and include any store or stores or any mercantile establishment or establishments in this State which are owned, operated, maintained or controlled by the same 'retail merchant', as defined herein, either domestic or foreign, in which goods, wares or merchandise of any kind are sold at retail. The provisions of this act shall be construed to apply to every 'retail merchant' and 'store', as defined herein, which is controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management.

Section 2. Every retail merchant, as defined herein, shall pay an annual license tax for the opening, establishing, operating or maintaining, of any store or stores, as defined herein, determined by computing the tax on the amount of gross sales as follows:

One-twentieth of one per cent of the gross sales of Four Hundred thousand ($400,000.00) Dollars or less; two-twentieths of one per cent on the excess of the gross sales over Four hundred thousand ($400,000.00) Dollars and not exceeding Five Hundred thousand ($500,000.00) Dollars; five-twentieths of one per cent on the excess of the gross sales over Five hundred thousand ($500,000.00) Dollars and not exceeding Six hundred thousand ($600,000.00) Dollars; eight-twentieths of one per cent on the excess of the gross sales over Six hundred thousand ($600,000.00) Dol-

lars and not exceeding Seven hundred thousand ($700,000.00) Dollars; eleven-twentieths of one per cent on the excess of the gross sales over Seven hundred thousand [fol. 153] ($700,000.00) Dollars and not exceeding Eight hundred thousand ($800,000.00) Dollars; fourteen-twentieths of one per cent on the excess of the gross sales over Eight hundred thousand ($800,000.00) and not exceeding Nine hundred thousand ($900,000.00) Dollars; seventeen-twentieths of one per cent on the excess of the gross sales over Nine hundred thousand ($900,000.00) Dollars and not exceeding One million ($1,000,000.00) Dollars; one per cent on the excess of the gross sales over One million ($1,000,000.00) Dollars.

Section 3. Every retail merchant, as defined herein, in order to ascertain the amount of taxes due and payable under the next preceding section, shall file with the State Tax Commission on or before the first day of February each year a written report verified by the affidavit of the owner or chief officer on such forms as it may prescribe, giving the number and location of its store or stores, as defined herein, the name and post office address of its owner or principal officer, the name and address of its officer or agent in charge of its business at each separate store, the nature and kind of business, the total gross sales during the preceding year ending the thirty-first day of December, and such other facts bearing on the proper taxation as the Tax Commission may require.

The State Tax Commission may, in any case, require such additional information as it may deem necessary to enable it to perform its duties herein. It shall be the duty of the State Tax Commission from such reports, and from such additional information as it may obtain, to ascertain the amount of taxes due, and to certify to every such retail merchant the amount of taxes due for the preceding year, based upon such reports and information as it may ascertain. Upon final action by the State Tax Commission, it shall certify to the Auditor of Public Accounts and to the retail merchant the amount of such tax due by each retail merchant, as defined herein, and it shall be the duty of each retail merchant to pay the amount of such tax to the Auditor of Public Accounts not later than thirty days thereafter.

In reporting the gross sales for the year, 1930, retail merchants shall include only those sales made between the date that this act becomes effective and December 31, 1930, and the license tax due for the year 1930 shall be based on the amount of those sales only.

Section 4. The license or excise tax levied herein, shall not be in lieu of any special state license, excise, occupational or corporation license tax due under the provisions of any law now in force, or that may hereafter be enacted. Should any retail merchant, as defined herein, be liable for and pay any special state license, excise, occupational or corporation license tax under the laws now in force, or that may hereafter be enacted, credit may be taken on the tax [fol. 154] levied in this act for the amount of such special license, excise, occupational or corporation license tax so paid not to exceed the amount of the license or excise tax levied herein."

Plaintiffs contend that the Act violates the Fourteenth Amendment to the Federal Constitution in that it denies them the equal protection of the law and deprives them of their property without due process of law; that it violates the Federal Constitution in that it discriminates against and burdens interstate commerce, and that it violates the Bill of Rights of the State Constitution, which prohibits the exercise of arbitrary power over the lives, liberty and property of citizens and secures to all the inalienable right of acquiring and protecting property, and is so arbitrary and confiscatory as to be unauthorized as an excise or license tax under Section 181 of the Constitution. Some claim is also made that it violates other provisions of the Constitution of Kentucky, but these contentions apparently are not seriously urged, and we shall not notice them.

Does the Act Deny to the Plaintiffs the Equal Protection of the Law?

It is the contention of the plaintiffs that equal protection of the law under the Fourteenth Amendment is denied by the Act because:

(1) The classification of the persons taxed into eight different groups, according to the amount of gross sales, and a corresponding stepping up of the rate, is not justified

by any conceivably substantial distinction between the classes, but is wholly arbitrary and discriminatory.

(2) The credits allowed by Section 4 of the Act operate, in most cases, to exempt from the tax those falling in the class having annual gross sales of less than $400,000,000, and that this section also operates to give a preference to [fol. 155] those entitled to such credits over those taxpayers who have no special license or excise taxes upon which to claim the credits authorized by Section 4.

It should always be remembered that the power of the State to tax for public purposes within its constitutional sphere is as unlimited as is the power of the National Government within its sphere, except for the equality clause of the Fourteenth Amendment.

It has often been written that the equal protection provision of the Fourteenth Amendment is not a guarantee of equality of the operation or application of State legislation upon all the citizens of a State. All that it intends to secure to citizens is that the laws of a State shall have equality of operation and application on persons according to their relations. That is to say, it is a guarantee to every citizen that he shall be accorded the same treatment by the laws of his State as is accorded to other citizens in his class and similarly circumstanced. As applied to taxation, it has been repeatedly declared by the Supreme Court that this provision of the Constitution does not prohibit classification further that that the classification must be rested upon some ground of difference having a fair and substantial relation to the object of the legislation. The exemption of certain classes of property from taxation, or the imposition of different rates of taxation upon different classes of property or persons, is not prohibited by the equal protection provision of the Fourteenth Amendment, provided the classification is not unreasonable or arbitrary; and this is true as to excise, license and occupational taxation, as well as property taxation. It is not necessary that the classification shall be one that appeals to the judgment or sense of fairness of courts. It is enough if the classification is reasonably founded on the "purposes and policies [fol. 156] of taxation." Generally speaking, the judgment of the legislative body is conclusive as to classification unless it is based upon so unsubstantial a difference in the

classes affected, or is so arbitrary and unreasonable as to preclude the assumption that the classification was made in the good faith exercise of legislative judgment and discretion. These principles are so well settled that citation of authority is hardly necessary, but among the cases sustaining the principles above enunciated are: Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S. 232; Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283; Campbell v. California, 200 U. S. 87; Royster Guano Co. v. Virginia, 253 U. S. 412; Watson v. Comptroller, 254 U. S. 122; Stebbins v. Riley, 268 U. S. 137; Quong Wing v. Kirkendall, 223 U. S. 59; McLean v. Arkansas, 211 U. S. 539; Armour Packing Co. v. Lacy, 200 U. S. 226; Connolly v. Union Sewer Pipe Co., 184 U. S. 540; Alaska Fish Co. v. Smith, 255 U. S. 44.

The decisions are equally clear that in order to sustain classified taxation of things or persons the difference between the classes need not be great. We think it safe to say that slight differences, such as in ability to pay, in character of property or circumstances of persons taxed, will sustain State tax classification against attack under the equal protection clause of the Fourteenth Amendment. Further we think it may be laid down as a sound rule that even though the Court may doubt or question the existence of the distinction or difference forming the basis of classification for State Taxation, yet if the matter is one about which reasonable men may disagree, the judgment and discretion of the legislative body should not be interfered with.

Measured by these rules, we are unable to say that the Act in question violates the equal protection clause of the Fourteenth Amendment. It is well settled, and the plaintiffs concede, that classification for taxation based upon [fol. 157] mere volume is not open to attack under the Fourteenth Amendment. Plaintiffs contend, however, that it is a long cry from classification upon volume, by the application of the same rate to all classes, to a classification which steps up the rate on the respective classes determined according to volume. Conceivably there might be some merit in this contention, if the law under attack here imposed increasing rates upon the entire volume of business done by those in the higher classes. But such is not the case here. All those who fall exclusively within the $400,-

000.00 class have applied to them exactly the same rate, and each taxpayer in each higher classification gets the benefit of exactly the same rate, not only of other taxpayers in his particular classification, but he and all others in his class likewise get the same rate applied to that portion of their sales which falls within the lower classifications as is exacted of those taxpayers who fall exclusively within such lower classifications.

Therefore, it seems quite clear to us that the rates applied in this Act apply equally to all in the same class. Hence, the claim of the plaintiffs that classification of taxpayers according to volume and the application of different rates to different classes amounts to a denial of equal protection of the law, comes at last to the proposition that such classification is so unreasonable and arbitrary as to preclude the assumption that the classification was made in the good faith exercise of the taxing power of the State.

Having in mind the principles heretofore adverted to, we can not agree to this proposition. The Court judicially knows that there is in the public mind a quite widely accepted theory that taxation may properly be based upon ability to pay, and this theory has often been translated into legislative action. There is a widely accepted theory of economics that, as a general proposition, ability to pay increases with volume of business, because generally speak- [fol. 158] ing, increased volume of business means increased profits. We recognize, of course, that this theory of economics is not universally accepted, but, on the contrary, is vigorously opposed by another school of economic thought. These opposing theories were vigorously advanced in these cases by business men and economists in their testimony. If economists and business men disagree on these propositions, how can it be said that legislative classification in harmony with one of these schools of thought to the exclusion of the other is not reasonably founded in the "purposes and policies of taxation", or that such classification precludes the assumption that it was in the good faith exercise of legislative judgment and discretion?

It is vigorously urged upon us that the provision of Section 4 of the Act which allows a credit to the extent of special license, excise, occupational or corporation license

taxes paid by the retail merchant operates to deny equal protection to those taxpayers who are required to pay no such taxes, and as an illegal discrimination in favor of those taxpayers in the lower brackets whose special taxes paid under other laws of the State are sufficient in amount to almost or entirely liquidate the tax here involved. This view is an entirely superficial one. No individual taxpayer under this law has any vested right in the continuation of a corporation license tax imposed by State law on his corporate competitor, nor in the continuation of any other special license tax any of his competitors has heretofore been required to pay. Certainly the Legislature, in the imposition of the tax here involved, could have repealed all special license taxes which were imposed by law upon those coming within the ambit of the Act under consideration. If there are any retail merchants affected by this Act who, prior to its enactment, were not required to pay any special license [fol. 159] taxes, they had the advantage over their competitors from whom such taxes were exacted. Section 4, to the extent that it allows the payment of such taxes as a credit, simply eliminates a discrimination, though not an illegal one, which theretofore existed. The fact that these credits will substantially liquidate the tax of many of the taxpayers whose sales amount to less than $400,000.00 is simply an incident in the operation of the law. Taxpayers in the higher brackets, where they pay such special taxes, get exactly the same credits. Those who complain of these credits because they are not entitled to like credits put themselves in the anomalous position of complaining because they have not heretofore been subject to special license or other special taxes.

It seems to us that the claim of the department stores, that the law in requiring them to treat the operation of all their departments as one unit, and of the chain stores, that the law in requiring them to similarly treat the operation of all of their stores, amounts to a discrimination against them and in favor of the retail merchant operating a single non-department store, is equally wanting in merit. This unitary classification of department stores and chain stores undoubtedly conduces to simplification in the collection of the tax. The taxation is not based upon the number of stores the taxpayer owns, but upon his gross sales. It is in the nature of a license or excise tax, and we know of

no constitutional inhibition which would prohibit the State from requiring each taxpayer to report the result of all of his business in the State and pay taxes on the aggregate result. The seeming inequality urged because of this feature of the law arises from the taxpayer's method of doing business, and not from any inherent inequality in the law itself.

[fol. 160] Does the Act Deny Due Process under the Fourteenth Amendment?

Oftentimes it is difficult to test State legislation, particularly tax legislation, by the due process clause of the Fourteenth Amendment. As pointed out by Mr. Chief Justice Taft in Truax v. Corrigan, 257 U. S. 312, it is more or less customary to treat the due process and the equal protection clauses of the Fourteenth Amendment together; but, as he observed in that case, "while they overlap, and a violation of one may oftentimes involve a violation of the other, the spheres of the protection they offer are not coterminous." It is conceivable that a State taxing statute may be based on a proper classification and give absolute equality between persons in the same class, so as to make it immune from attack under the equal protection clause, and yet amount to a denial of due process.

In considering the question whether a State taxing law denies due process under the Fourteenth Amendment, a consideration of what amounts to a denial of due process of Congress under the Fifth Amendment is most helpful, because it is well settled that the restraint imposed upon State Legislatures by the due process clause of the Fourteenth Amendment is exactly the same as that imposed upon Congress by the due process clause of the Fifth Amendment. Coolidge v. Long, 282 U. S. 582; Heiner v. Donnan, 285 U. S. 312.

In the case of Brushaber v. Union Pacific Co., 240 U. S. page 1, the Supreme Court, in discussing the limitation of the due process clause of the Fifth Amendment on the taxing power of Congress, said:

"So far as the due process clause of the Fifth Amendment is relied upon, it suffices to say that there is no basis for such reliance since it is equally well settled that such clause is not a limitation upon the taxing power conferred

upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring upon the one hand a taxing power and taking the same away on the other by the limitations of the due process clause. * * * And no change in the situation here would arise even if it be conceded, as we think it must be, that this [fol. 161] doctrine would have no application in a case where although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment, or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion."

From this language it seems clear that if congressional legislation, under the guise of taxation, amounts to confiscation of property, or is so foreign to the practices of government in taxation as to shock the sense of justice, it would violate the due process clause of the Fifth Amendment, and this principle is re-affirmed in Heiner v. Donnan, supra, and in Nichols v. Coolidge, 274 U. S. 531. This rule, therefore, furnishes a safe guide for determining if State tax legislation transgresses the due process clause of the Fourteenth Amendment.

In thinking of valid taxation, State or National, we instinctively exclude legislation which, either because of the rate imposed or because of other features, amounts to confiscation of the taxpayer's property, whether that property is tangible effects or his business.

Under the Act here involved the effective tax rate, without allowing for deductions of the special taxes referred to in Section 4 of the Act, applicable to taxpayers with gross sales of $1,300,000.00 is in excess of one-half of one per cent; to taxpayers with sales of $5,000,000.00, in excess of 86/100 of one per cent; to taxpayers with $7,000,000.00 of gross sales, 9/10 of one per cent; and to taxpayers with $11,000,000.00 of sales, in excess of 93/100 of one per cent; and as the volume of sales increases beyond this figure, the effective rate gradually approaches, although it can never quite reach, one per cent, due to the fact that the taxpayer [fol. 162] in the higher backets gets the benefit of the ap-

plication of the lower rates to that part of his gross sales which falls within the lower classifications. Therefore, if the proof satisfactorily showed that one per cent of gross sales represents the net profit normally realized by any branch or subdivision of the retail mercantile industry, we would have no hesitation in holding the tax confiscatory—at least as to that branch or subdivision of the industry. The burden is upon the plaintiffs who are attacking the law to show that it is confiscatory; but this burden is not sustained merely by showing that it is confiscatory when applied to the business of the least efficient members of the industry taxed. The test is: What is its effect generally upon the class taxed, or what is the effect generally upon any branch or subdivision of that class? We think the proof falls far short of showing that one per cent of gross sales represents the net profit normally realized by retail merchants as an entire class, or normally realized by any branch or subdivision of the industry. On the contrary, we think the preponderance of the proof is to the effect that the profit is normally from two to two and one-half per cent of gross sales, after deduction of taxes, and that in many lines of retailing the profit is even higher.

Quite a good deal of proof has been introduced which shows that the tax would have been substantially confiscatory as applied to the business of the Kroger Grocery & Baking Company during the three years of 1930, 1931 and 1932; but the proof further strongly tends to show that there was lack of efficiency in the operation of the business of this concern during those years. The testimony of Mr. Morrill, the new President of that concern, shows that under his administration the efficiency of the operations of that company has been so improved that for the first six months of the year 1933 the net profits amounted to [fol. 163] $2,294,000, as compared to substantially $1,475,000 for the entire year 1930; to $2,199,000 for the entire year 1931, and to $2,441,000 for the entire year 1932; and that the net profits, after deduction of taxes for the first six months of 1933 amounted to 2.49 per cent of gross sales, as compared to a net profit of slightly in excess of one-half of one per cent for 1930, slightly less than one per cent for 1931, and slightly in excess of one per cent for 1932. There is nothing in the record to show that the experience of this company on its business in Kentucky is substantially different from that in its business as a whole.

We feel constrained, therefore, to hold that the proof fails to establish that in its application to those in the higher brackets the tax amounts to confiscation. We must confess that it appears to us that the tax falls very heavily on those in the higher brackets; but inasmuch as it falls short of confiscation, relief must be secured at the hands of the Legislature—not from the courts.

Does the Tax Discriminate Against Interstate Commerce, or Constitute a Burden on Interstate Commerce?

We think this question is conclusively decided against the contention of the plaintiffs by the opinion of the Court of Appeals of Kentucky in the case of Moore v. State Board of Charities & Corrections, 239 Ky., 729. The plaintiffs vigorously assail the authority of this case, upon the ground that a legal fraud was practiced upon the State Courts, in that there was no real controversy between the parties to that litigation. We can not escape the fact, however, that the validity of the Act was squarely presented to the Court of Appeals in that case. That court had jurisdiction of the subject matter and of the parties, and while the action which led to the opinion in that case originated after these actions had been filed in this court, that fact can have no [fol. 164] effect upon the binding force of the opinion of the State Court, in so far as it deals with the meaning and interpretation of the Act. The opinion of that court as to the meaning and scope of the Act is binding upon all State officials, and is binding upon us. Truax v. Corrigan, 257 U. S. 312. But of course the opinion of that court as to the practical results of the application of the Act so construed involves a finding of fact and is not binding upon us. That court in the opinion referred to specifically held that the Act does not apply to sales made in interstate commerce, and further held that, properly interpreted, Section 1 does not and was not intended to discriminate against farm and garden products raised in other States and sold in this State.

Does the Act Violate the Bill of Rights of the State Constitution, or Is It Unauthorized by Section 181 of That Instrument?

The tax involved here must find its justification in Sec-

tion 181 of the State Constitution, the pertinent part of which provides:

"The General Assembly may, by general laws only, provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations and professions, or a special or excise tax; and may, by general laws, delegate the power to counties, towns, cities and other municipal corporations to impose and collect license fees on stock used for breeding purposes, on franchises, trades, occupations and professions."

This section has been frequently considered by the Court of Appeals of the State, and it is now well settled that it must be read in connection with the Bill of Rights contained in the State Constitution, which forbids the exercise of arbitrary power over the lives, liberty and property of citizens, and secures to all the inalienable right of acquiring and protecting property, and that, when so read, Section 181 confers no power to prohibit, or substantially prohibit by taxation, a legitimate business or to resort to un- [fol. 165] reasonable classification in taxation. Fiscal Court of Owen County v. Cox, 132 Ky. 738; City of Louisville v. Pooley, 136 Ky. 286; Sperry & Hutchinson v. Owensboro, 151 Ky. 389. Thus, we have presented under the Bill of Rights contained in the State Constitution and under Section 181 of that instrument exactly the same questions we have disposed of in our consideration of the due process and equal protection clauses of the Fourteenth Amendment, and it necessarily follows that the claim of the plaintiffs that the Act violates the State Constitution in the particulars referred to must be denied.

The temporary injunction heretofore issued will be dissolved, and the permanent injunction prayed for denied. Inasmuch as we feel confident the plaintiffs will desire to appeal these cases to the Supreme Court, the temporary injunction will be continued in force for thirty days following the entry of the decree herein directed to be prepared, and if before the expiration of that period steps have been taken to appeal the cases, such temporary injunction will be continued until final disposition of the cases by the Supreme Court.

In view of the unsettled economic condition of the country, and in view of the possibility that after a reasonable

trial the law may prove confiscatory as to some branches or subdivisions of the retail mercantile business, we feel constrained to leave these cases on the docket, without prejudice to the right of the plaintiffs, after such reasonable trial, to apply to this Court to reopen and rehear the causes on the single question of confiscation. See: Opinion of the Supreme Court of December 4, 1933, in Glenn et al. v. Field Packing Company.

Counsel may prepare and present for entry a decree conforming to the views herein expressed.

Xen. Hicks, U. S. Circuit Judge. Chas. I. Dawson, U. S. District Judge.

Judge Cochran dissents.

December 20, 1933.

[fol. 166] Trabue, Doolan, Helm & Helm, Louisville, Ky.; Nichols, Morrill, Wood, Marx & Ginter, Cincinnati, Ohio, Attorneys for Plaintiffs.

Bailey P. Wootton, Attorney General, Frankfort, Ky.; S. H. Brown, Assistant Attorney General, Frankfort, Ky.; Batson, Cary & Welch, Louisville, Ky.; Leslie W. Morris, Frankfort, Ky., Attorneys for Defendants.

[fol. 167] In United States District Court

Dissenting Opinion—Filed May 22, 1934

Cochran, J.:

I feel constrained to dissent from the majority opinion of the court.

Certainly the step up in rate of tax as compared with that in volume of sales may be so great as to be arbitrary and unreasonable. It seems to me that such is the case here. The tax imposed for sales amounting to $400,000.00 is $200, and for those amounting to $1,000,000.00 plus is $10,000.00. The percentage of step up in volume was 250—in ax imposed 5,000 per cent, or twenty times as much.

In the case of City of Newport v. Frankel, 192 Ky. 408, it was held that a city ordinance providing that a moving picture theatre charging an admission fee of fifteen cents

should pay an annual tax of $450 and one charging twenty cents $5,000 was arbitrary and unreasonable. The step up [fol. 168] in volume was 33⅓ per cent and in tax 1,000 per cent or thirty times as much. I am unable to make out that legislation providing a step up in tax twenty times as much as the step up in volume is so much less than that providing thirty times as to remove it from being arbitrary and unreasonable. Difference in business may make this decision inapt.

The classification which the Act makes seems to me arbitrary and unreasonable on another ground. There are four distinct classes of retailers, singly operated units, department stores, chain stores and mail order houses. Their points of difference are many. The chain store has many features and advantages which definitely distinguish it from the singly operated unit. The same is true as to a department store. That such is the case was recognized and held in State Board of Tax Comm'rs vs. Jackson, 283 U. S. 527. It was emphasized in Leggett vs. Lee, 288 U. S. 517. It may be added that a department store has features and advantages definitely distinguishing it from the singly operated unit. The Act ignores this natural and inevitable classification. It classes all retailers of whatever nature together and then reclassifies them according to their volume of sales. Each retailer has to pay the same tax as every other retailer having the same volume of sales. The singly operated unit has to pay the same rate of tax as the chain store or department store having the same volume of sales notwithstanding both have advantages, greater in case of the chain store, which makes for greater profits, over it. Likewise the department store has to pay the same rate as the chain store with the same volume of sales notwithstanding the chain store has advantages, which make for greater profits, over it.

In the Titusville case retailers and wholesalers were treated by the municipality differently in the tax imposed per volume of sales. So here it seems to me that it was arbitrary and unreasonable not to treat singly operated [fol. 169] units, department stores and chain stores differently in the rate of tax imposed per volume. If the rate of tax was to be determined per volume it should have been different as to each class of retailers.

The arbitrary and unreasonable character of the Act

seems to me to be demonstrated by the operation of the Act. The returns for the years 1930, 1931, and 1932 are in the record. Mention will be made only of the returns for 1930, as they are the most complete. 24,163 retail merchants made returns for that year. Their gross sales amounted to $362,848,264 and the tax paid by them to $106,342.94. It is reasonable to assume that these returns cover all retail merchants in the state except plaintiffs and those not plaintiffs but protected by the temporary injunction, twenty-five in number. The gross sales of the plaintiff, Stewart Dry Goods Company, a corporation operating a department store containing seventy-seven departments in Louisville amounted to $3,000,000, the tax upon which is a little over $23,000.00. Those of the plaintiffs, Levy Brothers, a partnership operating a department store in Louisville, amounted to $1,250,000, the tax upon which is almost $5,500.00. The gross sales of the plaintiff, J. C. Penney Co., in this state, a corporation, a chain store operating department stores in and out of this state, twenty-one of which are located in this state, are not before me. The tax thereon seems to be about $10,000.00. And the gross sales in this state of the plaintiff, The Kroger Grocery & Baking Company, a corporation, a chain store operating retail groceries in and out of this state, 263 of which are located in this state, amounted to $14,500,000.00 in round numbers, the tax upon which is approximately $124,000.00. The tax of the Great Atlantic & Pacific Tea Company, one of the twenty-five protected by the injunction, is estimated at approximately $120,000.00 and the taxes of the other merchants so protected is placed at about $50,000.00. This makes the whole tax not over $450,000.00. Of this tax the Kroger Grocery & Baking Company and the [fol. 170] Great Atlantic & Pacific Tea Company pay more than one half though their aggregate gross sales are only 8% of the gross sales in the state. The tax of the Kroger Grocery & Baking Company on $14,500,000.00 gross sales is more than $18,000.00 in excess of that paid by 24,163 merchants on $362,000,000.00 gross sales. The Stewart Dry Goods Company operating a single department store in Louisville pays $23,000.00 taxes on $3,000,000.00 of gross sales, nearly one-fourth as much as the 24,163 merchants making returns upon gross sales amounting to $362,000,000.00, of those 24,163 merchants only 35 of them made

gross sales in excess of $400,000.00. The sum yielded by the tax is a measly sum as compared with the needs of the state and twenty-nine merchants out of over 24,000 pay three-fourths of this sum. In the case of the plaintiff, The Kroger Grocery & Baking Company, its profit in this State was in round numbers $172,000.00. Deducting from this the tax leaves $48,000.00 as net profit, or 1/3 of 1% of the gross sales. The net profit in 1931 would have been less than $40,000.00 and in 1932 there would have been a loss of $9,000.00. The same tax applied to its entire system would turn a profit of $1,400,000.00 into a loss of $700,000.00.

Apparently the sum yielded by the tax is contributed to generally by the retail merchants throughout the state. As a matter of fact, by reason of the credits against the tax, which the act authorizes, and which possibly of itself may render it unconstitutional, more than two-thirds of the retail merchants of the state make no contribution whatever to that sum. The statute is both vindictive and deceptive.

Another particular in which it seems to me that the Act is unconstitutional is that it discriminates against garden and farm products raised in other states, in that it excepts from its provision retail merchants selling garden and farm products raised by them in this state. A retail merchant who sells such products raised elsewhere is subject to the tax. The plaintiff, The Kroger Grocery & Baking Com-
[fol. 171] pany, comes within that category. It operates a farm of 360 acres in Ohio named "Country Club Farm" after the "Country Club" brand, one of its best known brands. On that farm it produces cattle, sheep, hogs, poultry, milk and garden and other farm products which are sold at retail in this state. The language of the exception is "those actually engaged in gardening or farming and selling garden or farm products raised by them in this state". The Court of Appeals of Kentucky in the case of Moore vs. State Board, 239 Ky. 729, construed this exception as follows:

"However, we are of the opinion that the phrase 'in this State' was meant to modify the word 'selling' and not 'raised'. The whole import of the Act is the levy of a tax measured by sales made in this state. It is the sales which count, not the place where the goods sold are produced. It was plainly the purpose of the act to exempt from its operation those engaged in gardening and farm-

ing and selling their own products, such sales the Legislature intended to be without the operation of the act and it was of no moment to that body where the produce sold was raised."

The construction placed on the exception is as if it read "those actually engaged in gardening and farming and selling in this state garden or farm products raised by them." It seems to me that construing it to mean as if it so read is taking unauthorized liberty with the language of the Act. There is one consideration, however, which makes it certain that the legislation had no such meaning. To so read the statute exempts the plaintiff, The Kroger Grocery & Baking Company, from the act. The exemption is not of persons, but of retail merchants so engaged in selling and that plaintiff is such a merchant. It is inconceivable that the legislature intended to make such an exemption. Then, if it be taken that it did, this circumstance of itself would seem to affect the validity of the act. It will hardly do to hold that the plaintiff, The Kroger Grocery & Baking Company, shall not pay the tax and The Great Atlantic & Pacific Tea Company shall. This [fol. 172] is a case, as I see it, where this court is not bound to follow the state court in its construction of the Act. It is governed by the statement on this subject in the case of Edward Hines Trustees v. Martin, 268 U. S. 458, 463.

On the other question involved I think that the plaintiffs have a plain and adequate remedy at law in this court. Where this state levies a tax which the taxpayer claims is illegal and pays under protest, it is exacted from him by duress and the official into whose hands it comes and the state itself hold it in trust to repay to the taxpayer if it is held by the court to have been illegal. It cannot and should not be used for the purpose for which it was levied and collected, at least, until the lapse of a resonable time for the taxpayer to assert his right. Nothing else appearing it is to be taken that this trust will be respected. In this state it has been the invariable practice to so treat taxes so paid and upon its being held that the tax is illegal to repay it at once. This is unaffected by the present wretched financial condition of the state. If the tax paid has not been kept intact so as to enable such repayment to be made there is always enough cash in the general fund sufficient

for that purpose. Sections 4688-1 to 4688a-2 and 4689, Kentucky Statutes, do not relate to warrants drawn by the Auditor on the Treasurer to repay illlegal taxes which have been collected. They relate solely to warrants so drawn in favor of voluntary creditors of the state. Hence they have no bearing here. Section 162, Kentucky Statutes, relates to warrants drawn to pay such taxes. A decision of the Kentucky Court of Appeals is not needed to make good any of these propositions. Their correctness is apparent. A recognition of the invariable practice of the state officials to respect the trust imposed by payment under protest of taxes claimed to be illegal and an indication that the Appellate Court of the state will enforce such trust is to be found in the case of Talbott, Auditor, vs. Childers, Execu- [fol. 173] tor, 247 Ky. 568. It involved the question as to whether a succession tax paid by an executor in order to procure the right to transfer corporate stock could be recovered when it had not been made under protest. The court, in demonstrating the need for such a protest made at the time the tax was paid, said:

"So that the Collector thereof may become forewarned that an effort would be later made to recover the amount, either in whole or in part, and so that the distributors of such tax to said agencies entitled to it might become advised that payments so made are not permanent but only tentative, subject to be refunded by whatever proceeding payor might thereafter take."

See also case of Talbott vs. Urquhart's Exors., 250 Ky. 143.

Section 10 of the act here involved expressly authorized the taxpayer to bring an action to recover the tax which he has paid under protest. This authority is unlimited and amounts to a consent on the part of the state that it may be sued in this court. If judgment is rendered in its favor this court has jurisdiction by mandamus to compel repayment of the tax. If limited to the general fund therefor, there is always sufficient in that fund out of which it can be paid. But it is not to be expected that it will be so limited. It should be taken that the tax paid, if paid under protest, will be kept intact so that it can be repaid upon such adjudication. There is nothing in the act against this.

[fol. 174] IN UNITED STATES DISTRICT COURT

MOTION FOR FINDINGS AND CONCLUSIONS—Filed December 26, 1933

The plaintiff in each of the above-styled cases, by counsel, moves the Court, before entry of a decree herein, to find the facts specially upon which its decree is based and to state separately its conclusions of law thereon, and to enter of record such findings and conclusions, all as provided by Equity Rule 70½ as expounded by the Supreme Court in Pub. Serv. Com. v. Wisconsin Tel. Co., 289 U. S. 67, at page 69; Tax Comm'rs. v. Jackson, 283 U. S. 527, at page 533.

Nichols, Morrill, Wood, Marx & Ginter; Trabue, Doolan, Helm & Helm, Attorneys for Plaintiffs.

Have seen. 12/26/33. H. W. Batson.

[fol. 175] IN UNITED STATES DISTRICT COURT

Findings of Fact and Conclusions of Law—Filed May 21, 1934

Findings of Fact

The court, pursuant to Equity Rule 70½, makes the following findings of fact:

State Warrants

1. The state of the General Fund of Kentucky on the dates set out hereunder is indicated by the figures which appear after the respective dates.

[fol. 176]

Date	Balance to credit of general fund	Outstanding warrants against general fund
6/30/1922	$297,967.85	$4,702,709.11
6/30/1923	2,590,470.14	5,947,750.40
6/30/1924	167,535.74	4,089,151.37
6/30/1925	310,242.68	4,127,746.17
6/30/1926	10,387.44	4,329,772.33
6/30/1927	257,566.83*	4,664,820.89
6/30/1928	440,328.14	6,715,347.99
6/30/1929	1,880,084.77	8,060,920.69
6/30/1930	1,826,244.05	8,533,394.79
12/31/1930	1,250,168.22	9,880,501.76
6/30/1931	2,440,128.46	11,023,911.53
12/31/1931	838,269.63	12,637,990.48
6/30/1932	1,302,267.69	13,851,414.57
12/31/1932	573,831.32	14,415,403.69
5/25/1933	1,898,229.25	14,668,744.57
7/30/1933	.....	15,197,005.42

*Deficit.

2. Claims against the Commonwealth of Kentucky, whether for refund of taxes or on account of other obligations of the State, are first audited by the Auditor of Public Accounts, and, if found correct, he issues a State warrant for the amount thereof, which is, in effect, an order on the Treasurer for the amount of the claim. These warrants are made payable out of different funds, some out of the General Fund, and others out of other funds set aside by legislative act for specific State purposes. If the Treasurer has on hand in the fund against which the warrant is drawn sufficient funds to pay same at the time it is presented, it is usually paid; otherwise it is stamped interest bearing, and after warrants have been stamped interest bearing, they are called and paid in the order in which they are issued. Due to lack of funds, however, to the credit of the General Fund, no interest bearing warrants against that fund issued since 1927 have been paid.

3. Outstanding interest bearing warrants against the General Fund of the State, during all the time since the passage of the Act in question in these cases, have sold below par, the price at times being as low as eighty-three cents on the dollar.

4. It has been the practice of the State Treasurer in recent years to pay in cash, upon presentation, warrants issued for refund of taxes, and such has been the uniform practice of the Treasurer who has been in office at all [fol. 177] times since the passage of the Act in question, and he has at all times since he has been in office followed the practice of keeping himself in financial position to refund all taxes paid under legal protest when required so to do, and he at all times has been in a position so to do with reference to the taxes involved in these actions. There is no statute in Kentucky, however, specifically authorizing such preferential treatment of tax refund warrants, nor has the Court of Appeals of the State ever held that such practice is authorized by the laws of the State.

5. Unless warrants drawn under Section 10 of the Act were given preferential treatment in payment, they could not be collected within a reasonable time.

Conclusions of Law Based Upon the Above Findings of Fact

Inasmuch as there is doubt of the authority of the Treasurer of the State to give preference in payment to warrants issued under Section 10 of the Act, that section fails to afford to the plaintiffs as certain, speedy, complete and efficient a remedy at law as is available to them in equity, and therefore these actions are cognizable in equity.

Facts Relative to Fourteenth Amendment

1. The challenged Act is essentially a revenue measure.

2. The tax imposed by the Act, exclusive of the credits allowed, is as follows:

Sales of first four..	$100,000	rate of	1/20 of 1%,	or a tax of	$200.00
Fifth	$100,000 of sales	" "	2/20 of 1%,	or a tax of	100.00
Sixth	$100,000 of sales	" "	5/20 of 1%,	or a tax of	250.00
Seventh	$100,000 of sales	" "	8/20 of 1%,	or a tax of	400.00
Eighth	$100,000 of sales	" "	11/20 of 1%,	or a tax of	550.00
Ninth	$100,000 of sales	" "	14/20 of 1%,	or a tax of	700.00
Tenth	$100,000 of sales	" "	17/20 of 1%,	or a tax of	850.00
Eleventh	$100,000 of sales	" "	1%,	or a tax of	1,000.00
On each	$100,000 of sales hereafter,		1%.		

[fol. 178] 3. Examples of the special license taxes and corporation taxes allowed as credits under Section 4 of the Act are: the corporation license tax of seventy cents on each one thousand dollars of business transacted by the corporation in the State, or on the value of the capital stock of the corporation; cigarette license tax of $10; soft drink license $2.50; oleomargarine license $3.; playing cards $10.00; pistols $10; bowie knives, dirks, etc. $100, etc.

4. There are approximately 25,000 retail stores in the State of Kentucky.

5. No merchant in Kentucky has an annual sales volume in excess of fifteen million dollars. Without giving effect to the credits authorized by Section 4 of the Act, there is shown below the amount of taxes which are payable by merchants falling in the respective brackets fixed by the Act, and also the effective rate of such tax expressed in percentage of gross sales.

Amount of sales	Total tax payable	Effective rate
$400,000	$200	.05
500,000	300	.06
600,000	550	.0917
700,000	950	.1357
800,000	1,500	.1875
900,000	2,200	.2444
1,000,000	3,050	.305
2,000,000	13,050	.6525
3,000,000	23,050	.7683
4,000,000	33,050	.8263
5,000,000	43,050	.861
10,000,000	93,050	.9305
15,000,000	143,050	.96

6. For the year 1930, 24,163 returns were filed by merchants subject to the Act, and these returns showed an aggregate of gross sales of $362,848,264. 24,128 of these reporting merchants showed gross sales of less than $400,000 each, and the aggregate gross sales of these 24,128 was $340,197,497. 16,413 of the merchants falling in this group, by reason of credits allowed by Section 4, paid no tax. The total tax levied against this group, after the allowance of credits, amounted to $89,220.76 for the year 1930.

[fol. 179] 7. The following is a correct analysis of the report filed by the 24,163 merchants above referred to for the year 1930, showing the number of returns in the various brackets, their gross sales in the same groups, and the net tax after deduction of credits allowed by Section 4, except that there is not shown the effect of the operation of the challenged Act upon the business of those merchants (25 in number), who made no report, having availed themselves of the opportunity afforded by the court to post bond in order to secure the protection of the injunction issued in these cases.

	Number of returns	Gross sales	Net tax
Sales less than $400,000	24,128	$340,197,497	$89,220.76
Sales between $400,000 and $500,000	13	5,866,935	1,261.37
Sales between $500,000 and $600,000	8	4,416,568	1,317.40
Sales between $600,000 and $700,000	5	3,234,563	1,768.56
Sales between $700,000 and $800,000	4	2,989,019	1,383.09
Sales between $800,000 and $900,000	1	814,559	0
Sales between $900,000 and $1,000,000	0	0	0
Sales in excess of $1,000,000	4	5,329,123	11,391.76
Totals	24,163	$362,848,264	$106,342.94

8. The following is a correct analysis of the returns, gross sales and net tax, after the allowance of credits under Section 4, for the year 1931, excluding the operation of

the Act on the business of those merchants who have posted bond, made no report and paid no tax.

[fol. 180]

	Number of returns	Gross sales	Net tax
Sales less than $400,000	20,351	$290,824,180	$66,769.82
Sales between $400,000 and $500,000	10	4,520,653	1,007.59
Sales between $500,000 and $600,000	9	4,887,385	1,360.02
Sales between $600,000 and $700,000	3	1,927,791	1,461.17
Sales between $700,000 and $800,000	2	1,472,166	905.08
Sales between $800,000 and $900,000	3	2,549,814	3,118.74
Sales between $900,000 and $1,000,000	2	1,895,680	4,128.35
Sales in excess of $1,000,000	2	2,389,404	6,386.22
Totals	20,382	$310,467,073	$85,136.99

9. Similarly, the following is a correct analysis of the returns of the same class of merchants for the year 1932, which had been filed up to and including April 17, 1933:

	Number of returns	Gross sales	Net tax
Sales less than $400,000	14,582	$178,783,514.26	$35,948.38
Sales between $400,000 and $500,000	4	1,835,261.79	282.28
Sales between $500,000 and $600,000	5	2,764,557.15	1,107.50
Sales between $600,000 and $700,000	1	601,558.29	0
Sales between $700,000 and $800,000	2	1,522,598.66	1,297.06
Sales between $800,000 and $900,000	1	864,205.61	1,534.44
Sales between $900,000 and $1,000,000	1	939,417.13	0
Sales in excess of $1,000,000	2	1,001,903.32	2,747.03
Totals	14,597	$186,313,016.81	$42,916.69

[fol. 181] 10. The evidence fails to show that there is no relation between sales volume and net earnings, nor does it satisfactorily rebut a widely accepted theory of economists that, as a general proposition, increased volume of sales results in increased profits and increased ability to pay. On the contrary, there is substantial evidence supporting the affirmative of each of these propositions.

11. The rate of profit realized from sales at retail generally varies with the character of goods sold.

12. Under the Act goods sold on credit are included in gross sales, whether payment therefor is made or not.

13. The management of a store or stores is one of the fundamental factors in determining whether or not a profit is realized, and the amount of profit.

14. As a general proposition, those merchants doing the largest volume of trade are enabled to secure the highest type of management.

15. In the field of retail merchandising large scale enterprises, properly and prudently managed, enjoy economies in operation, such as the ability to purchase in large quantities and wider spread of overhead, not generally enjoyed by those stores doing a small volume of business. Yet in exceptional instances some retail merchants enjoy a high rate of profit on a small volume of sales, while in other cases the margin of profit is very low, even though the sales volume be very large.

16. Sales made by merchants taxed under any of the brackets of the Act are in competition with sales made by merchants selling the same character of goods who are taxed under other brackets of the Act.

17. The Kroger Grocery & Baking Company operated 5302 stores in the United States in 1930; 4980 stores in 1931, and 4816 stores in 1932. Of this number 289 were [fol. 182] located in Kentucky in 1930; 254 in 1931, and 249 in 1932. The average annual sales per store of the Kroger Grocery & Baking Company in Kentucky over the past few years has been approximately $50,000. Most, if not all, of the stores of this company are in competition with other grocery stores located in the neighborhood, and the sales of some of these competing stores exceed the sales of the Kroger Stores with which they compete. Some of these competitors of the Kroger stores are owned by merchants operating single stores with a relatively small volume of sales, and in some instances are entitled to enough credits under Section 4 of the Act to wipe out the tax liability under the Act, whereas the competing Kroger stores, by reason of the fact that the Kroger tax liability is determined upon the aggregate sales of all of its stores, pay an average annual tax of between $425.00 and $450.00,

18. The retail sales of Kroger in the United States for the years, 1930, 1931 and 1932 have been as follows:

1930	$267,094,345.26
1931	244,371,147.17
1932	213,159,742.69

and the Kentucky sales for this same three year period have been:

1930	$14,653,448
1931	13,496,915
1932	11,447,611

19. The gross sales of the Stewart Dry Goods Company are approximately $3,000,000 per year. Without taking account of the credits to which it is entitled under Section 4 of the Act, its annual tax under the Act is approximately $23,000, which would figure approximately 76/100 of one per cent of gross sales. This company operates seventy departments, each bearing its proportionate part of the expense of the whole establishment. No department has annual sales in excess of $400,000, and in a considerable number of instances the total sales of a particular department of Stewarts are approximately the same as the sales of specialized stores selling the same line of goods, and [fol. 183] in some cases the sales of particular departments do not equal the sales of specialized stores in competition with that particular department. Department stores such as Stewart's do not enjoy any particular advantage over their specialty store competitors in purchasing, but do have over their specialized competitors some advantage, due to the fact that customers who come to purchase one article are attracted to articles and make purchases in other departments.

20. Levy Brothers are individuals, who operate as partners a department store in Louisville, Kentucky with annual gross sales of approximately $1,250,000, on which they are required to pay a tax under the Act of approximately $5,500. Departments in this store compete with one or two chain store organizations which have only one store in the State of Kentucky. They also compete with individual specialized stores, which in some instances, because of the comparatively small volume of business done and credits allowed, pay little or no tax.

21. Byck Brothers operate a department store in Louisville, Kentucky, with annual gross sales of approximately $700,000. They also operate a department by lease in the Wolf-Wile Department Store at Lexington, Kentucky. This department in Lexington is in no way affected by the sale of goods in Louisville, but does compete directly with stores handling similar merchandise in Lexington, and its annual volume of sales is approximately $50,000. Under

the Act, including the sales of this department, the tax of Byck Brothers is approximately .14/100 of one per cent of its gross sales. In a general way, this concern has the same problem of competition with single specialized stores as have Stewart Dry Goods Company and Levy Brothers, with relatively the same advantages.

Conclusions of Law on the Foregoing Findings of Fact

By reason of the foregoing findings of fact, we conclude that the Act does not deny the plaintiffs the equal protec- [fol. 184] tion of the law, within the meaning of the Fourteenth Amendment, in any of the particulars asserted by the plaintiffs.

Findings of Fact with Reference to Interstate Commerce

1. A considerable volume of the trade of the Stewart Dry Goods Company consists of sales made to customers in other States who buy merchandise by telephone, mail or personally from Stewarts, to be delivered at their place of residence in such other State. The record, however, fairly justifies the conclusion that such sales are actually consummated in Kentucky.

2. The Kroger Grocery & Baking Company ships packaged articles from outside the State of Kentucky to its stores in that State, where such articles are sold in the original containers in which they are packed for shipment. The retail sales of such articles, however, are separate and distinct transactions had after the goods have come to rest and become a part of the stock of merchandise of the particular store making the sale, such retail sales being entirely consummated in Kentucky.

3. The Kroger Grocery & Baking Company operates a farm in Ohio, where it raises farm and garden products, a portion of which is placed in some of its stores in Kentucky and sold by retail from such stores. The amount of such farm and garden products, however, is relatively small as compared to the total of such products handled by such stores.

Findings of Fact Relative to the Decision of Moore vs. State Board of Charities & Corrections, 239 Ky. 729

1. The case of Moore v. State Board of Charities & Cor-

rections, supra, was filed on the 22nd day of December, 1930, which was prior to the filing of any of these actions.

2. The D. T. Bohon Company, cross-petitioner in the Forrest Moore case, represented to the State courts of Kentucky in that action that it was a taxpayer under the [fol. 185] act, and the case was decided on the theory that such a statement was true, but the Bohon cross-petition was filed in the Moore case after the institution of these actions and after their submission on plaintiffs' motions for temporary injunctions.

Conclusions of Law Upon the Above Facts

1. The decision in the Moore case by the State court, as to the meaning and scope of the Act in question, is binding upon this court.

2. As the Act has been interpreted and construed by the Court of Appeals of Kentucky in the Moore case, it does not violate the commerce clause of the Federal Constitution in any of the particulars urged by the plaintiffs.

Facts Relative to Claim of Confiscation

1. The evidence fails to show that the tax imposed is generally so burdensome upon those taxed as to deprive them of an opportunity to make a reasonable profit in their business.

2. The Kroger Grocery & Baking Company, for the year 1930, realized a net profit of 55/100 per cent on its entire gross sales; 9/10 per cent for 1931, and 1.15 per cent for 1932. These figures, however, are not typical of the experience of the class taxed, nor of any subdivision of such class; nor do they present a fair picture of the operation of that company under reasonably efficient management. For the first six months of 1933, under the management of Mr. Morrill, who became President of the company in 1930, the net profit of the company was $2,294,000, as compared to approximately $1,475,600 for the entire calendar year 1930; $2,199,000 for the entire year 1931, and $2,441,000 for the entire year 1932; and the net profit for the first six months of 1933, after deduction of taxes, amounted to 2.49 per cent of gross sales.

[fol. 186] Conclusion of Law Based on the Foregoing Facts

Under the facts found, the tax imposed by the Act is not confiscatory, and therefore does not violate the due process clause of the Fourteenth Amendment, nor does it violate Section 181 of the Constitution of Kentucky or the Bill of Rights of that instrument.

These specific findings of fact are not to be construed as in derogation of any of our conclusions of fact set out in the opinion and not herein enumerated.

Xen. Hicks, U. S. Circuit Judge. Chas. I. Dawson, U. S. District Judge.

——, 1934.

[fol. 187] In United States District Court

Equity No. 611

Order and Decree—Entered June 19, 1934

This cause, having been heard on the merits, was submitted on August 21, 1933, upon the stipulations, proof and record set out in the order of submission entered as of that date, and the Court thereafter, to wit, on December 20, 1933, filed its opinion herein, concurred in by a majority of the Judges, Judge Cochran dissenting therefrom as set out in his dissenting opinion filed May 22, 1934, and now made part of the record herein.

Complainant, on December 26, 1933, moved the Court, before entry of any decree herein, to find the facts specially, upon which its decree is based, and to state separately its conclusions of law thereon, and to enter of record such findings and conclusions.

Thereafter, complainant, on March 24, 1934, and defendants on the — day of ——, 1934, by their respective counsel, tendered findings of fact and conclusions of law proposed by them respectively, and moved the Court to adopt same as set forth in their respective motions entered of record.

The Court, having considered this cause in chief and upon the respective motions made by the complainant and by the defendants as to findings of fact and conclusions of law proposed by them respectively, and being now advised, orders and decrees herein as follows:

I

[fol. 188] (1) Complainants' motion entered herein December 26, 1933, for findings of fact and conclusions of law, is hereby sustained, and the Court, in compliance therewith, now files herein its findings of fact and its conclusions of law and orders same to be entered of record, such findings of fact and conclusions of law being concurred in by a majority of the Court and dissented from in part by the Honorable Andrew M. J. Cochran.

(2) Except to the extent set forth or indicated in the findings of fact and conclusions of law this day filed herein by the Court as a compliance with Equity Rule 70½, the motion of complainant entered herein March 24, 1934, to adopt and enter the findings of fact and conclusions of law tendered with complainant's said motion of that date, is hereby overruled; to which the complainant excepts.

(3 In like manner, except to the extent set forth or indicated in the findings of fact and conclusions of law this day filed herein by the Court as a compliance with Equity Rule 70½, the motion of defendants entered herein —— —, 1934, to adopt and enter the findings of fact and conclusions of law tendered with defendants' said motion of that date, is hereby overruled: to which the defendants jointly and severally except.

II

Pursuant to its opinion filed herein December 20, 1933, and its findings of fact and conclusions of law filed herein on the 21st day of May, 1934, the Court now adjudges and decrees:

(1) That the complainant is without an adequate remedy at law, and therefore the motion of defendants to dismiss the complaint as amended, for want of jurisdiction in equity, is denied; to which ruling the defendants except.

(2) That complainant take nothing by its bill of complaint as amended herein; that on final hearing upon the [fol. 189] merits same is dismissed; and that defendants recover of complainant their costs herein expended; to all of which the complainant excepts.

(3) That complainant having this day stated in Court its intention to appeal from this decree insofar as it denies

the relief sought by it and dismisses its bill of complaint as amended, it is, for the reasons set forth in the Court's opinion filed herein December 20, 1933, hereby ordered and adjudged that the interlocutory injunction heretofore granted in this cause shall be continued in effect as to the complainant and as to each retail merchant listed of record (by order entered herein March 30, 1931, and supplemented, as to other intervening taxpayers, by later orders) as included in the same class of taxpayers as complainant, and such interlocutory injunction shall remain in full force as to the complainant and each of said taxpayers so listed, until the final determination of complainant's said appeal; to all of which the defendants except.

Provided, however, that the complainant, for itself only, and each of said taxpayers so listed desiring to avail himself or itself of the benefit of said restraining order pending such appeal, for himself or itself only (and not one for another), in addition to the bonds heretofore given by them respectively, with the approval of the District Judge for this District, shall within thirty (30) days from the entry of this decree execute such bond or make such deposit of money or securities as may be reasonably necessary to secure the Commonwealth of Kentucky against loss of any taxes, interest, court costs, or any other proper charges that may be or may become due from such taxpayer for the calendar year 1933 under the Act assailed herein by complainant, in the event the validity of such Act should be finally established.

The amount of any such additional bond so given, or the amount or value of securities or money deposited by any taxpayer, shall be fixed at an amount equal to the estimated [fol. 190] taxes claimed from such taxpayer for the calendar year 1933.

The parties to this action, through their respective counsel, may by agreement between them determine the amount of any such additional bond to be executed by any taxpayer, and the surety thereon, or the nature, kind and amount of money or securities to be deposited in lieu of bond, and if the parties, through their counsel, can not agree thereon, same shall be fixed by the District Judge of the District in which this cause is pending.

In the event the complainant or any one of said taxpayers shall fail to execute such bond or to give such security as

is required of it or him or them to cover taxes accrued for the calendar year 1933, within thirty (30) days from the entry of this order and decree, said restraining order, as to such taxpayer so failing, shall be thereupon immediately dissolved as to taxes accrued for the calendar year 1933, and shall afford no further protection of such taxpayer as to such taxes for the calendar year 1933, but the taxpayer shall be entitled to the benefit of the injunction as to prior years for which it has executed a bond or made deposit of money or securities under orders heretofore entered in this cause.

The bonds heretofore executed by the complainant or by any taxpayer herein for any of the taxable years prior to the calendar year 1933 shall be continued in full force and effect pending the final determination of this cause on appeal, and in like manner all deposits of securities heretofore made shall be continued in pledge for the purposes for which such deposits respectively were made.

Xen. Hicks, Circuit Judge. Chas. I. Dawson, District Judge.

June 19, 1934.

Have seen: Trabue, Doolan, Helm & Helm, of Counsel for Plaintiff. S. H. Brown, Asst. Atty. Gen. Ky.; H. W. Batson, for Defendants.

[fol. 191] IN UNITED STATES DISTRICT COURT

ORDER APPROVING BONDS—Entered July 17, 1934.

This 17th day of July, 1934, came the parties in the above styled cause, by counsel, and filed of record herein bonds executed by the plaintiffs and other taxpayers hereinafter listed in compliance with the order and decree of this Court entered herein June 19, 1934, conditioned as therein provided to secure the Commonwealth of Kentucky on account of its claim for taxes for the year 1933, together with interest, court costs and all other proper charges that may accrue thereunder.

J. C. Penney Company, in the amount of $13,000.00.
Kaufman-Straus Company, in the amount of $8,000.00.

Levy Bros. in the amount of $2,600.00.
H. P. Selman & Company, in the amount of $1,500.00.
Hook Drug Company, Inc., in the amount of $240.40.
Byck Bros. & Company, Inc., in the amount of $153.35.
J. Bacon & Sons, in the amount of $4,002.33.
Montgomery Ward & Co., Incorporated, in the amount of $2,000.00.
The Stewart Dry Goods Co., in the amount of $20,000.00.
Ben Snyder, Incorporated, in the amount of $5,960.00.
Lerman Brothers, in the amount of $3,600.00.

Chas. I. Dawson, Judge.

Have seen: S. H. Brown, Assistant Attorney General.

July 17, 1934.

[fol. 192]. In United States District Court

Petition for Appeal—Filed September 12, 1934

The plaintiff, J. C. Penney Company, conceiving itself aggrieved by the order and decree entered herein by this Court on the 19th day of June, 1934, in the above entitled cause, insofar as said order and decree denies the motion of this plaintiff, after notice and hearing, for an interlocutory injunction restraining the defendants as prayed for in the motion of the plaintiff for such interlocutory injunction, and insofar as said order and decree dismisses the Bill of Complaint as amended, and denies to the plaintiff a permanent injunction or any injunctive or other relief, hereby appeals to the Supreme Court of the United States from said order and decree.

The appeal herein prayed for is taken upon the grounds and for the reasons specified in the assignment of errors filed herewith.

Plaintiff prays that said appeal be allowed and that [fol. 193] a citation be issued thereon directed to the above named defendants, John B. Lewis, W. P. Sullivan and Emerson Beauchamp, individually and as Members of the State Tax Commission of the Commonwealth of Kentucky, and J. Dan Talbott, individually and as Auditor of Public Accounts of the Commonwealth of Kentucky, commanding them and each of them to appear before its Supreme Court

of the United States, to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record, proceedings and papers upon which said order and decree was entered be duly authenticated and sent to the Supreme Court of the United States.

—— ——, —— ——, Solicitors for Plaintiff.

[fol. 194] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed September 12, 1934.

The plaintiff, by counsel, respectfully represents that in the record and proceedings had in the above-entitled cause and in the rendition of the decree herein appealed from there is manifest error, for which said decree should be reversed, and as cause for such reversal the plaintiff makes the following assignments of error:

1. The Court erred in failing to hold that the challenged Act designedly denies to plaintiff and to other retail merchants similarly situated the equal protection of the laws, in that by reason of its classifications prescribed in Section 2 thereof, and its exemptions and credits or deductions provided in Section 4 thereof, and its consequent widely-varying rates of taxation, it unjustly and unreasonably discriminates against plaintiff and other retail merchants having [fol. 195] a large volume of annual gross retail sales and in favor of other retail merchants having gross annual retail sales in smaller volume, through its unreasonable and arbitrary exaction of taxes from plaintiff and other retail merchants in like situation, at excessive and grossly disproportionate rates arbitrarily levied in the higher brackets of said Act upon gross retail sales of larger volume, as compared with greatly reduced rates levied in its lower brackets upon other retail merchants having gross retail sales of smaller volume and therefore taxed at greatly reduced rates, or not taxed at all, by reason of credits or deductions allowed them—all in disregard of capital invested by the taxpayer, or of his ability to pay, or of his earnings, income or profits accruing from his business of retail merchant, and likewise in disregard of the fundamental factor of management.

2. The Court erred in failing to hold that the classification of retail merchants for purposes of taxation prescribed in Section 2 of the challenged Act does not rest upon a reasonable basis, and does not have any reasonable relation to the subject matter of the Act, and therefore effects an unjust and unreasonable discrimination against this plaintiff in the matter of taxation upon its gross annual retail sales as compared with the gross annual retail sales of other retail merchants having a smaller volume of such sales or greater exemptions, and thus denies to plaintiff the equal protection of the laws guaranteed to it by the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

3. The Court erred in holding that the enactment of the challenged Act might be sustained upon a mere academic [fol. 196] theory of economists in classifying property for taxation, when the facts shown in the record and the actual results in operation of the law demonstrate (a) that such theory is fallacious and (b) that there is no reasonable relationship between the assumed theory and the varying rates of taxation prescribed for the several classifications made under the challenged Act.

4. The Court erred in failing to hold that there was no reasonable relationship between the "step up" or increase in rates of taxation levied by the challenged Act, on the one hand, and the claim tendency of profits to increase with increased sales, regardless of capital investment, management, or other factors, on the other hand.

5. The Court erred in finding that there is a taxable relationship between sales volume and net earnings.

6. The Court erred in failing to hold that the classification of all retail merchants in one general class, including therein Chain Stores, Department Stores, Mail Order Houses and singly-operated units, of whatever character, with subclassifications thereof and varying rates of taxation thereon, based on volume of sales alone, was arbitrary, unreasonable, vindictive and capricious.

7. The Court erred in failing to hold that the increases in rates imposed and taxes levied by the challenged Act in its higher brackets for taxation were out of all propor-

tion to any actual or claimed increases in percentages of net profits to sales in such brackets respectively, and varied so greatly as to be arbitrary and unreasonable.

8. The Court erred in failing to hold, upon the evidence adduced, that the challenged Act, in its actual operation [fol. 197] and effect, exempts, wholly or substantially so, from the burdens of taxation levied by said Act, retail merchants who compete with plaintiff in the same or similar lines of business but who have a smaller volume of gross sales than plaintiff, while at the same time levying upon plaintiff, with its larger volume of gross sales, excessive and exorbitant rates of taxation, wholly out of arithmetical proportion or any reasonable proportion to the volume of sales of other retail merchants exempted wholly, or substantially so, from the burdens of said Act.

9. The Court erred in failing to hold that the challenged Act denies to the plaintiff the equal protection of the law in that it unjustly and unreasonably discriminates against the plaintiff by reason of the facts found by the Court (except the mere computation of plaintiff's taxes under the Act) as follows: that plaintiff, for the taxable years of 1930, 1931 and 1932 had gross sales in Kentucky with resulting taxes under the challenged Act as follows:

	Sales	Taxes	Deduction
1930	$1,854,174.23	$11,591.74	$1,499.54
1931	2,169,523.59	14,745.24	462.65
1932	1,924,550.86	12,295.51	512.15

whereas for said years respectively a vast number of other retail merchants, many of whom actually and actively compete with plaintiff, had gross sales in Kentucky with resulting taxes under the challenged Act as follows:

	Number of merchants	Sales	Net tax less deductions
1930	24,163	$362,848,264.00	$106,342.94
1931	20,382	310,467,073.00	85,136.99
1932	14,597	186,313,016.81	42,916.69

10. The Court erred in holding that the decision of Moore v. State Board of Charities and Corrections, re- [fol. 198] ported in 229 Ky. 729, was binding upon the Court as to the construction of the challenged Act and in

then refusing to adopt the construction attributed by that decision to the challenged Act.

11. The Court erred in failing to hold that the challenged Act, according to the construction approved by the Court, denies to the plaintiff and others similarly situated the equal protection of the law in that, as so construed, it exempts from its operation merchants selling farm products raised by them and therefore exempts The Kroger Grocery & Baking Company, together with other taxpayers, but applies to plaintiff and others doing a similar business.

Prayer for Reversal

Wherefore, for each and all of the reasons set forth in the foregoing assignment of errors, plaintiff prays that the decree herein appealed from be reversed with directions to the District Court to set aside said decree and in lieu thereof to render a decree in all respects in accordance with the prayer of plaintiff's Bill of Complaint.

Nichols, Morrill, Wood, Marx & Ginter; Trabue, Doolan, Helm & Helm, Solicitors for Plaintiff.

[fol. 199] IN UNITED STATES DISTRICT COURT

In Equity. No. 611

ORDER ALLOWING APPEAL—Entered September 12, 1934

This day came the parties, plaintiffs and defendants, by their counsel, and plaintiff filed herein its petition for appeal to the Supreme Court of the United States from the final decree herein rendered by this court on June 19, 1934, and filed also its assignment of errors in support of said petition.

Therefore, it is ordered by the court

1. That the appeal to the Supreme Court of the United States prayed for by the plaintiff, as set forth in its petition for appeal, be and it hereby is allowed as prayed for in said petition.

2. That a transcript of such parts of the record and proceedings herein as the parties may by praecipe duly desig-

nate, be transmitted, duly authenticated, to the Supreme Court of the United States in the manner provided by law.

3. That a citation be issued admonishing the defendants and each of them to be and appear in the Supreme Court [fol. 200] of the United States within thirty days from this date as provided by law.

4. That an appeal bond for costs and damages upon said appeal in the penal sum of $1,000 shall be given by the plaintiff, conditioned as provided by law, and in view of the fact that the plaintiff and all other taxpayers claiming the benefit of the temporary restraining order issued in this case have complied with the order and decree of this court entered June 19, 1934, by giving a bond or other approved security for the payment of estimated taxes that may become due from them respectively for the tax years 1930 to 1933, inclusive, it is now ordered that said appeal bond for costs and damages required herein shall act as a supersedeas bond as well as a bond for costs and damages on appeal.

5. The citation upon appeal shall be issued and the surety thereon herein required shall be approved by the District Judge presiding in the Western District of Kentucky.

Xen. Hicks, United States Circuit Judge. Chas I. Dawson, United States District Judge.

Sept. 12, 1934.

[fols. 201 & 202] Bond on Appeal for $1,000 approved and filed Sept. 12, 1934, omitted in printing.

[fols. 203 & 204] Citation in usual form showing service on Bailey P. Wooton and S. H. Brown issued Sept. 12, 1934, omitted in printing.

[fol. 205] IN UNITED STATES DISTRICT COURT

In Equity. No. 611

STIPULATION AS TO TRANSCRIPT OF RECORD—Filed September 20, 1934

It is hereby stipulated and agreed that the record on appeal in this case in the Supreme Court of the United States

shall consist of the following, omitting the style of the case, and also omitting certificates of oath or acknowledgment, and substituting therefor the words "duly verified:"

1. The record from this Court as printed for use of the Supreme Court on the former appeal of this case.
2. Mandate from Supreme Court with order filing same.
3. Order entered December 10, 1932.
4. Order amending interlocutory injunction.
5. Amended Bill.
6. Answer to Amended Bill.
7. Second Amended Answer.
8. Stipulation as to evidence on final hearing.
9. Order substituting Emerson Beauchamp as a party defendant.
10. Order of submission.

[fol. 206] 11. Stipulation as to statement of evidence.

12. Opinion of Judge Hicks and Judge Dawson.
13. Dissenting opinion of Judge Cochran.
14. Motion to find facts.
15. Findings of fact and conclusions of law.
16. Decree.
17. Order approving bonds.
18. Petition for appeal.
19. Assignment of errors.
20. Order allowing appeal.
21. Appeal bond.
22. Citation and endorsement of accepted service.
23. This Stipulation.

Nichols, Morrill, Wood, Marx & Ginter; Trabue, Doolan, Helm & Helm, Solicitors for Plaintiff.
B. P. Wooton, Attorney General; S. H. Brown, Asst. Atty. Gen., Solicitors for Defendants.

[fols. 207-209] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 210] SUPREME COURT OF THE UNITED STATES

Statement of Points to be Relied Upon and Designation as to Printing Record—Filed Oct. 9, 1934

STATEMENT OF POINTS

Comes now the appellant in the above entitled cause and states that the points upon which it intends to rely in this Court in this case are that the United States District Court for the Western District of Kentucky erred in the rendition of its final decree and in dismissing appellant's bill of complaint, in the following particulars:

Point 1. In failing to hold that the Challenged Act, Chapter 149 Session Acts of 1930, designedly discriminates against and denies to appellant and to other retail merchants similarly situated the equal protection of the laws, for the reason that the Challenged Act imposes upon the appellant and other retail merchants similarly situated a grossly excessive and disproportionate tax burden and at the same time wholly or partially exempts from the burdens of said Challenged Act the vast majority of other retail merchants competing with appellant and engaged in the same business, and for the further reasons specifically set forth in appellant's assignment of errors numbered 1, 2 and 9.

[fol. 211] Point 2. In failing to hold that the Challenged Act is, by reason of its classifications, exemptions, credits, disproportionate and widely varying rates of taxation, arbitrary, unreasonable, vindictive and capricious, as specifically set forth in assignment of errors numbered 3, 4, 5, 6, 7 and 8.

Point 3. In failing to hold that the Challenged Act denies to appellant and other retail merchants similarly situated the equal protection of the laws for the reason that said Act as construed by said Court exempts from its operation merchants selling farm products raised by them but applies to appellant and others similarly situated as specifically set forth in assignment of errors numbered 11.

The J. C. Penney Company, by Robert S. Marx, Frank E. Wood, John C. Doolan, Harry Kasfir, James W. Stites, Solicitors.

Service of a copy of the above list of points to be relied upon by appellant in the Supreme Court of the United States of America is hereby acknowledged and accepted on behalf of the several defendants and appellees.

John B. Lewis, W. P. Sullivan and Emerson Beauchamp, individually and as members of the State Tax Commission of the Commonwealth of Kentucky, and J. Dan Talbott, individually and as Auditor of Public Accounts of the Commonwealth of Kentucky, by S. H. Brown, Assistant Attorney General.

[fol. 212] SUPREME COURT OF THE UNITED STATES

DESIGNATION

Comes now the Appellant in the above-entitled case and states that in its opinion the whole record as filed is necessary for consideration of the case excepting the following, which may be omitted:

1. Opinion of District Court filed December 9, 1931. (Printed Record, page 79.)
2. Order approving bonds. (Printed Record, page 89.)
3. Stipulation re substitution of J. Dan Talbott. (Printed Record, page 90.)
4. Petition for appeal—on first appeal. (Printed Record, page 91.)
5. Assignment of errors—on first appeal. (Printed Record, page 92.)
6. Order allowing appeal—on first appeal. (Printed Record, page 100.)
7. Stipulation re Transcript of Record—on first appeal. (Printed Record, page 101.)

[fol. 213] 8. Statement of points to be relied on—on first appeal. (Printed Record, page 103.)

9. Statement of portion of record to be printed—on first appeal. (Printed Record, page 106.)

J. C. Penney Company, Appellant, by Robert S. Marx, Frank E. Wood, John C. Doolan, Harry Kasfir, James W. Stites, Solicitors.

Service of a copy of the above statement of portion of record to be printed by Clerk is hereby accepted and ac-

knowledged on behalf of the several defendants and appellees mentioned hereinabove.

John B. Lewis, W. P. Sullivan and Emerson Beauchamp, individually and as Members of the State Tax Commission of the Commonwealth of Kentucky, and J. Dan Talbott, individually and as Auditor of Public Accounts of the Commonwealth of Kentucky; Bailey P. Wootton, Attorney General, by S. H. Brown, Assistant Attorney General.

[fol. 214] [File endorsement omitted.]

[fol. 215] SUPREME COURT OF THE UNITED STATES

STATEMENT BY APPELLEES OF PORTION OF RECORD TO BE PRINTED BY CLERK—Filed Oct. 9, 1934

Come now the appellees, in the above entitled case, and state that, in their opinion, in addition to those parts of the record designated by the appellant, there should be printed for consideration of the Court:

1. Opinion of the District Court filed December 9, 1931. (Printed Record, page 77.)

[fol. 216] John B. Lewis, W. P. Sullivan and Emerson Beauchamp, Individually and as Members of the State Tax Commission of the Commonwealth of Kentucky, and J. Dan Talbott, Individually and as Auditor of Public Accounts of the Commonwealth of Kentucky; Bailey P. Wootton, Attorney General, by S. H. Brown, Assistant Attorney General.

Service of a copy of the above statement of portion of record to be printed by Clerk is hereby accepted and acknowledged on behalf of the appellant and appellees mentioned hereinabove.

J. C. Penney Company, Appellant, by Robert S. Marx, Frank E. Wood, John C. Doolan, Harry Kasfir, James W. Stites, Solicitors.

[fol. 217] [File endorsement omitted.]

Endorsed on cover: File No. 39.084. W. Kentucky, D. C. U. S. Term No. 456. J. C. Penney Company, Appellant, vs. John B. Lewis, W. P. Sullivan and Emerson Beauchamp, Individually and as Members of the State Tax Commission of the Commonwealth of Kentucky, et al. Filed October 9, 1934. File No. 456, O. T., 1934.

(5749-C)

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1924

No. 457

THE KROGER GROCERY & BAKING COMPANY, APPELLANT,

vs.

JOHN B. LEWIS, W. P. SULLIVAN AND EMERSON BEAUCHAMP, INDIVIDUALLY AND AS MEMBERS OF THE STATE TAX COMMISSION OF THE COMMONWEALTH OF KENTUCKY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY

FILED OCTOBER 4, 1924.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 457

THE KROGER GROCERY & BAKING COMPANY, APPELLANT,

vs.

JOHN B. LEWIS, W. P. SULLIVAN AND EMERSON BEAUCHAMP, INDIVIDUALLY AND AS MEMBERS OF THE STATE TAX COMMISSION OF THE COMMONWEALTH OF KENTUCKY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY

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IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

In Equity. No. 3908

THE KROGER GROCERY & BAKING COMPANY, a Corporation Duly Organized and Existing Under the Laws of the State of Ohio, Plaintiff,

vs.

JOHN B. LEWIS, SELDEN GLENN, and HENRY M. CLINE, as Members of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, Auditor of Public Accounts of the Commonwealth of Kentucky, Defendants

BILL OF COMPLAINT—Filed Dec. 27, 1930

To the Honorable Judge of the District Court of the United States for the Eastern District of Kentucky:

The Kroger Grocery & Baking Company, an Ohio corporation, and a citizen and resident of the State of Ohio, suing on behalf of itself and all other persons, firms, corporations and associations, similarly situated, brings this, its Bill of Complaint, against the defendants, John B. Lewis, Selden Glenn and Henry M. Cline as members of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, Auditor of Public Accounts of the Commonwealth of Kentucky, and each of them; all of said defendants being citizens and residents of the Commonwealth of Kentucky; said defendants, Henry M. Cline and Clell Coleman residing in the Eastern District thereof, and said defendants John B. Lewis and Selden R. Glenn residing in the Western District thereof.

1. The plaintiff was at all of the times hereinafter mentioned, ever since has been, and is, a corporation duly organized and existing under and by virtue of the laws of the State of Ohio, with its principal office and place of business in the City of Cincinnati, Hamilton County, Ohio, and is a citizen and resident of the State of Ohio. The plain-

[fol. 3] tiff has continuously complied with all of the laws of the Commonwealth of Kentucky relating to foreign corporations and is authorized to do and is doing business in said Commonwealth.

2. The defendants, John B. Lewis, Selden Glenn, and Henry M. Cline, are the duly and legally appointed, qualified, and acting members of the State Tax Commission of the Commonwealth of Kentucky, which is a commission created pursuant to an Act of the General Assembly of the Commonwealth of Kentucky, and which commission has been in existence, in pursuance of law, for many years continuously last past. Said individual defendants last named are the only members of said State Tax Commission. Under and by virtue of the terms of enrolled House Bill No. 111, enacted by the General Assembly of Kentucky at the session for the year 1930 (Chapter 149, Acts of 1930, Pages 475-482), the State Tax Commission is charged with the duty of preparing blank forms for, and ascertaining information from, certain retail merchants operating stores as defined in said Act, and of determining the tax due from said retail merchants, and of employing clerical and other assistance to carry out said Act, and generally to administer and enforce the provisions thereof.

Clell Coleman, one of the defendants herein, is the duly elected, qualified and acting Auditor of Public Accounts of Kentucky, and is charged under said Act with the duty of collecting and disbursing the taxes levied and assessed under the terms of and pursuant to said Act.

3. The amount in controversy in this cause exceeds the sum or value of Three Thousand Dollars, exclusive of interest and costs.

4. This is a suit of a civil nature in equity, and is brought for the purpose of enjoining the defendants from enforcing or attempting to enforce, an Act of General Assembly of Kentucky, bearing the title:

"An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an

[fol. 4] emergency to exist, and repealing all laws in conflict with the provisions of this Act."

Said Act is known as House Bill No. 111, and was read, passed, enrolled and signed under the title:

"H. B. 111. An act to restrain the unfair competition of chain stores and in aid of individual merchants of the Commonwealth."

5. The plaintiff, for more than twenty-five years continuously last past, has been engaged in the Commonwealth of Kentucky, and in other states of the United States, in the business of selling at retail, groceries, fruits, vegetables, poultry, meats, milk, butter, cheese, eggs and other food, meats and dairy products and goods commonly sold in grocery and meat stores.

In the course of such business, the plaintiff is engaged in interstate commerce in that a substantial portion of the above mentioned foodstuffs and merchandise is bought or purchased by the plaintiff in other states of the United States and is shipped to plaintiff into the Commonwealth of Kentucky, and is sold by plaintiff at retail, and in many cases in the original containers and packages. The plaintiff in the course of such business raises and produces on farms operated by the plaintiff in the State of Ohio a portion of the garden and farm products sold in said stores in Kentucky, including beef, veal, pork, lamb, mutton, poultry, eggs, potatoes and various dairy, meat and garden products, which are processed in plants owned and operated by the plaintiff in the State of Ohio and are then shipped and transported into the Commonwealth of Kentucky, where said garden and farm products are sold at retail by the plaintiff in its stores in the Commonwealth of Kentucky, and plaintiff is actually engaged in gardening and farming in the State of Ohio, and in selling garden and farm products in the Commonwealth of Kentucky.

The plaintiff, long prior to and at the time of the enactment of said statute, was the owner of a large number of retail grocery stores in the Commonwealth of Kentucky, and is now the owner of Two Hundred and Sixty-Three retail grocery stores in said Commonwealth, all of which are operated and maintained in separate locations in va-
[fol. 5] rious, numerous, different, and frequently widely

separated parts of said state. Each of said stores is in charge of a local store manager. All of said stores are subject to different competitive conditions depending upon the type of store, the character of competition, the locality, and numerous other factors which make each store a separate retail store, but all of said stores are owned, operated and controlled by plaintiff.

For many years last past the plaintiff has invested its capital in its said business in the Commonwealth of Kentucky, in warehouses, stores, leaseholds, fixtures, merchandise and other property, having a total value in excess of One Million Five Hundred Thousand Dollars, and plaintiff has been for many years last past, and is, a taxpayer in the Commonwealth of Kentucky, paying large sums for license, occupational, personal and real property taxes, and has paid for preceding years all taxes levied by the State, Counties and Municipalities in which its stores are situated, the same as other store owners and taxpayers similarly situated.

During the calendar year of 1929, the total gross retail sales of the plaintiff in all of said stores in the Commonwealth of Kentucky were $13,807,820.00, and for the calendar year of 1930 it is estimated that said sales have been approximately $12,000,000.00, the exact amount not being possible of immediate ascertainment at this time. The annual sales of each store for the calendar year 1929 averaged $51,468.00 per store. The average sales of each store for the year 1930 approximate $50,000.00 for each store. The gross sales by plaintiff during the period from March 17, 1930, to date have been in excess of $10,000,000.00

There is in each of the localities where the stores of plaintiff are situated, a large number of individuals, copartnerships and corporations engaged in business in said localities in Kentucky, which own and operate one store carrying on a business similar to that carried on by plaintiff, under similar circumstances, and doing a very much larger volume of business, and having larger gross retail sales than the store owned by the plaintiff which directly competes therewith. The plaintiff in its stores carries on business in every way exactly as business is carried on in stores which are separately owned by one individual, copartnership or corporation. The plaintiff deals in the same [fol. 6] character of articles and merchandise, and sells to

the same public, and plaintiff's business is distinguishable from that of a person, co-partnership or corporation operating only one store, in no way whatsoever, except that in plaintiff's case, the plaintiff owns more than one store, while in the case of such others, the owner owns and operates but one store.

The ownership of more than one store in separate and distinct locations does not increase the fire hazard, injure the health and morals of the community, or require increased or additional public protection.

6. There is a large number of persons, firms, corporations, associations, and co-partnerships, foreign and domestic, lawfully engaged in the operation of more than one store or more than one separate or distinct department under the same management, for the sale of goods, wares and merchandise at retail in the Commonwealth of Kentucky, who are in a like situation with plaintiff. The owners of said stores are too numerous to join in this action, and plaintiff prosecutes this case on its own behalf and on behalf of all other individuals, firms, associations, co-partnerships and corporations who are at the time engaged in the operation of two or more stores and two or more separate distinct departments under one management, for the purpose of enjoining the defendants from enforcing, or attempting to enforce, said Act of the General Assembly of Kentucky aforesaid, against plaintiff and such other individuals, firms, associations, co-partnerships and corporations, owning or operating two or more stores and two or more separate distinct departments, under one management, and others similarly situated with the plaintiff, in the Commonwealth of Kentucky.

The question of the invalidity of said statute is one of common and general interest to all of said class of persons within the meaning of Equity Rule No. 38.

7. The General Assembly of Kentucky at its 1930 session, enacted House Bill No. 111 (Chapter 149, Acts of 1930, pages 475-482), which was approved by the Governor and purported to become effective March 17, 1930. Said Act was and is in words and figures as follows, to-wit:

"An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words [fol. 7] 'retail merchants' are used in this act; providing

for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this act. Be it Enacted by the General Assembly of the Commonwealth of Kentucky:

Section One. The words 'retail merchant,' as used in this act, shall mean and include every person, firm, association, co-partnership or corporation opening, establishing, operating or maintaining any 'store' as defined herein, for the purpose of and selling goods, wares or merchandise at retail in this State; except those actually engaged in gardening or farming and selling garden or farm products raised by them in this State. The term 'store' as used in this act, shall be construed to mean and include any store or stores or any mercantile establishment or establishments in this State which are owned, operated, maintained or controlled by the same 'retail merchant,' as defined herein, either domestic or foreign, in which goods, wares or merchandise of any kind, are sold at retail. The provisions of this act shall be construed to apply to every 'retail merchant' and 'store' as defined herein, which is controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management.

Section Two. Every retail merchant, as defined herein, shall pay an annual license tax for the opening, establishing, operating or maintaining of any store or stores, as defined herein, determined by computing the tax on the amount of gross sales as follows: One-twentieth of one per cent of the gross sales of Four Hundred Thousand (Four hundred thousand Dollars) Dollars or less; two-twentieths of one per cent on the excess of the gross sales over Four hundred thousand (Four hundred thousand dollars) Dollars and not exceeding Five hundred thousand (Five hundred thousand dollars) Dollars; five-twentieths of one per cent on the excess of the gross sales over Five hundred thousand (Five hundred thousand dollars) Dollars, and not exceeding Six hundred thousand (Six hundred thousand dollars) Dollars; eight twentieths of one [fol. 8] per cent on the excess of the gross sales over Six hundred thousand (Six hundred thousand dollars) Dollars, and not exceeding Seven hundred thousand (Seven hun-

dhed thousand dollars) Dollars; eleven-twentieths of one per cent on the excess of the gross sales over Seven hundred thousand (Seven hundred thousand dollars) Dollars and not exceeding Eight hundred thousand (Eight hundred thousand dollars) Dollars; fourteen-twentieths of one per cent on the excess of the gross sales over Eight hundred thousand (Eight hundred thousand dollars) Dollars and not exceeding Nine hundred thousand (Nine hundred thousand dollars) Dollars; seventeen-twentieths of one per cent on the excess of the gross sales over Nine hundred thousand (Nine hundred thousand dollars) Dollars, and not exceeding One million (One million dollars) Dollars; one per cent on the excess of the gross sales over one million (One million dollars) Dollars.

Section Three. Every retail merchant, as defined herein, in order to ascertain the amount of taxes due and payable under the next preceding section, shall file with the State Tax Commission on or before the first day of February each year a written report verified by the affidavit of the owner or chief officer on such forms as it may prescribe, giving the number and location of its store or stores, as defined herein, the name and post office address of its owner or principal officer, the name and address of its officer or agent in charge of its business at each separate store, the nature and kind of business, the total gross sales during the preceding year ending the thirty-first day of December, and such other facts bearing on the proper taxation as the Tax Commission may require. The State Tax Commission may, in any case, require such additional information as it may deem necessary to enable it to perform its duties herein. It shall be the duty of the State Tax Commission, from such reports, and from such additional information as it may obtain, to ascertain the amount of taxes due, and to certify to every such retail merchant the amount of taxes due for the preceding year, based upon such reports and information as it may ascertain. Upon final action by the State Tax Commission, it shall certify to the Auditor of Public Accounts and to the retail merchant, the amount of such tax due by each retail merchant, as defined, herein, and [fol. 9] it shall be the duty of each retail merchant to pay the amount of such tax to the Auditor of Public Accounts not later than thirty days thereafter. In reporting the gross sales for the year, One thousand nine hundred and

thirty, retail merchants shall include only those sales made between the date that this act becomes effective and December Thirty-one, One thousand nine hundred and thirty, and the license tax due for the year One thousand nine hundred and thirty shall be based on the amount of those sales only.

Section Four. The license or excise tax levied herein, shall not be in lieu of any special state license, excise, occupational or corporation license tax due under the provisions of any law now in force, or that may hereafter be enacted. Should any retail merchant, as defined herein, be liable for and pay any special state license, excise, occupational or corporation license tax under the laws now in force or that may hereafter be enacted, credit may be taken on the tax levied in this act for the amount of such special license, excise, occupational or corporation license tax so paid not to exceed the amount of the license or excise tax levied herein.

Section Five. If any retail merchant, as defined herein, neglects or refuses to file the verified report or pay the tax due at the time herein provided, the amount thereof with an addition of a penalty of twenty per centum thereof, with interest at the rate of six per centum per annum from the date when due until paid, shall be collected on an account settled by the State Tax Commission as other taxes are settled and collected:; and if collected by proceedings in any court, an additional penalty of twenty per centum shall be collected, as is authorized to be collected in revenue agent's proceedings under Section Four thousand two hundred and sixty-three-four of the Kentucky Statutes. The said twenty per centum penalty thereon and interest due shall be paid into the State Treasury as part of the tax, and the twenty per centum penalty collected in revenue agent's proceedings shall be distributed as provided in Section Four thousand two hundred and sixty-three-four of the Kentucky Statutes.

Section Six. The State Tax Commission, or any assistant or representative thereof, appointed in writing by it, is [fol. 10] hereby authorized to examine the books, records, papers, files and equipment of any retail merchant, as defined herein, made taxable by this act, and to that end, shall have the power to examine witnesses under oath to verify

the accuracy of any return made under the provisions of this act, or to ascertain whether or not any tax is due under the provisions of this act by any retail merchant; and in the collection of said tax, the State Tax Commission shall have the power to institute legal proceedings for the purpose of ascertaining the amount of tax due and the collection thereof with the penalties thereon, and the State Tax Commission shall be vested with all the powers under the law of the State for the collection of taxes. The State Tax Commission may, at or after the commencement of any action for the purpose of collecting the amount of tax due and penalties and interest due thereon, as set out herein, have an attachment against the property of the defendant, including garnishees, without the execution of a bond upon the filing of an affidavit showing the nature of the claim, that it is just, the sum which the State Tax Commission believes the plaintiff ought to recover and that the collection of the demand will be endangered by delay in obtaining judgment or a return of no property found. Any information gained by the State Tax Commission, or any assistant, agent or representative thereof, as a result of the reports, investigations or verifications herein required to be made, shall be confidential, and any person divulging such information shall be guilty of misdemeanor and upon conviction shall be fined not exceeding Five hundred (Five hundred dollars) Dollars; provided, that this prohibition shall not extend to information required in prosecutions for making false reports or returns or in the preparation and prosecution of legal proceedings for the collection of any tax due under the provisions of this act, or any prosecutions for any other infraction of the tax laws of the State.

Section Seven. Any retail merchant, as defined herein, or any officer, director, trustee or agent, who shall fail, neglect, or refuse to make the reports and pay the tax herein prescribed, or shall refuse to permit the State Tax Commission, its assistants, agents or representatives appointed by it in writing to examine the books, records, papers, files [fol. 11] and equipment of such retail merchant, as defined herein, or who does, or attempts to do, anything whatever to avoid a full disclosure of the amount of business done, or to avoid the payment of the whole or any part of the tax or penalties due, shall be guilty of misdemeanor, and upon

conviction shall be fined not exceeding One thousand (One thousand dollars) Dollars, and in case the offender is an individual he may be imprisoned in the county jail not exceeding six months, or both so fined and imprisoned, Such penalty shall be in addition to the penalty imposed in Section Five of this Act.

Section Eight. It shall be the duty of the State Tax Commission to administer and enforce the provisions of this act, and it is hereby authorized and empowered to prescribe all blanks, forms and reports necessary to carry out the provisions of this act, and all costs and expenses incurred by the State Tax Commission in the administration of this act shall be paid out of the funds collected hereunder.

Section Nine. All taxes collected under the provisions of this act shall be paid to the Auditor of Public Accounts, and of such amounts so received by the Auditor in any fiscal year, one-half part shall be set aside and credited to the Board of Charities and Corrections for the specific purpose of repairing, maintaining and constructing permanent improvements for the use of the institutions under the control of said board. The remainder of the amounts so collected and received by the Auditor in any fiscal year shall be credited to a fund to be used for the specific purpose of liquidating any indebtedness of the Commonwealth.

Section Ten. No suit shall be maintained in any court to restrain or delay the collection or payment of the tax herein imposed upon any ground whatever, but the aggrieved taxpayer shall pay the tax as and when due, and if paid under protest may at any time within two years from the date of such payment sue the Auditor of Public Accounts in an action at law to recover the tax so paid, with legal interest thereon, from the date of payment. If it is finally determined that said tax or any part thereof, was wrongfully [fol. 12] collected for any reason, it shall be the duty of the Auditor of Public Accounts then in office to issue his warrant on the Treasurer of the Commonwealth of Kentucky for the amount of such tax so adjudged to have been wrongfully collected together with interest thereon, and the Treasurer shall pay same out of the General Fund of the State. A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made,

and which are not barred by the limitation of two years herein imposed.

Section Eleven. The provisions of this act are severable and if any of its provisions or any penalty provided by this act shall be held unconstitutional, such provisions or the particular penalty held to be invalid may be rejected without affecting the remainder of the act or such part of the penalties as are not held to be invalid and the decisions of the courts shall not affect or impair the remaining provisions of this act or any of the other penalties anywhere in this act provided. It is hereby declared as a legislative intent that this act would have been adopted had such unconstitutional provisions or such invalid penalties not been included therein.

Section Twelve. All laws and parts of laws in conflict herewith are hereby repealed to the extent of such conflict.

Section Thirteen. Whereas, The present state revenue does not meet the immediate needs for the maintenance and development of the State Government and its agencies, an emergency is declared to exist, and this act shall become a law and be effective upon its passage and approval by the Governor."

8. Said Act was deliberately designed and intended to, and in practical operation and effect said Act does, destroy, oppress, prohibit, restrain and arbitrarily discriminate against the lawful business of the owners of two or more retail stores, and the owners of two or more separate departments under one management.

Said design and intent was set forth in the title of said Bill as introduced and read in the House of Representatives of the General Assembly of Kentucky, to-wit:

[fol. 13] "H. B. No. 111, An Act to restrain the unfair competition of chain stores and in aid of individual merchants of the Commonwealth."

Said bill, as enacted, was read only by the aforesaid title at the time of its second and third reading and passage in said House of Representatives, and said bill was reported by the Committee of Enrollment only by said title, and was thereupon signed by the Speaker of the House and the President of the Senate of the General Assembly of Kentucky.

9. Under and by virtue of the terms of said Act hereinbefore set out, if the same should be held valid, the plaintiff in order to conduct its lawful business, and to open, establish, operate or maintain any store or stores in the State of Kentucky, would be required to file a written report with the State Tax Commission on or before February 1, 1931, and each year thereafter, of the total gross sales of all its stores for the preceding year ending December 31, and would be required to pay, approximately thirty days thereafter, a license tax on the total gross sales of all its stores without reference to the sales per store, as follows, to-wit:

1/20th of 1% on the first $400,000.00 of sales.....	$200.00 Tax
2/20th of 1% on the next $100,000.00 of sales.....	100.00 Tax
5/20th of 1% on the next $100,000.00 of sales.....	250.00 Tax
8/20th of 1% on the next $100,000.00 of sales.....	400.00 Tax
11/20th of 1% on the next $100,000.00 of sales.....	550.00 Tax
14/20th of 1% on the next $100,000.00 of sales.....	700.00 Tax
17/20th of 1% on the next $100,000.00 of sales.....	850.00 Tax
1% on the excess over $1,000,000.00 of sales.....	$110,000.00 Tax
Total Tax on $12,000,000.00 of sales.....	$113,050.00 Tax

Pursuant to the terms of said statute, plaintiff would be required to pay an annual tax on the gross retail sales of all of its stores combined of nearly One (1%) Percent of every sale, which tax on gross sales of $12,000,000.00 would equal $113,050.00.

By Section 5, of said Act, any retail merchant who fails to file the report and pay the tax as required herein, is subject to a penalty of 20% plus 6% interest, with an additional penalty of 20% if collected by proceedings in any court. By Section 7, any retail merchant or any officer, director, trustee or agent, who fails to make the report and [fol. 14] pay the tax prescribed in said Act, in whole or in part, is deemed guilty of a misdemeanor and is subject to a fine of $1,000.00 and to imprisonment in the County Jail, not exceeding six months, or to both fine and imprisonment, in addition to the penalties imposed in Section 5.

Said Act was declared an emergency measure and became effective March 17, 1930. Section 8 thereof, empowers the defendants, members of the State Tax Commission, to incur expenses and costs for the enforcement and administration of said Act, to be paid out of the funds collected thereunder.

Plaintiff is informed and believes and alleges upon such information and belief, that the defendants are preparing

for the administration and enforcement of said Act, and have already expended monies out of the State Treasury for the purpose of preparing blank forms and reports necessary to carry out the provisions of said Act, and unless enjoined and restrained by this Court, all of the defendants hereto will administer said law and expend funds raised by taxation in an amount in excess of Five Thousand ($5,000.00) Dollars for the enforcement thereof, and will require the plaintiff and all other retail store owners not exempt under the exemptions hereinafter set forth, to pay the taxes prescribed by said Act, and upon the failure of said store owners, including the plaintiff, to make said payments, the said defendants will attempt to enforce against them, including this plaintiff, the drastic penalties provided for by Sections 5, and 7, of said Act, and will attempt to enforce against them, including the plaintiff, any other penalties or causes of action provided for by the statute of General Laws of the Commonwealth of Kentucky, all to the irreparable injury and damage of plaintiff and other store owners similarly situated.

10. Said Act, hereinbefore set out (Chapter 149, Acts of 1930, Pages 475-482), is unconstitutional, invalid and void for the following reasons and each of them:

First. Said Act violates the provisions of the Fourteenth Amendment of the Constitution of the United States, in that it deprives the plaintiff, and all other taxpayers similarly situated, of its and their property without due process of law, and denies to the plaintiff, and all others similarly [fol. 15] situated, the equal protection of the laws in the following particulars:

(a) Said Act is, in effect, a tax measure and has nothing to do with the exercise of the police power of the state. It has no relation to the public health, and public welfare, the public morals, or the public safety. It is not an attempt to regulate the business of any corporation or individual whose business is affected with a public interest. It is not an inspection measure in which fees are prescribed for the purpose of covering the cost of making inspection. No provision is contained in said Act for regulation, supervision or inspection. No standards are prescribed for the conduct of the business subject to said tax. As a tax measure, its operation and effect is not equal or uniform,

and the classification made by the terms of the Act is deliberately and designedly oppressive, prohibitory, unreasonable, arbitrary, discriminatory, and in the higher brackets is confiscatory as to the plaintiff and other taxpayers similarly situated.

(b) Although said act purports to apply to every retail merchant operating any store as defined in said Act, except those actually engaged in gardening or farming and selling garden or farm products raised by them in Kentucky, the true design, intent, practical operation and actual effect of said Act is to exempt from the payment of said tax practically all of the owners of individual and single unit stores and to impose substantially the entire burden of said tax upon a small part of the taxpayers, viz: taxpayers owning two or more separate stores and/or two or more separate and distinct departments operated under the same management or ownership and having gross retail sales over four hundred thousand dollars. Section 4 of said Act provides that the license or excise tax levied therein shall not be in lieu of any special state license, excise, occupational or corporation tax due under the provisions of any law now in force, or that may hereafter be enacted. Said Section of said Act, however, provides that any retail merchant, as defined herein, who is liable for and pays any special state license, excise, occupational or corporation license tax, under the laws now in force or hereafter enacted, may take credit on the tax levied under said Act for the amount of [fol. 16] such special license, excise, occupational or corporation license tax so paid not to exceed the amount of the license or excise tax levied under said Act. Said credit allowed by the terms of said Act was known at the time of the enactment of said Act to be, and is, sufficient in practically all cases entirely to offset the relatively small tax levied under said Act on sales of retail merchants, as defined herein, which do not exceed four hundred thousand dollars. The tax levied under said Act is only fifty (50¢) Cents per thousand dollars of sales on the first four hundred thousand dollars of gross sales. There are comparatively few, if any, retail merchants in the State of Kentucky whose gross retail sales in an individual or single store, or department, exceeds four hundred thousand dollars per annum. The gross retail sales of practically all of said individual or single stores or departments are

under one hundred thousand dollars per annum. The result of the credit which said stores are permitted to take for the amount of such special license, excise, occupational and corporation license taxes paid by them is that substantially all of the retail merchants owning individual or single unit stores or departments will be, and are, and were so intended to be exempt from the payment of any tax under the terms of said Act, and thus, as to them, such special license, excise, occupational and corporation license taxes as are paid by them are levied upon and collected from them in lieu of any license tax provided for by said House Bill 111, enacted as Chapter 149, Session Acts of 1930. In practical effect and operation only retail merchants who own or manage more than one separate store or more than one separate department, and which have gross retail sales in all said stores and departments aggregating in excess of four hundred thousand dollars, will be, and are, subject to taxation under said Act; and such retail merchants are a very small and limited class in the Commonwealth of Kentucky. There is no basis for said exemption and classification created by said Act and said exemption is unjust, unreasonable, discriminatory and arbitrary.

The plaintiff paid, during the year 1929, in the Commonwealth of Kentucky for special state license, excise, occupational and corporation license taxes, under the provi- [fol. 17] sions of laws now in force, the sum of $16,488.50 and has paid approximately the same amount during the year 1930, being an average of $62.32 for each of its 263 stores. All other grocery stores in competition with the plaintiff in the Commonwealth of Kentucky pay in said special taxes approximately the same sum per store as paid by the plaintiff. The amount of special taxes so paid is permitted by this Act to be deducted from the amount of taxes assessed under this Act, so that in practical effect and operation a retail merchant having sales of $300,000.00 or less will not be required to pay any taxes under this Act.

(c) Section 1, of said Act provides that it shall be construed to apply to "every retail merchant" and "store" as defined therein, which is controlled or held with others by majority of stock ownership or ultimately controlled or directed by one management or association of ultimate management. The design, intent, practical operation and

effect of said provision is to require and compel the owner or management of two or more separate and distinct stores and/or departments as defined in said Act, to aggregate for the purposes of taxation the gross sales of all stores and/or departments controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management without regard to the fact that said stores and/or departments may be separate and distinct enterprises; without regard to their location and without regard to the fact that said stores, and/or departments, are each engaged in the sale at retail of wholly different merchandise and commodities unrelated to the merchandise and commodities sold in other stores, and/or departments. The design, intent and practical operation of said Act is thereby to tax, penalize and because of the increased rate of taxation in the higher brackets, to prohibit the employment of capital in the acquisition of stock in corporations owning stores, as defined by said Act, which may result in majority stock ownership, and to tax, penalize and in effect prohibit the employment of capital, skill, efficiency and economy in the operation of such stores under one management or cooperatively under an association of management. Said Act, by reason of its application to all retail merchants and stores which are now controlled or held with others by majority [fol. 18] stock ownership, and which are now controlled or directed by one management or association of ultimate management, is a deprivation of the property rights of the plaintiff and is prohibitive, oppressive, confiscatory, unreasonable and arbitrary and denies to the plaintiff and other taxpayers similarly situated, the equal protection of the laws and deprives it, and others similarly situated of its and their property without due process of law.

(d) The classification made as a basis for the tax imposed rests wholly upon gross retail sales and the percentage of said tax is increased with each one hundred thousand dollars of sales above $400,000.00, unequally, disproportionately, arbitrarily, and with the sole design and intent to burden, oppress, prohibit and discriminate against the ownership or ultimate management of two or more stores or separate and distinct departments, and unreasonably, unequally and disproportionately to discriminate against, oppress, burden and penalize the employment of capital

skill, efficiency and the ability of retail merchants in the State of Kentucky to increase their sales above four hundred thousand dollars. The rate of tax is one-twentieth of one per cent on the first four hundred thousand dollars of gross sales. The rate of tax is doubled for the next one hundred thousand dollars of sales. The rate of tax is five times as great for the next one hundred thousand dollars of sales; eight times as great for the next one hundred thousand dollars; eleven times as great for the next one hundred thousand dollars; fourteen times as great for the next one hundred thousand dollars; seventeen times as great for the next one hundred thousand dollars; and twenty times as great for all sales in excess of one million dollars. The practical operation and effect of said unequal and disproportionate increase in the percentage of tax per one hundred thousand dollars of increasd sales is that a retail merchant who increases his sales one hundred thousand dollars above four hundred thousand dollars pays as much tax on said one hundred thousand dollars as a retail merchant whose sales are two hundred thousand dollars. For the next one hundred thousand dollar increase, said merchant is [fol. 19] required to pay an additional Two Hundred and Fifty Dollars; for the next one hundred thousand dollar increase, an additional four hundred dollars, or a greater tax on said one hundred thousand dollars of increased sales than the entire tax of a retail merchant whose total sales are five hundred thousand dollars; for the next one hundred thousand dollars of sales, five hundred and fifty dollars, which tax on said one hundred thousand dollars of sales is as great as the total tax of a retail merchant having total sales of six hundred thousand dollars; for the next one hundred thousand dollars of sales the tax is seven hundred dollars; for the next one hundred thousand dollars of sales the tax is eight hundred and fifty dollars; for the next one hundred thousand dollars of sales and for every one hundred thousand dollars of sales thereafter, a tax is assessed of One Thousand Dollars, which is a greater tax per one hundred thousand dollars of sales than the total tax required of a merchant whose total sales are seven hundred thousand dollars. Under said Act, a retail merchant having gross sales in any amount not exceeding three hundred thousand dollars, who increases said sales by one hundred thousand

dollars, is only liable to a maximum increase in taxation of $50.00, less his permitted credits, whereas, the plaintiff is subject to a tax of $1,000.00 on every one hundred thousand dollar increase in its sales. Said classification is unreasonable, unequal, discriminatory, oppressive, arbitrary and confiscatory as to this plaintiff and other tax payers similarly situated.

(e) The grocery stores owned by the plaintiff are in direct, open and free competition, in each and every locality where said stores are located, with a number of other grocery stores selling similar merchandise to the same public under similar circumstances, except that the owners of said stores are not generally the owners of other retail stores. Said singly or individually owned grocery stores in many of the localities in which the stores of the plaintiff are located, although singly or individually owned, are members of large co-operative organizations or associations for the purpose of co-operative buying, advertising and efficient merchandising. Said competitive stores, by reason of membership in said co-operative associations or organizations, although singly or individually owned, enjoy any and all the advantages which may flow from group [fol. 20] or co-operative buying on a large scale, the pooling of purchasing power, the ability to contract for newspaper display, store and other advertising co-operatively and upon a large scale, and for the scientific and efficient arrangement of stores, window displays and the development of merchandising methods through the employment, co-operatively, of experts and others experienced therein. Said co-operative associations combine co-operatively as great or a greater number of stores and have as great or greater purchasing and buying power and have as great or greater advertising and merchandising ability as the plaintiff and other retail merchants who own two or more stores in the Commonwealth of Kentucky. However, said singly or individually owned stores and members of co-operative associations, as aforesaid, although similarly circumstanced and in direct competition with the plaintiff and other retail merchants owning two or more stores, are not required to aggregate or combine for the purpose of taxation or to report for taxation the total sales of all stores in Kentucky joined together in the same co-operative association or organization, and hence, said competitive stores, members of

said associations or organizations, are not subject to taxation on the same basis, classification or rate as the plaintiff, but in practical operation and effect are practically exempt from any taxation under said Act, whereas, the plaintiff is subject to taxation at the highest rate prescribed in the said Act. By reason thereof, said competitive stores are given undue and unfair economic advantages over the stores of the plaintiff and are in effect aided, helped and subsidized by said Act in their competition with the plaintiff at the expense of the plaintiff.

The average gross sales of the grocery stores owned by the plaintiff in the Commonwealth of Kentucky during the year last past, were approximately fifty thousand dollars per store, as heretofore set forth. The average sales of the grocery stores with which the stores of the plaintiff are in direct, free and open competition, under similar circumstances, will not exceed, except in a relatively few cases, said average sales of the stores owned by the plaintiff in Kentucky. Said individually or singly owned stores, having gross retail sales averaging fifty thousand dollars per store, are only subject under the terms of said Act to a [fol. 21] maximum tax of one-twentieth of one per cent, i. e., Twenty-five Dollars, which amount will be, in practically all cases, entirely offset by the credit of other taxes permitted under Section 4 of said Act, as heretofore set forth. While said stores with which the plaintiff is in competition as aforesaid will not be subject to any tax under the provisions of said Act, or at most, to a tax of Twenty-five Dollars per store, the plaintiff will be required to aggregate for the purposes of taxation the gross retail sales of all its said stores, amounting during the year last past to something in excess of twelve million dollars and will thereby be required to pay a tax of something in excess of Four Hundred and twenty-nine dollars per store. The result of the operation and effect of said tax practically exempts from taxation the competitors of the plaintiff and requires the plaintiff to pay an excessive prohibitory, oppressive and confiscatory tax in addition to all other taxes on its said stores, and therefore denies to the plaintiff the equal protection of the laws, takes its property without due process of law and its effect upon the plaintiff and other tax payers similarly situated is unjust, unequal, discriminatory and arbitrary.

(f) The classification and graduation made as a basis for the tax imposed rests wholly upon the amount of gross retail sales of all stores controlled or held with others by majority stock ownership, or controlled or directed by one management or association of ultimate management. Said classification does not rest in any particular upon the ability of the taxpayer to pay said tax. It does not rest in any particular upon the income or earnings from any store or stores. It has no necessary relation to receipts. It is imposed regardless of whether said sales are made at a profit or loss, or the amount of profit or loss therefrom. It has no relation to profits or losses, if any accrue from said sales, It has no relation whatsoever to the capital employed or invested. It does not take into account the type of business. Said Act does not make any provision for the merchandise returned, for the cancellation of sales or resales of merchandise or the net amount of sales, or sales on credits for which payment is not received, but classifies sales solely as to the gross amount thereof by dollars, and strikes at the increase in said gross sales by a geometrical increase in the [fol. 22] rate of taxation, as heretofore set forth, per one hundred thousand dollars of increased sales up to one million dollars, after which the increase of gross sales above one million dollars, and the tax thereon is levied and collected at the highest bracket of one per cent.

Although said Act purports to classify and tax sales by dollars, it taxes the dollar of sales of certain retail merchants upon a materially and substantially different rate and basis than the dollar of sales of retail merchants engaged in direct competition and similarly circumstanced, and imposes upon a merchant having gross sales of eight hundred thousand dollars, a tax of Fifteen Hundred Dollars, or seven and one-half times the tax imposed upon his competitor who does exactly one-half the volume, to-wit, four hundred thousand dollars, who is only subject to a tax of two hundred dollars.

Thereby, one retail merchant doing exactly twice the business of his competitor is required to pay seven and one-half times as much tax on his dollar of sales as his competitor, who, in the same class and similarly circumstanced, is required to pay on his dollar of sales. Said classification is unreasonable, without a rational basis, and is arbitrary, unequal, burdensome and oppressive.

— The Act in question, although directly imposing a tax, makes it unlawful for a person, engaged in lawful business, viz., the operation of a store, to continue to engage in such business and to operate or maintain any store or stores, or to open or establish such business without paying the so-called license or excise taxes levied therein, although said Act is not based on an exercise of the police power and said Act imposes heavy penalties upon the person or corporation failing to make the reports and to pay the tax prescribed therein, and obedience is thus coerced to an invalid law by excessive and drastic penalties.

(h) The General Assembly of Kentucky has no right under the guise of an excise or licensing measure to require the owner of a store or stores engaged in a lawful business to pay a tax as a condition precedent to the continuance of that business where the so-called licensing feature has no relation to the public health, the public welfare, the public morals, or the public safety.

(i) The efficient and successful method of conducting retail business in the Commonwealth of Kentucky and elsewhere in the United States, at the present time, [fol. 23] is to sell merchandise at the lowest possible price, consistent with a small percentage of profit on each individual sale, endeavoring thereby to increase the volume of sales and to secure a more rapid turnover of merchandise and capital. The retail merchant is required by reason of a small percentage of profit on a single sale to have a large volume of sales and continuously to increase his sales volume in order to secure a fair return on the capital employed by him in his business. The highly competitive character of the grocery business, in which this plaintiff is engaged, and other retail business in the Commonwealth of Kentucky and elsewhere in the United States, makes it necessary for the plaintiff to meet such competition and to conform its practice and methods of retail merchandising, selling and distribution to the accepted standards for the efficient and successful conduct of such business. In conformity therewith, the plaintiff has built up and developed in the Commonwealth of Kentucky and elsewhere a large and valuable business, upon the basis of selling meats, groceries, and other articles at retail to the public, at the lowest possible prices, consistent with a small average profit

in individual sales. The plaintiff is dependent upon a large volume of sales in order to secure a fair, reasonable and adequate return upon its invested capital employed in the conduct of its business. Such merchandising methods are the basis of the business of the plaintiff, are of benefit to the general public of the Commonwealth of Kentucky and have brought to the plaintiff a large and valuable good will and a large sales volume. The profit which the plaintiff is endeavoring to make in order to sell its merchandise at the lowest possible price and to encourage the patronage of the public, has not averaged in excess of one and one-half to two per cent on its gross sales and the plaintiff has actually sustained a loss of seventy-six one-hundredths of one per cent on its gross sales in the Commonwealth of Kentucky for the calendar year 1929, and will sustain a similar or greater loss in the calendar year 1930.

Said Act, by levying a so-called excise or license tax, amounting to practically one per cent on all gross sales made by the plaintiff, and others similarly situated, in practical operation and effect, makes it impossible for the plaintiff to continue the operation of its lawful business within [fol. 24] the Commonwealth of Kentucky at a profit and confiscates under the guise of taxation from one-half to two-thirds of any possible profit arising from sales made by the plaintiff in the Commonwealth of Kentucky. By reason of its ownership of warehouses and stores, frequently under long term leases, and its investments in improvements to leaseholds, fixtures and other property, the plaintiff cannot withdraw from business in the Commonwealth of Kentucky without sacrifice and at a tremendous loss of all of said property, and without losing the value of its good will built up by the expenditure of vast sums of money, through a period of many years, and without subjecting itself to liability amounting to many thousands of dollars. In consequence of the foregoing facts, said tax as applied to the plaintiff and others similarly situated, is prohibitory and confiscatory and in practical effect and operation is destructive of and takes the property of the plaintiff without any process of law.

(j) Said Act imposes an arbitrary and illegal tax in that it attempts to raise revenue by arbitrarily discriminating against retail merchants who have developed and built up their business in reliance upon a large sales volume

and a small average profit therefrom instead of a larger profit from a smaller volume of business and arbitrarily increases the rate of taxation against such merchants.

Second. Said Act violates the provisions of the Fourteenth Amendment to the Constitution of the United States in that it is an unwarraned abridgment of the privileges and immunities guaranteed to the plaintiff by said Fourteenth Amendment, in each of the following particulars:

(a) Said Act in its provisions is partial, unreasonable, arbitrary and unequal.

(b) The classification fixed by said law rests upon no sound or reasonable basis, but is wholly arbitrary.

(c) Said Act requires the plaintiff and other persons, co-partnerships and corproations engaged in a lawful business; to-wit, the operation of two or more stores, to pay a license or excise tax as a condition precedent to continuing in said business although said Act was not passed in the exercise of the police power but is purely a tax measure.

[fol. 25] (d) The tax fees required to be paid under the terms and provisions of said Act are unequal and discriminatory, based upon a classification that is wholly arbitrary and unjust, and discriminates against the owners and operators of two or more stores, and/or two or more separate and distinct departments, having total gross retail sales in excess of four hundred thousand dollars, in favor of persons, co-partnerships and associations owning and operating but a single store or department and/or having sales of four hundred thousand dollars or less.

(e) Said Act is unequal and discriminatory in that said Act discriminates between retail merchants who engage in gardening or farming and sell garden or farm products raised by them in the Commonwealth of Kentucky, and retail merchants who sell garden or farm products in Kentucky which are raised without the Commonwealth of Kentucky, although said retail merchants are all members of the same class and are similarly engaged in the retail trade of selling garden or farm products.

(f) Said Act unequally, unjustly, unreasonably and arbitrarily discriminates in favor of, and excepts from the operation thereof, all retail merchants who actually engage in

gardening or farming and selling garden or farm products raised by them in the Commonwealth of Kentucky, although not solely or exclusively engaged in such business, against retail merchants who do not actually engage in gardening or farming and/or do not sell garden or farm products raised by them in the Commonwealth of Kentucky.

Third. Said Act violates the provisions of Article I, Section 8, Subdivision 3, of the Constitution of the United States, and is an attempt, substantially, to burden and interfere with and regulate interstate trade and commerce, and to levy and impose a tax upon the importation of farm and garden products raised and grown outside of the Commonwealth of Kentucky into the Commonwealth of Kentucky for sale in stores therein, in the following particulars:

(a) Section 1 excepts from the operation of said Act, and from the payment of any tax, those actually engaged in gardening or farming and selling garden or farm products raised by them in Kentucky. Said Act by its terms, pur- [fol. 26] ports to include as retail merchants and to tax the gross sales of all retail merchants who operate a store for the sale at retail of any goods, wares or merchandise, and who do not actually engage in gardening or farming, and the sale of garden or farm products raised and grown in the Commonwealth of Kentucky.. The plaintiff is actually engaged in farming in the State of Ohio, and raises and produces on farms in said state various meat, garden and dairy products, which are subsequently processed in the plants of the plaintiff in the State of Ohio, and are shipped and transported from Ohio to Kentucky, and are actually sold by plaintiff in its stores in the Commonwealth of Kentucky. The plaintiff also purchases from farmers and gardeners in various states of the United States large quantities of garden and farm products which are shipped and transported from said states to the plaintiff in the Commonwealth of Kentucky, and are there sold in stores operated by the plaintiff in said state. A number of the competitors of the plaintiff are actually engaged in gardening or farming and selling such garden and farm products raised by them in the Commonwealth of Kentucky, and are therefore excepted from and not subject to the provisions of said Act or to the payment of any tax thereunder, whereas the plaintiff is subject to and required to pay the tax pro-

vided therein. The provisions of said Act hereinabove set forth, constitute a clear discrimination in favor of gardeners and farmers producing garden and farm products in the Commonwealth of Kentucky against the farmers and gardeners of other states. Said tax is made to depend upon the foreign character of the farm and garden produce—that is, its having been raised or having been grown without the Commonwealth of Kentucky—and is therefore an attempt to regulate commerce between the states of the United States. Said tax is imposed upon the sale of farm produce imported from other states and is indirectly an attempt on the part of the Commonwealth of Kentucky to tax the importation of garden, farm and other produce shipped into the Commonwealth of Kentucky from other states of the United States.

Fourth. Said Act violates fundamental principles of uniformity in the matter of taxes levied upon occupations, persons or property upon some reasonable basis of classifica-[fol. 27] tion, as such principles of uniformity are recognized by Section 171, of the Constitution of the State of Kentucky providing that taxes shall be levied and collected for public purposes only, and shall be uniform on all property of the same class subject to taxation within the territorial limits of the authority levying the tax, in each of the following particulars:

(a) Said Act, in its nature and effect, is a tax measure and provides for a rate of assessment and taxation which is not uniform and which requires different property owners of the same class, to-wit: retail merchants, similarly situated, to pay an unequal rate of assessment and taxation. The plaintiff, because of the fact that it owns and operates 263 stores in the Commonwealth of Kentucky will be required to pay a rate of taxation on its sales per store approximately twenty times as much as the nominal tax apparently but not actually imposed on the sales of other property owners engaged in a similar business in the Commonwealth of Kentucky owning and operating a single competitive store. In actual operation and effect, the credit of the operator of a single grocery store will offset the nominal tax, so that said owner of a single competitive store will not pay any taxes per store, whereas the plaintiff will be required to pay more than $429.00 per store.

(b) Retail merchants are not taxed at a uniform rate graded in proportion to the volume of business done or of sales made, but said taxes are increased upward so that the proportionate increase has no relationship whatsoever to the increase of sales, and increased sales are taxed at an arbitrary and capricious rate, disproportionately and unequally.

(c) Although purporting to tax all retail merchants, said Act, in actual operation and effect, was designed, intended and does single out a limited class of retail merchants, to-wit: those owning two or more stores, and two or more separate and distinct departments, having sales in excess of $400,000, by compelling the owners thereof to aggregate the sales of all stores and departments commonly owned, controlled or managed or associated in one ultimate management, to pay a tax based upon a total of all of said sales when so combined and aggregated, places substantially the [fol. 28] entire burden of said tax upon said limited class, and brings said class under the highest brackets of said tax.

Fifth. Said Act violates the provisions of Section 181, of the Constitution of the Commonwealth of Kentucky authorizing the General Assembly to provide by general laws only, for the payment of license fees, or special or excise taxes on various trades, occupations and professions, in the following particulars:

(a) Said section as construed by the Court of Appeals of Kentucky, does not authorize the levying of prohibitory, oppressive, burdensome and arbitrary taxes, which prohibit, oppress and unreasonably burden lawful business. Said Act was designed and intended to and in actual operation and effect will prohibit, oppress and unreasonably burden the business of plaintiff and others similarly situated.

(b) Said Act, under the guise of a license tax would take from the plaintiff and others similarly situated, from one-half to two-thirds of its entire possible profits, and thereby make it impossible for the plaintiff by increasing its sales or otherwise, to earn a fair return upon its capital.

10. Unless the defendants, after notice and hearing, are enjoined and restrained from enforcing or attempting to

enforce said Act, the plaintiff and all others similarly situated, will sustain irreparable loss and injury for which they have no plain, adequate and complete remedy at law, in each of the following particulars:

(a) The plaintiff and all others similarly situated, will be compelled to pay taxes pursuant to an invalid and unconstitutional enactment, and for which they are not legally liable.

(b) Upon the failure of the plaintiff, and others similarly situated, to pay said illegal taxes, the drastic penalties provided by said Act will be attempted to be enforced by the defendants against the plaintiff, and others similarly situated, and as a result thereof plaintiff, and others similarly situated, will be compelled to defend innumerable actions at law brought to recover said taxes and penalties and criminal proceedings brought to impose the criminal penalties provided in Section 7, of said Act, all at great expense and damage.

[fol. 29] (c) The defendants will expend public funds raised by taxation for the purpose of preparing to enforce and carry out the provisions of said Act to the irreparable injury and damage of the plaintiff as a taxpayer of the Commonwealth of Kentucky.

(d) If plaintiff and others similarly situated should pay said taxes under protest and be compelled to commence actions to recover the same as provided in Section 10, of said Act, they would be put to large expense for attorneys' fees and court costs, and would be required to bring a multiplicity of actions in order to recover said monies, and said Act contains no provisions of any kind for the reimbursement to plaintiff and others similarly situated, of said large sums which it would be required to expend in prosecuting such actions for attorneys' fees, expenses, court costs and other expenses.

(e) Said Act contains no provision authorizing or permitting the plaintiff, or others similarly situated, to commence or prosecute any action at law in the courts of the United States for the recovery of any tax paid by it under protest, but plainly attempts to prohibit any remedy whatever in the courts of the United States, and no waiver is provided of the right of the Commonwealth of Kentucky to

defend any action brought in the courts of the United States as a suit against a state within the meaning of the Eleventh Amendment to the Constitution of the United States. In consequence whereof, the plaintiff and others similarly situated, do not have a plain, adequate and complete remedy in an action at law in the courts of the United States.

The only remedy afforded by said Act, or by any law of the Commonwealth of Kentucky, is a suit at law in the Franklin Circuit Court against the Auditor of Public Accounts for a mandamus to compel him to draw his warrant upon the Treasurer for the amount of taxes erroneously exacted of the taxpayer and paid by him under protest, all of which appears from Section 10, of said challenged Act of 1930, and from Section 162, Kentucky Statutes, these being the only statutes of the State of Kentucky which afford any remedy in such cases to the taxpayer from whom illegal taxes have been collected by the State of Kentucky.

[fol. 30] By no other statute has the Commonwealth of Kentucky ever consented in any way to be sued itself or through any of its officers for the recovery of taxes illegally exacted from a taxpayer and covered into the Treasury of the State.

(f) If, in the event plaintiff was successful in obtaining a judgment for the recovery of such tax paid under protest, the Auditor of Public Accounts did not issue his warrant on the Treasury of the Commonwealth of Kentucky for the amount of such tax and interest as provided in said Act, the courts of the United States would not have jurisdiction of an action in mandamus to require the Auditor to issue said warrant and by reason thereof, the plaintiff does not have a plain, adequate and complete remedy at law in the courts of the United States.

(g) Section 9, of said Act, provides that all of the taxes received thereunder shall be divided and that one-half shall be set aside and credited to the Board of Charities and Corrections for the specific purpose of repairing, maintaining and constructing permanent improvements for the use of the institutions under the control of said Board, and that the remaining one-half shall be credited to a fund to be used for the specific purpose of liquidating any indebtedness of the Commonwealth. Should the plaintiff, and others

similarly situated, be successful in obtaining a judgment for the recovery of any taxes paid under protest, no provision is made for the payment of said judgment in money, but the remedy of the plaintiff in such event would be limited under Section 10, of said Act, and possibly under Section 162, General Statutes of Kentucky, to the issuance of a warrant by the Auditor of Public Accounts on the Treasurer of the Commonwealth of Kentucky, for the amount of said tax, with legal interest thereon from the date of payment, which warrant by the provisions of said Act is made payable only out of the general fund of the State. Said tax collected under the provisions of said Act would not go into the general fund of the Commonwealth of Kentucky, but one-half to the Board of Charities and Corrections and one-half to liquidate the public indebtedness as aforesaid, and plaintiff is informed and believes, and alleges upon information and belief that there are not sufficient funds in the general fund of the Commonwealth of Kentucky immediately, or within a reasonable time, to redeem and pay all of said state warrants heretofore and hereafter to be [fol. 31] drawn on said fund, and that it is the practice and procedure of the Treasurer of the Commonwealth of Kentucky, to redeem and pay said warrants in the order in which the same are issued and that said warrants are for this and other reasons, not readily redeemable, saleable or bankable immediately for their face value, and are subject to delay in payment. Wherefore, the plaintiff would be unable to obtain full, adequate and complete relief in an action at law, and whether it would be able to obtain a return of any taxes illegally paid under said Act would be dependent upon the condition of said general fund at the time thereof, and what, if any appropriations, the General Assembly of Kentucky would, in its discretion, be willing to make thereto and therefor.

(h) Said Act is ambiguous and doubtful as to its application and meaning, and as to the procedure and requirement thereunder, and has never been interpreted by the Court of Appeals of the Commonwealth of Kentucky.

(i) The amount of said tax which the plaintiff would be required to pay under the terms of said Act will be in excess of $113,000.00, which is a substantial portion of the capital invested by the plaintiff in the Commonwealth of Kentucky,

and needed by the plaintiff to carry on its business therein. The payment of so large a sum of money will impair the ability of the plaintiff to operate its business in Kentucky and will substantially decrease the amount of annual business which it will be enabled to do, and will give competitors of the plaintiff who are not required to withdraw any money from their respective businesses or who are not required to withdraw a proportionate sum therefrom, an unfair and undue advantage over the plaintiff, for which the plaintiff has no plain, adequate and complete remedy at law.

(j) Section 6 of said Act authorizes the State Tax Commission to have an attachment against the property of the defendant, including garnishees, without the execution of a bond, upon the filing of an affidavit showing the nature of the claim, that it is just, the sum which the defendant, the State Tax Commission, believes it ought to recover, and that the collection will be endangered by delay in obtaining judgment. The enforcement of such drastic provisions and the other provisions of said Act against the plaintiff, and others similarly situated, will result in a substantial dimi-
[fol. 32] nution of the value of the property employed by them respectively in their business, which loss will be large in amount, and will substantially decrease the amount of annual business done by them respectively, but which amount cannot be measured by any damages.

(k) The enforcement of said Act will have the effect of injuring and impairing all lawful business in which the plaintiff and others similarly situated are engaged and in which they have the undoubted right to engage, and which right is guaranteed by the State and Federal Constitutions.

Inasmuch, therefore, as the plaintiff is without adequate remedy at law, and can obtain relief only in a court of equity, the plaintiff prays:

1. That writs of subpœna be issued to each of said defendants, requiring each of them to answer this complaint fully and truthfully, but not under oath, an answer under oath being hereby expressly waived as to each and all of said defendants.

2. That a temporary restraining order be issued, restraining the defendants and each of them, from enforcing

said Act against the plaintiff and all others similarly situated, under the provisions of the Act of the Kentucky Legislature hereinbefore set out, and that each and all of said defendants and their successors in office be enjoined and restrained, after final hearing, from enforcing against the plaintiff and all others similarly situated, the provisions of House Bill No. 111 of the General Assembly of Kentucky (Chapter 149, Acts of 1930, Pages 475-482); directly or indirectly from instituting or maintaining any actions at law or suits in equity to recover of or from the plaintiff, and others similarly situated, the tax complained of, or for the recovery of any of the penalties prescribed in said tax for the nonpayment thereof; from expending any monies received by taxation or otherwise; from enforcing or preparing for the enforcement of said Act complained of, and from taking any steps looking to the exclusion of the plaintiff and/or other persons similarly situated, from carrying on its and/or their business in the Commonwealth of Kentucky, and from taking any steps looking to the prosecution of the plaintiff, its agents, servants, or employees, or any person, firm or corporation similarly situated in the Com- [fol. 33] monwealth of Kentucky, and their agents, servants and employees, for a violation of said Act, and from in any manner interfering with the carrying on and operation of such business in the Commonwealth of Kentucky.

3. That upon the final hearing of said cause, this court will order, adjudge and decree that House Bill No. 111 of the General Assembly of Kentucky, passed at a session of 1930 (Chapter 149, Acts of 1930, Pages 475 to 482), entitled: "An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act," be declared unconstitutional, null and void, as violating the Constitution of the United States and that of the Commonwealth of Kentucky, in the particulars hereinbefore pointed out, and that the enforcement thereof be perpetually enjoined; and for all other and

further and general relief, as may be just and equitable in the premises.

Nichols, Morrill, Wood, Marx & Ginter, Cincinnati, Ohio; Trabue, Doolan, Helm & Helm, Louisville, Kentucky, Solicitors for Plaintiff.

Duly sworn to by Albert H. Morrill. Jurat omitted in printing.

IN UNITED STATES DISTRICT COURT

[Title omitted]

APPLICATION FOR INTERLOCUTORY INJUNCTION—Filed Jan. 10, 1931

The plaintiff in the above entitled cause hereby applies to the Court for an interlocutory injunction, as prayed for in its Bill of Complaint, suspending restraining and enjoining the enforcement, operation and execution of House Bill No. 111, enacted by the General Assembly of Kentucky, at its [fol. 34] session for the year 1930, and known as Chapter 149, Acts of 1930, pages 475-482, and restraining and enjoining the defendants and the action of any officer of the State of Kentucky in the enforcement and execution of such statute and in the enforcement or execution of any order made by any administrative Board or Commission acting under and pursuant to such statute against the plaintiff and all others similarly situated.

And the plaintiff requests that its application for an interlocutory injunction be heard before three Judges, as prescribed in such case made and provided, and that said interlocutory injunction continue in force until the final hearing herein.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR TEMPORARY RESTRAINING ORDER—Filed Jan. 12, 1931

Now comes the plaintiff in the above entitled cause and represents to the Court that irreparable loss and damage will result to the Complainant unless a temporary restraining order is granted by this Honorable Court, restraining the enforcement, operation or execution of enrolled House Bill No. 111, enacted by the General Assembly of Kentucky, at its session for the year 1930, being Chapter 149, Acts of 1930, pages 475-482, and the enforcement or execution of such statute or any order made by any Board or Commission acting thereunder, until the hearing and determination of the application for an Interlocutory Injunction, as prayed for in the Bill of Complaint.

Wherefore, the plaintiff moves the Court for a temporary restraining order, suspending, restraining and enjoining the enforcement, operation and execution of said enrolled House Bill No. 111, enacted by the General Assembly of Kentucky, being Chapter 149, Acts of 1930, pages 475-[fol. 35] 482, and the enforcement or execution of such statute or of any order made by any administrative Board or Commission acting under and pursuant to such statute, until the hearing and determination of the application of the plaintiff for an interlocutory injunction, as heretofore applied for in the Bill of Complaint and by Motion duly made herein.

Trabue, Doolan, Helm & Helm, Nichols, Morrill, Wood, Marx & Ginter.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER CONVENING THREE JUDGE COURT—Filed Jan. 20, 1931

This is an application for interlocutory injunction restraining the defendants in the above named cause from enforcing a statute of the State of Kentucky. The applica-

tion seeks both an interlocutory injunction and a final order adjudging and decreeing that said statute is unconstitutional and void under the several Articles of the Constitution of the United States.

It appearing therefore that under the provisions of Title 28, Section 380, U. S. C. A. Judicial Court, Section 266, this application and cause should be heard by a Court consisting of three Judges as is provided in the statute governing the procedure in such cases.

Now, therefore, it is ordered this 20 day of January, 1931, that Honorable Arthur C. Denison, United States Circuit Judge and Honorable Charles I. Dawson, United States District Judge be and they hereby are called to my assistance to hear and determine the said application for an interlocutory injunction and for final decree.

It is further ordered that this cause be set for hearing before the Court as constituted on the 7th day of February, 1931, at 9 A. M. o'clock in the Federal Building in the City of Covington, State of Kentucky.

A. M. J. Cochran, Judge.

[fol. 36] IN UNITED STATES DISTRICT COURT

[Title omitted]

TEMPORARY RESTRAINING ORDER—Filed Jan. 29, 1931

This cause came on to be heard before me on the verified Bill of Complaint of plaintiff, The Kroger Grocery & Baking Company, an Ohio corporation, suing for itself and for all others similarly situated, alleging that House Bill No. 111, enacted by the General Assembly of Kentucky, at its session for the year 1930, and known as Chapter 149, Acts of 1930, pages 475-482, violates and is contrary to the provisions of the Constitution of the United States; and it appearing that said Bill of Complaint prays for an interlocutory injunction restraining the enforcement of said statute and the action of any officer of Kentucky in the enforcement or execution of such statute, and for a temporary restraining order pending the hearing and determination of said application for an interlocutory injunction;

And it further appearing that two Judges having been called to my assistance to hear and determine said applica-

tion for an interlocutory injunction on the 17th day of January, 1931, at Covington, Kentucky, and at least five (5) days notice of said hearing was given to the Governor and the Attorney General of the Commonwealth of Kentucky, and to the defendants in this cause, as provided by law.

And the Attorney General of the Commonwealth of Kentucky, on behalf of the defendants herein, having moved for a continuance of said hearing and the Court having granted said motion, set the hearing of said application for an interlocutory injunction before said Court of three Judges for the 7th day of February, 1931 at 9:00 A. M. o'clock, at Covington, Kentucky;

Whereupon, the plaintiff having moved for a temporary restraining order pending the hearing and determination of its application for an interlocutory injunction and due notice threreof having been given to the defendants and the same having been submitted to the Court; Now, therefore, the Court finds and is of the opinion that irreparable loss and damage will result to the plaintiff unless a temporary restraining order is granted restraining the enforcement of [fol. 37] said statute and the action of any officer of the Commonwealth of Kentucky in the enforcement or execution thereof until the hearing and determination of the application for an interlocutory injunction and that said statute, which is alleged to be unconstitutional, as aforesaid, purports to become effective on February 1, 1931, and that the plaintiff would thereupon be subject to the provisions and penalties thereof and that the defendants are now expending and are about to expend large sums thereunder and will immediately enforce said statute unless restrained and enjoined, all to the irreparable loss and damage of the Complainant and all others subject thereto;

Wherefore, it is ordered, adjudged and decreed that a temporary restraining order issue, suspending, restraining and enjoining the enforcement, operation and execution of enrolled House Bill No. 111, enacted by the General Assembly of Kentucky, at its session for the year 1930, and known as Chapter 149, Acts of 1930, pages 475-482 bearing the title:

"An Act relating to revenue and taxation imposing an excise or license tax on retail merchants, as the words 're-

tail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom, the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this act. Be it enacted by the General Assembly of the Commonwealth of Kentucky."

And restraining and enjoining the defendants, John B. Lewis, Selden Glenn, Henry M. Cline and Clell Coleman, and each of them, and any officer of the Commonwealth of Kentucky, their agents, servants, employees and attoneys, from enforcing or executing such statute and from enforcing or executing any order made by any administrative Board or Commission acting thereunder pursuant to such statute, against the plaintiff, The Kroger Grocery & Baking Company, and any other person, firm, corporation, association and co-partnership operating chain stores in the state until February 7th and it can be so determined by the three Judges whether it shall be continued pending the hearing and determination of the application for the interlocutory injunction and that the plaintiff enter into a bond, [fol. 38] payable to the Commonwealth of Kentucky, in the amount of Five Thousand ($5,000.00) Dollars, conditioned according to law.

A. M. J. Cochran, Judge.

Jany 29th, 1931.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER PERMITTING PLAINTIFF TO SUE AS REPRESENTATIVE OF CLASS—Filed Jan. 31, 1931

On motion of plaintiff, based upon its verified petition herein, it appearing that the issues and questions raised in plaintiff's Bill of Complaint are of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the Court, it is now ordered, pursuant to Equity Rule 38, that plaintiff may sue on behalf of all other persons similarly

situated, as well as on its own behalf, as to any issue or question presented by said Bill of Complaint that is of common or general interest to other taxpayers similarly situated, who are affected by said Chapter 149 of the Acts of 1930.

A. M. J. Cochran, Judge.

Jany. 31, 1931.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER CONTINUING TEMPORARY RESTRAINING ORDER—Filed Feb. 7, 1931

It appearing that one of the Judges called to my assistance to hear and determine the application for an interlocutory injunction in the above cause cannot be present on February 7, 1931, on account of illness, and that it is necesary to continue the hearing of said application by reason thereof, it is therefore ordered and adjudged that the hearing of said application for an interlocutory injunc-
[fol. 39] tion be continued to February 14, 1931, and that said application shall be heard on said date at Covington, Kentucky.

And it is further ordered and adjudged that the temporary restraining order, heretofore entered and issued in this cause on the 29th day of January, 1931, be and the same hereby is continued in full force and effect until the hearing and determination of said application for an interlocutory injunction, as aforesaid.

A. M. J. Cochran, Judge.

February 7, 1931.

[fol. 40] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed Feb. 14, 1931

Come the defendants, John B. Lewis, Selden Glenn and Henry M. Cline, as members of the State Tax Commission

of the Commonwealth of Kentucky, and Clell Coleman, Auditor of Public Accounts of the Commonwealth of Kentucky, and for their answer to the bill of complaint filed in the above styled action, plead as follows:

1. Said defendants do not have sufficient information to answer the allegations contained in Paragraph 1 of the Bill of Complaint and therefore neither admit nor deny the same, but require strict proof thereof.

2. Defendants admit all the allegations contained in Paragraph 3 of the Bill of Complaint.

3. Defendants admit all the allegations contained in Paragraph 3 of the Bill of Complaint.

4. Defendants, for answer to Paragraph 4, deny that this is a suit of civil nature in equity, or is brought for the purpose of enjoining the defendants from enforcing or attempting to enforce an Act of the General Assembly of Kentucky, bearing the title:

"An act relating to revenue and taxation imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing [fol. 41] fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this act."

They deny that House Bill No. 111 was read, passed, enrolled or signed under the title:

"H. B. 111. An act restraining the unfair competition of chain stores and in aid of individual merchants of the Commonwealth."

5. Said defendants do not have sufficient information to answer the allegations contained in Paragraph 5 of the Bill of Complaint and therefore neither admit nor deny the same, but require strict proof thereof.

6. Defendants, for answer to Paragraph 6, deny that there is a large or any number of persons, firms, corporations, associations, or co-partnerships, foreign or domestic, lawfully engaged in the operation of one or more stores or more than one separate or distinct department under the

same management, for the sale of goods, wares, or merchandise at retail in the Commonwealth of Kentucky, who are in a like position with plaintiff.

Den*ies* that the owners of said stores are too numerous to join in this action or that plaintiff prosecutes this case on behalf of any other individual, firm, association, co-partnership or corporation, who are at this time engaged in the operation of two or more stores or two or more separate, distinct departments under one management, for the purpose of enjoining the defendants from enforcing, or attempting to enforce, said Act of the General Assembly of Kentucky aforesaid, against plaintiff or such other individuals, firms, associations, co-partnerships or corporations, owning or operating two or more stores or two or more separate, distinct departments under one management, or others similarly situated with the plaintiff in the Commonwealth of Kentucky.

Den*ies* that the question of the invalidity of said statute is one of common or general interest to any or all of the people of Kentucky within the meaning of Equity Rule No. 38.

7. Defendants admit all the allegations contained in Paragraph 7 of the Bill of Complaint.

[fol. 42] 8. Defendants, for answer to Paragraph 8, deny that said Act was deliberately designed or intended to, or in practical operation or effect does, destroy, oppress, prohibit, restrain or arbitrarily discriminate against the lawful business of the owners of two or more retail stores, or the owners of two or more separate departments under one management; or that said design or intent was set forth in the title of said bill as introduced or read in the House of Representatives of the General Assembly of Kentucky, to-wit:

"H. B. 111. An Act restraining the unfair competition of chain stores and in aid of individual merchants of the Commonwealth."

Deny that said bill was enacted or read only or at all by the aforesaid title at the time of its second or third reading or passage in the House of Representatives by the Committee of Enrollment, or at all, by said title, or was there-

upon signed by the Speaker of the House or the President of the Senate of the General Assembly of Kentucky while containing said alleged title.

9. Said defendants do not have sufficient information to answer the allegations contained in Paragraph 9 of the Bill of Complaint and therefore neither admit or deny the same, but require strict proof thereof.

10. Defendants, for answer to Paragraph 10, deny that said Act (Chapter 149, Acts of 1930, Pages 475-482) is unconstitutional, invalid or void for the alleged reasons set out in said Bill of Complaint, and hereafter referred to separately, or any of them.

First. Deny that said Act violates the provisions of the Fourteenth Amendment of the Constitution of the United States in that it deprives the plaintiff, or other taxpayers similarly situated, of its or their property without due process of law, or denies to the plaintiff, or others similarly situated, the equal protection of the law in the following particulars, or at all:

(a) Deny that said Act is, in effect, a tax measure, or that it has no relation to the police powers of the state; or that it has no relation to the public health, the public welfare, the public morals, or the public safety. Deny that [fol. 43] it is not an attempt to regulate the business of any corporation or individual whose business is affected with a public interest. Deny that it is not an inspection measure in which fees are prescribed for the purpose of covering the cost of making inspection. Deny that no provision is contained in said act for regulation, supervision or inspection; that no standards are prescribed for the conduct of the business subject to said tax; or that as a tax measure, its operation or effect is not equal or uniform; or that the classification made by the terms of the Act is deliberately or designedly, or at all, oppressive, prohibitory, unreasonable, arbitrary, discriminatory, or in the higher brackets, or at all, is confiscatory as to the plaintff or other taxpayers similarly situated.

(b) Deny that although said Act purports to apply to every retail merchant operating any store as defined in said Act, except those actually engaged in gardening or farming or selling garden or farm products raised by them in

Kentucky, the true design, intent, practical operation, or actual effect of said Act is to exempt from the payment of said tax practically all, or any, of the owners of individual or single unit stores, or to impose substantially the entire burden of said tax upon a small part of the taxpayers, viz: taxpayers owning two or more separate and distinct departments operated under the same management or ownership, or having gross retail sales over four hundred thousand dollars. Defendants deny that the credits for special license, excise, occupational or corporation license tax, allowed by the terms of said Act, were known at the time of the enactment of said Act to be, or are sufficient, in practically all or any cases, entirely to offset the relatively small tax levied on sales of retail merchants which do not exceed four hundred thousand dollars. Deny that there are comparatively few, if any, retail merchants in the State of Kentucky whose gross retail sales in an individual or single store, or department, exceeds four hundred thousand dollars per annum. Deny that the gross retail sales of practically all, of any, of said individual or single stores or departments are under one hundred thousand dollars per annum; or that the results of the credit which said stores are permitted to take for the amount of such special license, excise, occupational or corporation li-
[fol. 44] cense tax paid by them is that substantially all, or any, of the retail merchants owning individual or single unit stores will be, or are, or were so intended to be exempt from the payment of any tax under the terms of said Act, or thus, as to them, such special license, excise, occupational or corporation license taxes as are paid by them, or are levied upon or collected from them in lien of any license tax provided for by said House Bill No. 111.

Deny that in practical effect or operation only retail merchants who own or manage more than one separate store or more than one separate department, or which have gross retail sales in all said stores or departments aggregating in excess of four hundred thousand dollars, will be, or are, subject to taxation under said Act, or that said merchants are a very small or limited class in the Commonwealth of Kentucky. Deny that there is no basis for said exemption or classification created by said Act, or that said exemption is unjust, unreasonable, discriminatory, or arbitrary.

Defendants deny that all, or any, other grocery stores in competition with the plaintiff in the Commonwealth of Kentucky pay in special state license, excise, occupational or corporation license tax approximately the same sum per store as paid by the plaintiff, or that in practical effect or operation a retail merchant having sales of $300,000 or less will not be required to pay any taxes under this Act.

(c) Defendants deny that the design, intent, practical operation or effect of said Act is to require or compel the owner or management of two or more separate or distinct stores or departments as defined in said Act, to aggregate for the purposes of taxation the gross sales of all stores or departments controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management without regard to the fact that said stores or departments are separate or distinct enterprises; without regard to location or without regard to the fact that said stores or departments are each engaged in the sale at retail of wholly different merchandise or commodities unrelated to the merchandise or commodities sold in other stores or departments. Deny that the design, intent, or practical operation of said Act is thereby to tax, penalize, or, because of the [fol. 45] increased rate of taxation in the higher brackets, to prohibit the employment of capital in the acquisition of stock in corporations owning stores, as defined by said Act, which may result in majority stock ownership, or to tax, penalize, or in effect prohibit the employment of capital, skill, efficiency or economy in the operation of said stores under one management or cooperatively under an association of management. Deny that said Act, by reason of its application to all retail merchants or stores, which are now controlled or held with others by majority stock ownership, or which are now controlled or directed by one management or association of ultimate management, is a deprivation of the property rights of the plaintiff or is prohibitive, oppressive, confiscatory, unreasonable, or arbitrary or denies to the plaintiff or other taxpayers similarly situated, the equal protection of the laws or deprives it, or others similarly situated, of its or their property without due process of law.

(d) Deny that the classification made as a basis for the tax imposed, rests wholly upon gross retail sales, or that

the percentage of said tax is increased with each one hundred thousand dollars of sales above $400,000, unequally, disproportionately, arbitrarily or with the sole, or any, design or intent to burden, oppress, prohibit or discriminate against the ownership or ultimate management of two or more stores or separate or distinct departments, or unreasonably, unequally or disproportionately to discriminate against, oppress, burden or penalize the employment of capital, skill, efficiency or the ability of retail merchants in the State of Kentucky to increase their sales above four hundred thousand dollars. Deny that the practical operation or effect of said increase in the percentage of tax per one hundred thousand dollars of increased sales is that a retail merchant who increases his sales one hundred thousand dollars above four hundred thousand dollars pays as much tax on one hundred thousand dollars as a retail merchants whose sales are two hundred thousand dollars, or for the next one hundred thousand dollar increase, said merchant is required to pay an additional two hundred and fifty dollars; or for the next one hundred thousand dollar increase, an additional four hundred dollars, or a greater tax on said one hundred thousand dollars of increased sales [fol. 46] than the entire tax of a retail merchant whose total sales are five hundred thousand dollars; for the next one hundred thousand dollars of sales, five hundred and fifty dollars, which tax on said one hundred thousand dollars of sales is as great as the total tax of a retail merchant having total sales of six hundred thousand dollars; for the next one hundred thousand dollars of sales the tax is seven hundred dollars; for the next one hundred thousand dollars of sales the tax is eight hundred and fifty dollars; for the next one hundred thousand dollars of sales and for every one hundred thousand dollar- of sales thereafter, a tax is assessed of one thousand dollars, which is a greater tax per one hundred thousand dollars of sales than the total tax required of a merchant whose total sales are seven hundred thousand dollars. Deny that under said act a retail merchant having gross sales in any amount not exceeding three hundred thousand dollars, who increases said sales by one hundred thousand dollars, is only liable to a maximum increase in taxation of fifty dollars, less his permitted credits, or, the plaintiff is subject to a tax of $1,000 on every one hundred thousand dollar increase in its sales.

Deny that said classification is unreasonable, unequal, discriminatory, oppressive, arbitrary or confiscatory as to this plaintiff or other taxpayers similarly situated.

(e) Deny that the grocery stores owned by the plaintiff are in direct, open or free competition, in every or each locality where said stores are located, with any other grocery stores selling similar merchandise to the same public under similar circumstances, except that the owners of said stores are not generally the owners of other retail stores. Deny that the singly or individually owned grocery stores in many, or any, of the localities in which the stores of this plaintiff are located, although singly or individually owned, are members of large cooperative organizations or associations for the purpose of cooperative buying, advertising or efficient merchandising. Deny that said competitive stores, by reason of membership in said cooperative associations or organizations, although singly or individually owned, enjoy any or all the advantages which may flow from group or cooperative buying on a large scale, including the pooling of purchasing power, the ability [fol. 47] to contract for newspaper display, store *as* other advertising, cooperatively or upon a large scale, or for the scientific or efficient arrangement of stores, window displays, or the development of merchandising methods through the employment cooperatively, of experts or others experienced therein. Deny that said cooperative associations combine cooperatively as great or a greater number of stores or have as great or greater purchasing or buying power, or have as great or greater advertising or merchandising ability as the plaintiff or other retail merchants who own two or more stores in the Commonwealth of Kentucky. Deny that any singly or individually owned stores, or members of cooperative associations of similar circumstances or in direct competition with the plaintiff or other retail merchants owning two or more stores, are not required to aggregate or combine for the purpose of taxation or to report for taxation the total sale of all stores in Kentucky joined together in the same cooperative association or organization, or hence, said competitive stores members of said association or organization, are not subject to taxation on the same basis, classification or rate as the plaintiff, or are in practical operation or effect practically exempt from any taxation under said

act; or that the plaintiff is subject to taxation at the highest rate prescribed in said act; or that by reason thereof, said competitive stores are given undue or unfair economic advantages over the stores of the plaintiff, or are in effect aided, helped or subsidized by said act in their competition with the plaintiff at the expense of the plaintiff.

Deny that the average gross sales of the grocery stores owned by the plaintiff in Kentucky during the year last past was approximately fifty thousand dollars per store. Deny that the average sales of the grocery stores with which the grocery stores of the plaintiff are in direct, free or open competition, under similar, or any, circumstances, will not exceed, except in a relatively few, or any, cases, said average sales of the stores owned by the plaintiff in Kentucky. Deny that individually or singly owned stores will have gross sales averaging only $50,000 per store or will pay a tax of only one twentieth of one percent, i. e. Twenty-five dollars, or that said amount will be in practically all cases entirely offset by the credit of other taxes permitted under Section 4 of said Act. Deny that the stores in competition with the plaintiff will not be subject [fol. 48] to any tax under the provisions of said Act, or at most, to a tax of Twenty-five dollars per store, or that the plaintiff will be required to pay a tax of something in excess of four hundred and twenty-nine dollars per store, or any such amount. Deny that the result of the operation or effect of said tax practically, or at all, exempts from taxation the competitors of the plaintiff, or requires the plaintiff to pay an excessive prohibitory, oppressive or confiscatory tax in addition to all other taxes, or any other taxes, on its said stores or thereby denies to the plaintiff the equal protection of the laws, takes its property without due process of law or its effect upon the plaintiff and other taxpayers similarly situated is unjust, unequal, discriminatory or arbitrary.

(f) Deny that the classification or graduation made as a basis for the tax imposed rests wholly, or at all, upon the amount of gross retail sales of all stores controlled or held with others by majority stock ownership, or controlled or directed by one management or association of ultimate management; that said classification does not rest in any particular upon the ability of the taxpayer to pay said tax. Deny that it does not rest in any particular upon the in-

come or earnings from any store or stores, or that it has no necessary relation to receipts; that it is imposed regardless of whether said sales are made at a profit or loss, or the amount of profit or loss therefrom; that it has no relation to profits or losses, if any accrue from said sales; that it has no relation to the capital employed or invested. Deny that it does not take into account the type of business. Deny that said Act does not make any provision for the merchandise returned, or for the cancellation of sales or resales of merchandise, or for the net amount of sales, or sales on credits for which payment is not received, or that it classifies sales solely as to gross amount thereof by dollars, or strikes at the increase in said gross sales by a geometrical increase in the rate of taxation; for one hundred thousand dollars of increased sales up to one million dollars, after which the increase of gross sales above one million dollars, or the tax thereon is levied or collected at the highest bracket of one per cent.

Deny that said Act purports to classify or tax sales by dollars; or that it taxes the dollar of sales of certain retail [fol. 49] merchants upon a materially or substantially different rate or basis than the dollar of sales of retail merchants engaged in direct competition or similarly circumstanced, or imposes upon a merchant having gross sales of eight hundred thousand dollars, a tax of fifteen hundred dollars, or seven and one-half times the tax imposed upon his competitor who does exactly one-half the volume, or who is only subject to a tax of two hundred dollars.

Deny that thereby, one retail merchant doing exactly twice the business of his competitor is required to pay seven and one-half, or any, times as much on his dollar of sales as his competitor, who, in the same or similar circumstances, is required to pay on his dollar of sales. Deny that said classification is unreasonable, without a rational basis, or is arbitrary, unequal, burdensome, or oppressive.

— Deny that the Act in question, although directly imposing a tax, makes it unlawful for a person, engaged in lawful business, viz: the operation of a store, to continue to engage in such business or to operate or maintain any store or stores, or to open or establish such business without paying the so-called license or excise taxes levied therein, although said Act is not based on an exercise of the police power, or said Act imposes heavy penalties upon the

person or corporation failing to make the reports or to pay the tax prescribed therein, or obedience is thus, or at all, coerced to an invalid law by excessive or drastic penalties.

(h) Deny that the General Assembly of Kentucky has no right under the guise of an excise or licensing measure to require the owner of a store or stores to pay a tax as a condition precedent to the continuance of that business, where the so-called licensing feature has no relation to the public health, the public welfare, the public morals, or the public safety.

(i) Deny that the efficient or successful method of conducting retail business in the Commonwealth of Kentucky, or elsewhere in the United States, at the present time, is to sell merchandise at the lowest possible price, consistent with a small percentage of profit on each individual sale, endeavoring thereby to increase the volume of sales or to secure a more rapid turnover of merchandise or capital. [fol. 50] Deny that the retail merchant is required by reason of a small percentage of profit on a single sale to have a large volume of sales or continuously to increase his sales volume in order to secure a fair return on the capital employed by him in his business. Deny that the highly competitive character of the grocery business, in which this plaintiff is engaged, and other retail business in the Commonwealth of Kentucky or elsewhere in the United States, makes it necessary for the plaintiff to meet such competition or to conform its practice or methods of retail merchandising, selling or distribution to the accepted standards for the efficient or successful conduct of such business. Deny that in conformity therewith, the plaintiff has built up or developed in the Commonwealth of Kentucky or elsewhere a large or valuable business, upon the basis of selling meats, groceries or other articles at retail to the public at the lowest possible prices, consistent with a small average profit in individual sales.

Deny that the plaintiff is dependent upon a large volume of sales in order to secure a fair, reasonable or adequate return upon its invested capital employed in the conduct of its business. Deny that said merchandising methods are the basis of the business of the plaintiff, or are of benefit to the general public of the Commonwealth of Kentucky, or have brought to the plaintiff a large or valuable good will,

or a large sales volume. Deny that the profit which the plaintiff is endeavoring to make in order to sell its merchandise at the lowest possible price, or any other reason, or to encourage the patronage of the public, has not averaged in excess of one and one-half to two per cent. on its gross sales, or that the plaintiff has actually sustained a loss of seventy-six one hundredths of one per cent, or any other amount, on its gross sales in the Commonwealth of Kentucky for the calendar year 1929, or will sustain a similar or greater, or any loss in the calendar year 1930.

Deny that said Act, by levying a so-called excise or license tax, amounting to practically one per cent. on all gross sales made by plaintiff, or others similarly situated, in practical operation or effect, or at all, makes it impossible for the plaintiff to continue the operation of its lawful business within the Commonwealth of Kentucky at a profit or con- [fol. 51] fiscates under the guise of taxation, or at all, from one-half to two-thirds of any amount or kind of possible profit arising from sales made by plaintiff in the Commonwealth of Kentucky. Deny that by reason of its ownership of warehouses or stores, frequently under long term leases, or otherwise, or its investments in improvements to leaseholds, fixtures, or other property, the plaintiff cannot withdraw from business in the Commonwealth of Kentucky without sacrifice, or at a tremendous loss of all, or any, of said property, or without losing the value of its good will, built up by the expenditure of vast sums of money, or otherwise, through a period of many years, or any years, or without subjecting itself to liability to many thousands of dollars, or any amount. Deny that in consequence of the foregoing facts, or at all, said tax as applied to the plaintiff or others similarly situated, is prohibitory or confiscatory, or in practical effect or operation is destructive of, or takes the property of plaintiff without any process of law.

(j) Defendants deny that said Act imposed an arbitrary or illegal tax in that it attempts to raise revenue by arbitrarily discriminating against retail merchants who have built up their business in reliance upon a large sales volume, or a small average profit therefrom instead of a larger profit from a smaller volume of business or arbitrarily increases the rate of taxation against such merchants.

Second. Defendants deny that said Act violates the provisions of the Fourteenth Amendment to the Constitution of the United States in that it is an unwarranted abridgment of the privileges or immunities guaranteed to the plaintiff by said Fourteenth Amendment, in each of the following particulars, or at all;

(a) Defendants deny that said Act in its provisions is *is* partial, unreasonable, arbitrary or unequal.

(b) Defendants deny that the classification fixed by law rests upon no sound or reasonable basis, or that it is wholly or at all arbitrary.

(c) Deny that said Act requires the plaintiff or other persons, co-partnerships or corporations engaged in a lawful business, to-wit: the operation of two or more stores, to pay a license or excise tax as a condition precedent to [fol. 52] continuing in said business, or that said Act was not passed in the exercise of the police power, or that it is purely a tax measure.

(d) Deny that the tax fees required to be paid under the terms or provisions of said Act are unequal or discriminatory, based upon a classification that is wholly arbitrary or unjust, or discriminates against the owners or operators of two or more stores or two or more separate or distinct departments, having total gross retail sales in excess of four hundred thousand dollars, in favor of persons, co-partnerships or associations owning or operating but a single store or department or having sales of four hundred thousand dollars or less.

(e) Defendants deny that said Act is unequal or discriminatory in that said Act discriminates against retail merchants who engage in gardening or farming or sell garden or farm products raised by them in the Commonwealth of Kentucky, or retail merchants who sell garden or farm products in Kentucky which are raised without the Commonwealth of Kentucky, although said retail merchants are all members of the same class. Deny that they are all members of the same class, or are similarly engaged in selling at retail garden or farm products.

(f) Defendants deny that said Act unequally, unjustly, unreasonably or arbitrarily, or at all, discriminates in favor of, or excepts from the operation thereof, all, or any, retail merchants who actually engage in gardening or selling garden or farm products raised by them in the Commonwealth of Kentucky, although not solely or exclusively engaged in such business, against retail merchants who do not actually engage in gardening or farming, or do not sell garden or farm products raised by them in the Commonwealth of Kentucky.

Third. Defendants deny that said Act violates the provisions of Article 1, Section 8, Subdivision 3, of the Constitution of the United States, or that it is an attempt, substantially, or at all, to burden or interfere with or regulate interstate trade or commerce, or to levy or impose a tax upon the importation of farm or garden products raised or grown outside the Commonwealth of Kentucky into the [fol. 53] Commonwealth of Kentucky for sale in stores therein, in the following particulars, or at all:

(a) Defendants deny that Section 1 excepts from the operation of said Act, or from the payment of any tax, those actually engaged in gardening or farming or selling garden or farm products raised by them in Kentucky. Deny that said Act by its terms, purports to include as retail merchants, or to tax the gross sales of all, or any, retail merchants who operate a store for the sale at retail of any goods, wares or merchandise, or who do not actually engage in gardening or farming, or the sale of garden or farm products raised or grown in the Commonwealth of Kentucky. Deny that the plaintiff is actually engaged in farming in the State of Ohio, or raises or produces on farms in said state various meat, garden or dairy products, which are subsequently processed in the plants of plaintiff in the State of Ohio, or are shipped or transported from Ohio to Kentucky, or are actually sold by plaintiff in its stores in the Commonwealth of Kentucky. Deny that the plaintiff purchases from farmers or gardeners in various states of the United States, or any state, large, or any, quantities of garden or farm products which are shipped or transported from said states to the plaintiff in the Commonwealth of Kentucky, or that said products are sold in stores operated by plaintiff in said State. Deny that a

number, or any, of the competitors of the plaintiff are actually engaged in gardening or farming, or selling such garden or farm products raised by them in the Commonwealth of Kentucky, or are therefore excepted from, or not subject to the provisions of said Act, or to the payment of any tax thereunder, or that plaintiff is subject to or required to pay the tax provided therein.

Deny the provisions of said Act constitute a clear, or any, discrimination in favor of gardeners, or farmers producing garden or farm products in the Commonwealth of Kentucky against the farmers or gardeners of other states. Deny the said tax is made to depend upon the foreign character of the garden or farm produce—that is, its having been raised or having been grown without the Commonwealth of Kentucky—or is an attempt to regulate commerce between the states of the United States. Deny that said [fol. 54] tax is imposed upon the sale of farm produce imported from other states or is directly, or at all, an attempt by the Commonwealth of Kentucky to tax the importation of garden, farm or other produce shipped into the Commonwealth of Kentucky from other states of the United States.

Fourth. Defendants deny that said Act violates fundamental principles of uniformity, or any principles of uniformity, in the matter of taxes levied upon occupations, persons or property upon some reasonable basis of classification, as such principles of uniformity are recognized by Section 171 of the Constitution of the State of Kentucky providing that taxes shall be levied or collected for public purposes only, or shall be uniform on all property of the same class subject to taxation within the territorial limits of the authority levying the tax, in each of the following particulars, or at all:

(a) Defendants deny that said Act, in its nature or effect, is a tax measure or provides for a rate of assessment or taxation which is not uniform or which requires different property owners of the same class to-wit: retail merchants similarly situated, to pay an unequal rate of assessment or taxation.

Deny that the plaintiff, because of the fact that it owns or operates Two Hundred and Sixty-three stores in the Commonwealth of Kentucky, will be required to pay a rate

of taxation on its sales per store approximately twenty, or any, times as much as the nominal tax apparently but not actually imposed on the sales of other property owners engaged in a similar business in single or competitive store. Deny that said tax is not actually imposed on sales of property owners owning or operating single competitive stores.

Deny that in actual operation or effect, the credit of the operator of a single grocery store will offset the nominal tax, or that said tax is a nominal tax, so that said owner of a single competitive store will not pay any tax per store, or that the plaintiff will be required to pay more than $429.00 per store, or any sum.

(b) Deny that retail merchants are not taxed at a uniform rate graded in proportion to the volume of business done or of sales made, or that said taxes are increased upward so that the proportionate increase has no relation-[fol. 55] ship whatsoever to the increase of sales, or increased sales are taxed at an arbitrary or capricious rate, disproportionately or unequally.

(c) Defendants deny that although purporting to tax all retail merchants, said Act, in actual operation or effect, or at all, was designed, intended or does single out a limited class of retail merchants, to-wit: those owning two or more stores, or having two or more separate and distinct departments, having sales in excess of $400,000, by compelling the owners thereof to aggregate the sales of all stores or departments commonly owned, controlled or managed or associated in one ultimate management, to pay a tax based upon a total of all said sales when so combined or aggregated, places substantially the entire burden or said tax upon said limited class, or brings said class under the highest brackets of said tax.

Fifth. Defendants deny that said Act violates the provisions of Section 181, of the Constitution of the Commonwealth of Kentucky, authorizing the General Assembly to provide by general laws only, for the payment of license fees, or special or excise taxes on various trades, occupations or professions, in the following particulars, or at all:

(a) Deny that said Act was designed or intended to, or in actual operation or effect will prohibit, oppress, or unreasonably burden the business of plaintiff or others similarly situated.

(b) Deny that said Act, under the guise of a license tax, or at all, would take from the plaintiff or others similarly situated, from one-half to two-thirds of its entire possible profits, or any of its possible profits, or thereby make it impossible for the plaintiff by increasing its sales or otherwise, to earn a fair return upon the capital.

10. Defendants deny that unless they are restrained or enjoined from enforcing or attempting to enforce said Act, the plaintiff or any others similarly situated, will sustain irreparable, or any, losses or injury for which they have no plain, adequate or complete remedy at law, in each of the following particulars, or at al-:

(a) Deny that the plaintiff or any others similarly situated, will be compelled to pay taxes pursuant to an invalid [fol. 56] or unconstitutional enactment, or for which they are not legally liable.

(b) Deny that upon the failure of the plaintiff or others similarly situated, to pay said taxes, that any drastic penalties will be attempted to be enforced by the defendants against the plaintiff, or others similarly situated, or as a result thereof, plaintiff, or others similarly situated, will be compelled to defend innumerable actions at law brought to recover said taxes or penalties or criminal proceedings brought to impose the criminal penalties provided in Section 7, of said Act, or at a great or any expense or damage.

(c) Deny that they will expend public funds raised by taxation for the purpose of preparing to enforce or carry out the provisions of said Act to the irreparable injury or damage, or any injury or damage, of the plaintiff as a taxpayer of the Commonwealth of Kentucky.

(d) Deny that if the plaintiff, or others similarly situated, should pay said taxes under protest or be compelled to commence actions to recover the same as provided in Section 10 of said Act, they would be put to a large, or any, expense for attorneys' fees or court costs, or would be required to bring a multiplicity of actions in order to recover said moneys, or that said Act contains no provisions of any kind for the reimbursement to plaintiff, or others similarly situated, of said large sums which it would be required to expend in prosecuting such actions for attorneys' fees, expenses, court costs, or other expenses, or

that plaintiff, or others similarly situated, would be required to expend said funds.

(e) Defendants deny that said Act contains no provision authorizing or permitting the plaintiff, or others similarly situated, to commence or prosecute any action at law in the courts of the United States for recovery of any tax paid by it under protest, or that it plainly, or at all, attempts to prohibit any remedy, or that no waiver is provided of the right of the Commonwealth of Kentucky to defend any action brought in the courts of the United States as a suit against a state within the meaning of the Eleventh Amendment to the Constitution of the United States; or that in consequence whereof, or at all, the plaintiff, or others [fol. 57] similarly situated, do not have a plain, adequate or complete remedy in an action at law in the courts of the United States.

Deny that the only remedy afforded by said Act, or by any law of the Commonwealth of Kentucky, is a suit at law in the Franklin Circuit Court against the Auditor of Public Accounts for a mandamus to compel him to draw his warrant upon the Treasurer for the amount of taxes erroneously exacted of the taxpayer or paid by him under protest, or that such is the meaning of Section 10 of said challenged Act of 1930, or from Section 162 of the Kentucky Statutes, or that these are the only statutes of the Commonwealth of Kentucky which afford any remedy in such cases to the taxpayer from whom illegal taxes have been collected by the Commonwealth of Kentucky.

Deny that by no other statute has the Commonwealth of Kentucky ever consented in any way to be sued itself or through any of its officers for the recovery of taxes illegally exacted from a taxpayer or covered into the Treasury of the State.

(f) Defendants deny that if, in the event plaintiff was successful in obtaining judgment for the recovery of such taxes under protest, the Auditor of Public Accounts did not issue his warrant upon the Treasury of the Commonwealth of Kentucky for the amount of such tax or interest as provided in said Act, the courts of the United States would have no jurisdiction of an action in mandamus to require the Auditor to issue said warrant, or that by reason thereof, or at all, plaintiff does not have a plain, adequate or complete remedy at law in the courts of the United States.

(g) Defendants deny that if the plaintiff, or others similarly situated, be successful in obtaining a judgment for the recovery of any taxes under protest, that no provision is made for the payment of said judgment in money, or that the remedy of the plaintiff in such event would be limited under Section 10 of said Act, or possibly under Section 162, General Statutes of Kentucky, to the issuance of a warrant by the Auditor of Public Accounts on the Treasurer of the Commonwealth of Kentucky, for the amount of said taxes, with legal interest thereon from the date of payment, or [fol. 58] that said warrant by the provisions of said Act is made payable only out of the general fund of the State. Deny that said tax collected under the provisions of said Act would not go into the general fund of the Commonwealth of Kentucky. Deny that there is not sufficient funds in the general fund of the Commonwealth of Kentucky immediately, or within a reasonable time, to redeem or pay all of said state warrants heretofore or hereafter to be drawn on said fund, or that it is the practice or procedure of the Treasurer of the Commonwealth of Kentucky to redeem or pay said warrants in the order in which the same are issued or that said warrants are for this, or other reasons, not readily redeemable, saleable or bankable immediately for their face value or are subject to delay in payment. Deny that the plaintiff would be unable to obtain, full, adequate or complete relief in an action at law, or whether it would be able to obtain a return of any taxes illegally paid under said Act would depend upon the condition of said general fund at the time thereof, or upon what, if any, appropriations, the General Assembly of Kentucky would, in its discretion, be willing to make thereto or therefor.

(h) Deny that said Act is ambiguous or doubtful as to its application or meaning, or as to the procedure or requirements thereunder, or that it has never been interpreted by the Court of Appeals of the Commonwealth of Kentucky.

(i) Defendants deny that the amount of said tax which the plaintiff would be required to pay under the terms of said Act would be in excess of $113,000, or in excess of $80,000, or that said named amount is a substantial portion of the capital invested by the plaintiff in the Commonwealth of Kentucky, or that such amount is needed by the plaintiff

to carry on its business therein. Deny that the payment of such a sum of money would impair the ability of the plaintiff to operate its business in Kentucky, or will substantially decrease the amount of annual business which it will be enabled to do, or will give competitors of the plaintiff, who are not required to withdraw any money from their respective businesses, or who are not required to withdraw a proportionate sum therefrom, an unfair or undue [fol. 59] advantage over plaintiff, for which plaintiff has no plain, adequate or complete remedy at law.

(j) Defendants deny that Section 6 of said Act which authorizes the State Tax Commission to have an attachment for the collection of the tax levied under said Act, will result in a substantial or any diminution of the value of the property employed by plaintiff, or others similarly situated, respectively in their business, or that any losses will be large in amount, or that there will be substantial losses, or any losses, or that there will be any substantial, or at all, decrease of amount of annual business done by them respectively, or that such amount, if any, cannot be measured by any damages.

(k) Defendants deny that the enforcement of said Act will have the effect of injuring or impairing all lawful business in which the plaintiff, or others similarly situated, are engaged, or in which they have the undoubted right to engage, or which is guaranteed by the State or Federal Constitutions.

11. Defendants deny each and every allegation in the Bill of Complaint not herein admitted, controverted or specifically denied.

Further answering, said defendants aver and allege as follows:

1. The Act in question (House Bill 111, now Chapter 149 of the Acts of the General Assembly of 1930) levies a tax graduated progressively as to rate upon all sales of goods at retail in this Commonwealth. Retail merchants are, by the provisions of said Act, classified by amount of annual gross retail sales. The word "merchant" as defined in said Act, includes every person, firm, corporation, association, or co-partnership selling at retail in this Commonwealth, and exactly the same rate is levied upon each merchant doing a given amount of annual gross retail business with-

out regard to whether such merchant operates one store or many stores.

2. The classification made as a basis for the tax imposed by said Act rests not only on the volume of gross retail sales, but also upon the ability of the merchants affected by [fol. 60] the various gradations of the Act to pay the tax imposed, it being a well recognized economic law of merchandising that the per cent of income per dollar investment increases progressively in the same or approximately the same ratio to the volume of sales as does the rate levied by said Act, that is to say, those merchants, and especially those engaged in the retail grocery business in this Commonwealth, having gross annual sales of less than $400,000 per annum, as a class, have an average annual income of —% upon their invesment, and those merchants engaged in the grocery business having annual gross sales of more than $— and less than $— per year have an average annual income, as a class, of —% on their invested capital, and those retail merchants engaged in the grocery business in this Commonwealth having sales of more than $1,000,000 per year, and less than $— per year, as a class, have an average annual income of —% on their invested capital, and those retail merchants engaged in the grocery business in this Commonwealth having an annual gross retail sale of $— per year, or over, have, as a class, an income of —% upon their invested capital.

Defendants further say that the example set out above is illustrative of the progressive increased ratio of earning power of invested capital to the volume of sales enjoyed by this plaintiff and others similarly situated.

3. Defendants say that the progressive increase in earning power of invested capital based on increased volume of sales as illustrated in the paragraph above, conclusively proves a proportionate increased ability to pay the tax levied by the Act in question.

4. Defendants further allege that the plaintiff, Kroger Grocery & Baking Company, and all others similarly situated are now enjoying, and have for many years enjoyed a large and prosperous retail business in this State, and that their gross annual retail sales have in many instances exceeded $12,000,000 per annum, and that they are now making, and have made, a profit of more than 3.1% on said

annual sales, and that this represents a net income on capital invested in the retail business in this State of more than 17.4%, and that this plaintiff and others similarly situated, after the exaction of the tax imposed by the Act in question, [fol. 61] will still have a net return of more than 13% on their invested capital but this plaintiff, The Kroger Grocery & Baking Company, has due to mismanagement, internal dissention, and certain unsound merchandising practices heretofore followed by it, enjoyed a less return on its invested capital than others similarly situated.

They say that the return enjoyed by the plaintiff is not, in any wise, illustrative of the return enjoyed by others engaged in like business, that is to say, other multiple outlet retail grovery organizations doing business in this State.

5. Defendants further allege that the great volume of business enjoyed by plaintiff, and others similarly situated, and the consequent progressive increase in the ratio of income from invested capital to volume of business, is brought about by the operation of natural and well recognized economic laws, as follows:

(a) It is a well established and well recognized law of merchandising economics, in so far as retail business such as conducted by plaintiff, and others similarly situated, that those merchants who enjoy a greater volume of business comparable to the volume enjoyed by plaintiff, and others similarly situated, have a much greater buying power than those enjoying a smaller volume of trade.

They say that this plaintiff, and others similarly situated can, and do, buy goods, wares, and merchandise at a much greater discount and at a much lower price than the smaller individual merchants having a smaller volume of trade can purchase goods, wares, and merchandise of the same quality. That this plaintiff, by reason of said greater volume of trade and its great number of outlet stores, can and does contract for the entire output of many manufacturers, canners, and packers engaged in the preparation of goods, wares, and merchandise for retail trade.

They say that this plaintiff, and others similarly situated can, and do, buy their goods, wares and merchandise in car load lots and often in multiple car load lots, and they can, and do, purchase merchandise at —% less than goods, wares, and merchandise of like quality can be bought or

purchased by individual retail merchants having a smaller volume of trade and who are competitors of this plaintiff and others similarly situated.

[fol. 62] (b) It is a well recognized and established rule in this Commonwealth that the ratio of turnover or volume of trade to capital invested increases progressively as volume increases.

Defendants say that this is true because plaintiff, and others similarly situated, owning many stores respectively, are enabled to, and do, deliver goods, wares and merchandise daily to practically all of their stores and are thus enabled to do a great volume of business with a minimum investment.

6. Defendants further allege that the tax imposed by the Act in question was designed, intended, and in practical operation and effect does equalize the tax burden heretofore borne by those doing a retail business in this Commonwealth, and that said equalization is brought about in part by reason of the following:

(a) Retail grocery stores now doing business in this Commonwealth, as a class, are forced by the demands of trade to sell the following articles, oleomargarine, soft drinks, and cigarettes, the privilege of selling of each of said commodities entailing the payment of license tax to the State of $10, and that without regard to the amount of volume of sales of either of said commodities; the practical operation and effect of said license tax levied on the privilege of selling the above commodities is to penalize, punish, and to place an undue burden on individual retail merchants having a small volume of business, and to favor and subsidize this plaintiff and others similarly situated.

(b) Defendants further allege that it is the law of this Commonwealth that all property subject to a state ad valorem tax is assessed as of July 1 of each year, and that the value and amount of the property owned and in this State at that time determines the amount of taxes imposed without regard to the amount or value of property owned and in this State on any other day of the year.

Defendants say that this plaintiff, and others similarly situated, as a class, have heretofore, and do now, practically escape ad valorem taxation in this State by reason

of the fact that they are enabled to, and do, by the very nature and operation of their business, have on hand for assessment as of July 1 of each year a minimum amount of merchandise, but that, on the other hand, individual merchants with a small volume of trade, who are endeavoring [fol. 63] to compete with plaintiff, and others similarly situated, or by reason of the fact that they own but one store, and for further reason that they have a lower turnover and are compelled to, in order to meet trade demands, carry a much larger stock subject to ad valorem taxation at all times, including July 1, and that thus such individual merchants are compelled to, and do, bear an undue and unjust proportion of the ad valorem taxation levied on retail merchants of this Commonwealth.

Defendants further say that this plaintiff in particular, and others similarly situated, maintain supply depots and warehouses in the State of Ohio and other adjoining states; that they can, and do, deliver to their respective stores goods, wares, and merchandise only in such amounts as are necessary to meet daily trade demands, and by reason of the fact that the State of Ohio has a different assessment rate than the State of Kentucky, they can, and do, so arrange the transfer of goods, wares and merchandise so as to practically escape ad valorem taxation in both states by the simple expedient of having a great bulk of such goods, wares, and merchandise in Ohio, or some other state, on July 1, and in Kentucky on the assessment date of such other states.

(c) Defendants further allege that this plaintiff, and others similarly situated, are enabled to, and do, escape taxation altogether on money in banks of this State, by the simple expedient of sending their money received from sales to another state as soon as it is received, but that this practice cannot be followed by individual competing merchants.

(d) Defendants further allege that this plaintiff, and others similarly situated, who have for many years, and are now enjoying a great volume of business in this Commonwealth, have never paid, and are not now paying, their just and due proportion of the taxes levied in this Commonwealth upon retail merchants, but that said tax burden has been, and is now being borne by the small individual

retail merchants in this State out of all proportion of volume of retail business enjoyed by them.

The say that those merchants enjoying the greater volume of business are not now paying more than 0.2% of the annual volume of sales for tax purposes, but that on the other hand, the small retail merchants have been, and are now, paying taxes for tax purposes at the rate of 1.3% of the gross annual sales.

[fol. 64] 7. Defendants further allege that the individual merchants in this Commonwealth, that is to say, those doing a small volume of business, owning but one store, and that store in or near the community in or where they reside, have for many years rendered to their home communities certain social services.

They say that said merchants, as citizens and residents of their respective communities, are taking and have heretofore taken, a prominent and leading part in all the charitable, religious, cultural, and social activities ~~of~~ their respective communities; they have, both voluntarily and in response to the pressure of public demand, given freely both of their time and money to all community activities. They say that said activities, so carried on by said merchants as a class, were worth, and are now worth, much actual money to this Commonwealth.

Defendants further say that with the coming of the multiple owned stores, such as operated by this plaintiff and others similarly situated, that such individual merchants are in large part being driven from business, and that the burden heretofore borne by said individual merchants as a class, will of necessity fall upon the State, and that the State can only bear said burden by an increase in taxation.

They state that the clerk's managers, and employees who operate plaintiff's stores, can not, by the very nature of their employment, take any material part in any community activities; that plaintiff's stores are conducted with one objective; and that that objective is to take from each community in which said store is situated the greatest possible amount of money.

8. Defendants say that House Bill 111, Chapter 149 of the Acts of the General Assembly of 1930, was introduced, passed, enrolled, and signed in the manner shown by the certified copies of the entries in both House and Senate

Journal relating to said bill, such certified copies are filed herewith and made a part hereof as if copied in full, marked for certification "Exhibit A."

Defendants further say that said bill was introduced, passed, enrolled, and filed in exact conformity with the Constitution and laws of the State of Kentucky.

9. For a separate and distinct defense in point of law arising upon the face of the Bill of Complaint herein, the [fol. 65] defendants say that the facts alleged in said Bill of Complaint are insufficient to constitute a valid cause of action.

Wherefore defendants pray judgment that the Bill of Complaint be dismissed and held for naught; and the prayer thereof denied; for all costs about this action expended, and for all proper relief.

J. W. Cammack, Attorney General; S. H. Brown, Assistant Attorney General; Howard Smith Gentry, Frankfort, Kentucky, Solicitors for Defendants. Batson, Carey & Welch, Louisville, Kentucky; Leslie W. Morris, Frankfort, Kentucky, of Counsel.

IN UNITED STATES DISTRICT COURT

[Title omitted]

REPLY—Filed April 1, 1931

Comes now the plaintiff, The Kroger Grocery & Baking Company, in the above entitled cause, and for its reply to the answer filed on behalf of the defendants, states as follows:

1. Plaintiff denies that the Act in question (House Bill No. 111, now Chapter 149 of the Acts of the General Assembly of 1930) levies a graduated tax upon the sale of goods at retail in the State of Kentucky, and plaintiff further denies that the same rate is levied upon each merchant doing a given amount of annual gross retail business without regard to whether such merchant operates one store or many stores.

2. Plaintiff denies that the classification made as a basis for the tax imposed by said Act rests upon volume of gross

sales or upon ability of the merchant affected by the various graduations of the Act to pay the tax imposed; plaintiff denies that the per cent of income per dollar investment increases progressively in the same or approximately the same ratio to the volume of sales as does the rate levied by said Act, and plaintiff states that the per cent of income per dollar of investment has no relation whatsoever to the volume of sales, and plaintiff alleges that lack of relationship between per cent of income per dollar investment and [fol. 66] volume of sales applies in the grocery business generally and to grocers operating in the Commonwealth of Kentucky as well as to other retail merchants.

3. Plaintiff denies that persons having large volume of sales necessarily have an increased ability to pay, and plaintiff alleges that the tax levied by the Act in question has no relationship to ability to pay and that said tax is levied on gross sales and bears no relation whatsoever to net income. Plaintiff further alleges that gross sales of any particular merchant has no relation to the net income of said merchant.

4. Plaintiff denies that the Kroger Grocery & Baking Company have made a profit of more than 3.1% on its annual sales in the Commonwealth of Kentucky, and plaintiff denies that it has realized a net income on capital invested in the retail business in the Commonwealth of Kentucky of 17.4%, and plaintiff denies that after the imposition of the tax imposed by the Act in question it will still have a net return of more than 13% on its invested capital, and plaintiff denies that there has been any mismanagement, internal dissension or unsound purchasing practices followed by it. Plaintiff denies that persons similarly situated will have a net return of more than 13% on their invested capital after the imposition of the tax in question, and plaintiff alleges that its return is illustrative of the return enjoyed by others engaged in a similar business, and plaintiff alleges that the per cent of profit to sales on such similar concerns does not exceed 1.5 to 2%.

5. Plaintiff denies that merchants enjoying a greater volume of business have a greater buying power than those enjoying a smaller volume of trade, and plaintiff states that many merchants with a small volume of trade have, by means of cooperative organizations, a buying power which

is equal to or greater than that of the plaintiff. Plaintiff alleges that individual merchants having a volume of trade which is smaller than the retail sales of this plaintiff can purchase goods, wares and merchandise of the same quality at the same discounts as are given plaintiff and at the same price that plaintiff has to pay for said goods, and plaintiff says that merchants having a smaller volume than this plaintiff, by means of voluntary purchasing combinations, [fol. 67] can and do contract for the entire output of many manufacturers, canners and packers engaged in the preparation of goods, wares and merchandise for retail trade.

Plaintiff denies that the ratio of turnover to capital invested increases progressively as volume increases and plaintiff alleges that increased sales, in many instances, are a result of an increased capital investment and not as a result of an increased rate of turnover. Plaintiff further alleges that individual merchants, conducting a single store, and having a smaller volume of sales, have a turnover which is equal to the turnover enjoyed by this plaintiff and have a minimum investment which bears the same proportion or a smaller proportion to their sales than the ratio of plaintiff's investment to its sales, and plaintiff says that these individual merchants enjoy a per cent of profit on capital invested which is equal to or exceeds the per cent of profit to capital invested enjoyed by this plaintiff.

Plaintiff says that it makes frequent delivery of goods, wares and merchandise to all of its stores in order to enable the public to secure fresh food, meats and vegetables at said stores, and plaintiff says that said frequent deliveries entail the use of expensive distribution agencies, such as trucks, warehouses, etc., and require the employment of a great number of persons. Plaintiff says that because of the use of said expensive equipment and because of the employment of persons for the purpose of making frequent deliveries to its stores, it is required to expend a great deal of money, and plaintiff denies therefore, that the frequent delivery of goods, wares and merchandise to its stores enables it to do a great volume of business with a minimum investment.

6. Plaintiff denies that the tax burden heretofore borne by those doing a retail business in the Commonwealth of Kentucky was unequal and plaintiff alleges that it has at all times borne its proportionate share and paid to the

Commonwealth of Kentucky and to the municipalities and subdivisions thereof all taxes which were levied on all other retail merchants at the same rate as paid by other retail merchants, and that this plaintiff has paid all other taxes at the same rate as has been paid by other individuals in the State of Kentucky. Plaintiff denies that the tax imposed by the Act in question was designed or intended to equalize the tax burden. Plaintiff states that the effect and opera- [fol. 68] tion of the Act in question will be to impose a burden on this plaintiff and others similarly situated and plaintiff further alleges that by reason of the low rate imposed on competitors and the deductions allowed, said competitors will only pay a negligible sum under the Gross Sales Tax Law. Plaintiff says that as a result of the discriminatory rates and deductions allowed a great percentage of the tax burden will be placed on this plaintiff and others similarly situated, than is placed upon other retail merchants, and that this burden will be imposed without regard to ability to pay.

Plaintiff admits that it pays a license tax for oleomargarine of $10., and plaintiff states that said license tax of $10. is imposed on each store operated by plaintiff, and plaintiff states that the sales of oleomargarine in each of its stores does not exceed the sales of oleomargarine by competitors who operate only a single store, and plaintiff denies that the practical operation and effect of said license tax levied on the privilege of selling the above commodity is to penalize, punish or place an undue burden on individual retail merchants who operate only a single store, and plaintiff further denies that the practical operation and effect of said license tax favors or subsidizes this plaintiff, or others similarly situated.

Plaintiff admits that it sells soft drinks and cigarettes and plaintiff states that it pays for each of the stores in which it sells soft drinks and cigarettes, a fixed license fee. Plaintiff alleges that the cigarettes and soft drinks sold in each of its stores does not exceed the cigarettes or soft drinks sold by its competitors operating a single store. Plaintiff denies therefore, that the practical operation and effect of said license taxes levied on the privilege of selling the above commodities is either to penalize, punish or

place an undue burden on individual merchants operating a single store, or to favor or subsidize this plaintiff.

Plaintiff further alleges that the tax paid for the privilege of selling oleomargarine, soft drinks and cigarettes is in direct proportion to its sales of those particular items. Plaintiff further says that the percentage of such tax to its sales of the particular items for which the tax is imposed, is as great as the percentage of tax paid for special licenses by individual merchants to the sales of similar articles by said individual merchants.

Plaintiff denies that this plaintiff or others similarly [fol. 69] situated, have heretofore and do now practically escape ad valorem taxes in the State of Kentucky, and plaintiffs deny that on July 1st, of each year they have on hand for assessment a minimum amount of merchandise. Plaintiff says that on July 1st, the plaintiff has on hand merchandise which is equal in value to merchandise on hand any other day during the year, and plaintiffs deny that individual merchants are compelled to and do bear an undue and unjust proportion of the ad valorem taxes levied on retail merchants of the Commonwealth of Kentucky.

Plaintiff denies that persons operating a single store have a lower turnover than this plaintiff, and plaintiff denies therefore, that said individual merchants are compelled to and do bear an unjust and undue proportion of the ad valorem taxes levied on retail merchants in the State of Kentucky.

Plaintiff denies it transfers goods, wares and merchandise from the State of Kentucky so as to escape ad valorem taxation, and plaintiff further denies that goods are moved out of this state or out of any other state for the purpose of evading the assessment of personal property or any other tax. Plaintiff alleges that a stock of goods, wares and merchandise in each store is maintained in relation to the needs of the store and the demands of customers, and plaintiff states that the needs of each particular store and demands of customers purchasing goods at Kentucky stores are no different on July 1st, than on any other date, and plaintiff states that the goods, wares and merchandise in stores in the State of Kentucky on the first day of July, 1930, are equal to the supply of goods, wares and merchandise at any other time.

Plaintiff denies that it evades taxation on money in banks in the State of Kentucky by sending its money to

any other state, and plaintiff states that individual merchants operating only one store have the same rights and same opportunities of depositing their money where they desire, as are enjoyed by this plaintiff.

Plaintiff denies that merchants enjoying a greater volume of business in the Commonwealth of Kentucky have never paid and are not now paying their just and due proportion of the taxes levied in the Commonwealth of Kentucky upon retail merchants, and plaintiff denies that merchants having a greater volume of business are not paying [fol. 70] more than .2% of the annual volume of sales for tax purposes, and plaintiff further denies that small retail merchants are paying as high as 1.3% of the gross annual sales for tax purposes. Plaintiff states that the ad valorem taxes of the State of Kentucky are based on the value of the property and that this plaintiff and others similarly situated pay at the same rate on the value of their property as do individual merchants having a smaller volume of sales.

Plaintiff denies that individual merchants in the Commonwealth of Kentucky doing a small volume of business and owning but one store render any special service to the community by reason of the fact that they operate a retail store.

Plaintiff further denies that the operation of its business or the operation of similar businesses has caused individual merchants to be driven from business, and plaintiff denies that there has been any special burden carried by said individual merchants, and plaintiff further denies that any special burden falls upon the state by reason of the operation of plaintiff's business.

Plaintiff further denies that the purpose of the Kentucky Gross Sales Tax Law was to prevent individual merchants from being put out of business, but plaintiff says that the purpose of said tax law was to subsidize individual merchants operating a single store at the expense of this plaintiff, although said subsidized merchants conduct a business which is similar to that of plaintiff, and compete directly with this plaintiff.

Plaintiff denies that the clerks, managers and employees who operate plaintiff's stores cannot, by the nature of their employment, take any material part in the community activities, but plaintiff states that these employees do take part

in community activities, and plaintiff further alleges that it encourages its employees to take an interest in the life of the community in which they reside. Plaintiff denies that its stores are conducted with the objective of taking from each community in which said store is situated, the greatest possible amount of money. Plaintiff states that it endeavors to sell food of the highest quality at the lowest possible price and that as a result of the saving which customers enjoy, because of the small margin of profit, that [fols. 71-75] the communities in which plaintiff's stores are situated have retained a great amount of money which would be lost to said communities if consumers purchased their food products at the establishments conducted by persons who did not attempt to sell merchandise of the quality sold by plaintiff at prices equal to prices charged by this plaintiff.

7. Plaintiff denies that House Bill No. 111, Chapter 149 of the Acts of the General Assembly of 1930, was introduced, passed, enrolled and filed in exact conformity with the Constitution and Laws of the State of Kentucky, and plaintiff states that said Act was introduced, read, passed, enrolled and signed under the title: "H. B. 111, An Act to Restrain the Unfair Competition of Chain Stores and in Aid of Individual Merchants of the Commonwealth."

Wherefore plaintiff prays that the above entitled Act be held unconstitutional and that the defendants be enjoined in the manner prayed for in its Bill of Complaint, and for its costs herein expended, and for all other proper relief.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors for Plaintiff.

Duly sworn to by C. M. Robertson. Jurat omitted in printing.

[fol. 76] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

KROGER GROCERY & BAKING COMPANY, Plaintiffs,

vs.

JOHN B. LEWIS, SELDEN GLENN, and HENRY M. CLINE, as Members of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, Auditor of Public Accounts of the Commonwealth of Kentucky, Defendants

Before Moorman, Circuit Judge, and Cochran and Dawson, District Judges

OPINION—Filed Nov. 6, 1931

In this action plaintiff, an Ohio corporation, owning and operating a chain of retail grocery stores in the United States, two hundred and sixty-three of which are located in different parts of the Commonwealth of Kentucky, attacks Chapter 149 of the 1930 Acts of the General Assembly of the Commonwealth of Kentucky, commonly known as the Retail Merchant's Gross Sales Tax Act, as violative of the Federal and State Constitutions. The case is now before us on application of the plaintiff for an interlocutory injunction, under Section 266 of the Judicial Code (28 U. S. C. A., Section 380).

At the threshold of the case we are met with the contention of the defendants that a Federal court of equity is without power to grant the relief sought, for the reason that the law of Kentucky affords plaintiff an adequate remedy at law for any injury sustained by it resulting from its enforced compliance with the terms of the Act. A decision of this question involves a construction of Section 10 of the Act, which reads as follows:

"No suit shall be maintained in any court to restrain or delay the collection or payment of the tax herein imposed upon any ground whatever, but the aggrieved taxpayer shall pay the tax and when due, and if paid under protest may at any time within two years from the date of such payments sue the Auditor of Public Accounts in an action at law to recover the tax so paid, with legal interest thereon

[fol. 77] from the date of payment. If it is finally determined that said tax, or any part thereof, was wrongfully collected for any reason, it shall be the duty of the Auditor of Public Accounts then in office to issue his warrant on the Treasurer of the Commonwealth of Kentucky for the amount of such tax so adjudged to have been wrongfully collected, together with interest thereon, and the Treasurer shall pay same out of the General Fund of the State. A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made, and which are not barred by the limitation of two years herein imposed."

If this section of the Act affords to the aggrieved taxpayer a remedy as certain, complete, practicable and efficient as is available in equity, and if the remedy thus afforded is available in the Federal Courts, other jurisdictional requirements appearing, then this action must be dismissed. The declared purpose of Section 10 is to prevent injunctive interference with the operation of the law. It is quite apparent from a reading of this section that its draftsman was familiar with the rule, that in order to make effective the prohibition against injunctive interference, the statute must furnish an adequate remedy at law in lieu thereof. The effort in Section 10 is to afford such adequate remedy at law, and, in view of the well settled rule that such a remedy must be available in the Federal Courts, if the necessary jurisdictional facts exist, it will not be presumed that the legal remedy provided was intended to be confined to the State courts, unless the language of the Act requires such construction. On the contrary, the statute will be construed to render effective the evident legislature intent, if such construction is not inconsistent with the plain language of the Act. Of course, the common law action authorized by Section 10 against the Auditor of Public Accounts is, in reality, an action against the state. The section does not contemplate that the Auditor shall personally satisfy any judgment obtained under its provisions. By its express terms the ultimate liability is that of this State, and the Auditor is simply designated as a convenient alter ego of the State in suits for the recovery of taxes and interest claimed to have been illegally collected under the Act in question. Highway Commission of Wyoming v. Utah Con-

struction Co., 278 U. S. 194. So we must regard Section 10 [fol. 78] as the standing consent of the State, subject to the conditions therein imposed, to be sued for the recovery of taxes exacted under the provisions of the Act in question. Of course, when a sovereign consents to be sued, it may fix the conditions under which such suit may be maintained. It may even name the court in which such suit may be maintained, and the State's consent to be sued in a Federal Court. Chandler v. Dix, 194 U. S. 590; Murray v. Wilson Distilling Co., 213 U. S. 151.

We are unable, however, to agree with the suggestion of the plaintiff that Section 10 limits the common law action therein provided for to State courts. The section contains no language, expressly or by implication, so limiting the cause of action. The language is certainly broad enough to authorize actions in the Federal courts, and having in mind the evident purpose of the General Assembly to provide an adequate remedy at law for all taxpayers under the act, we conclude that the legal remedy provided by Section 10 was intended to be available in the Federal courts, as well as in the State courts. Such being the case, Section 10 operates as a waiver the immunity against suits in Federal courts granted to States by the Eleventh Amendment to the Federal Constitution.

The plaintiff contends that even conceding that it is the purpose of Section 10 to make the legal remedy provided by that section available in the Federal courts, such purpose is aborted by reason of the fact that the suit at law authorized by that section is a mandamus proceeding, of which United States District Courts have no original jurisdiction. If the premise thus advanced is sound, the conclusion necessarily follows, as it is well settled that Federal courts are without jurisdiction to issue a writ of mandamus in an original action brought for the sole purpose of securing relief by such writ. Marbury v. Madison 1 Cranch 137; Covington Bridge Co. v. Hager, 203 U. S. 109; Knapp v. Lake Shore & Michigan Southern Ry. Co., 197 U. S. 536. But we can not agree with the premise. The common law suit authorized by Section 10 is not an original mandamus proceeding. It is an ordinary common law action against the Auditor of Public Accounts in his official capacity as the agent and representative of the State for a money judgment for the amount of taxes paid under the Act under

[fol. 79] protest, and interest thereon. The suit has none of the characteristics of an original mandamus proceeding. If, after judgment is obtained, the Auditor then in office declines to issue a warrant for the amount of such judgment and interest, the Federal Court which rendered the judgment could issue a mandamus to compel the issual of such a warrant. Such a writ, however, would not be one issued in an original mandamus proceeding, but would be one issued in aid of the Court's jurisdiction which had already attached in the common law action for a money judgment. The issual of the writ in such a situation is authorized by Section 262 of the Judicial Code (Title 28, Section 377, U. S. C. A.) and is fully justified by the authorities. County of Green v. Daniel, 102 U. S. 187; Davenport v. County of Dodge, 105 U. S. 237.

We do not agree with the suggestion of the plaintiff that the settled and approved practice under Section 162 of Kentucky Statutes fixes the nature of the proceeding under Section 10 of the Act in question. Section 162 is, in part, as follows:

"When it shall appear to the Auditor that money has been paid into the treasury for taxes when no such taxes were in fact due, he shall issue his warrant on the Treasurer for such money so improperly paid in behalf of the person who paid the same."

This section makes no provision whatever for a common law action against the Auditor for a money judgment. It simply lays upon the Auditor the duty in a proper case of issuing his warrant for the taxes illegally or improperly collected. If he fails in the performance of this statutory duty, then mandamus in the State court is the only remedy against him, and in such proceeding the court must determine if he wrongfully refused to issue warrant for the amount claimed. Under Section 10 of the Act under consideration, however, the statutory duty of the Auditor to issue his warrant never arises until the amount for which the warrant is to be issued has been fixed by a money judgment in a common law suit. The difference between the two provisions of the statute is obvious. Furthermore, if the remedy under Section 10 is the same remedy granted by Section 162 of Kentucky Statutes, there would have [fol. 80] been no occasion for the incorporation of Section

10 in the Act under consideration. We must and do regard Section 10 as a specific remedy at law, intended to apply only to the recovery of taxes exacted under the Gross Sales Tax Act.

The plaintiff suggests that conceding that Section 10 gives a right of action in Federal Courts, still the remedy at law is not adequate, for the reason that the General Fund of the State, out of which Section 10 directs the warrants to be paid, is not in such condition as to enable these warrants to be paid within a reasonable time after they are issued. In support of this argument plaintiff has introduced proof, showing that there are now outstanding nearly ten million dollars of warrants against the General Fund, and that this fund is usually over two years behind in the redemption of warrants drawn against it. It may be conceded that if taxpayers obtaining judgments under Section 10 were compelled to wait an unreasonable length of time for their money, the remedy at law given by this section would not be adequate; but no such unreasonable delay is indicated. The fair and reasonable manning of that part of Section 10 which provides for the payment of warrants issued in satisfaction of judgments obtained under that section is that such warrants shall be paid when presented, if there is sufficient money in the General Fund to do so, even though there may be outstanding other and prior warrants against this fund. The general law of Kentucky contains no express direction to the Treasurer to pay warrants drawn on the treasury in the order of their issue, although such is probably the fair inference to be drawn from language used in Section 4688a-4, Kentucky Statutes, Carroll's 1930 Edition, and the Court of Appeals in the case of Rhea v. Newman, 153 Ky. 604, held that the Treasurer should pay them in the order issued, for the purpose of insuring fair treatment to all. Bearing in mind, however, that the purpose of Section 10 is to afford the taxpayers entitled to its provisions a full and complete remedy at law, and that this remedy would not be full and complete unless the holders of judgments obtained under its provisions could secure the reasonably prompt payment thereof, it seems entirely consistent to hold that it was the purpose of the General Assembly to give warrants issued in satisfaction of judgments obtained under Section 10 [fol. 81] priority of payment over other outstanding war-

rants against the General Fund, and to that extent to make an exception to the general rule as to the order of payment of State warrants. Such a construction of the section does no violence to its language and works no impairment of any contract obligation of the State to holders of prior warrants, as such outstanding warrants do not pledge the State to redeem them at any particular time. Even if we should be mistaken in this construction of Section 10, and if warrants issued under its provisions enjoy no priority of payment, we would not be justified in holding that taxpayers recovering judgments under Section 10 would be required to wait an unreasonable length of time to realize on such judgments.

Under the general law of Kentucky, when a warrant against the General Fund is presented for payment, and the fund is not sufficient to satisfy same, the Treasurer must stamp same as interest bearing, and it thereafter draws interest at the rate of five per cent per annum, payable semi-annually, until called for redemption. (Section 4688a-2, Kentucky Statutes, Carroll's 1930 Edition.) Such warrants by the law of Kentucky are made negotiable instruments and are exempt from State and local taxation. (Section 4688a-8, Kentucky Statutes, Carroll's 1930 Edition.) It appears that these warrants are readily salable, and the record fails to disclose that any concession in the way of discount must be made to effect their sale. It will be observed that Section 10 not only provides for the recovery of the taxes paid, but for interest thereon as well. So far as we are advised, the Supreme Court has never held that the recovery of interest on taxes paid is necessary in order to make the remedy at law adequate. On the contrary, it is fairly deducible from the cases that the remedy at law is adequate, even though no recovery of interest is allowed in the cases of Shelton v. Platt, 139 U. S. 591, and Allen v. Pullman Palace Car Co., 139 U. S. 658, the Supreme Court held that a law of Tennessee which permitted a taxpayer to recover from the State taxes paid under protest if they were wrongfully collected, but which made no provision for the recovery of interest, afforded an adequate remedy at law. Inasmuch as it is a settled principle of law that interest can not be collected from a sov-
[fol. 82] ereign State unless its recovery is specifically authorized by a State statute, we can not presume that the

Supreme Court in the cases referred to went on the assumption that interest as a matter of right followed the judgment. So we think it may be safely said that in permitting the recovery of interest under Section 10, the Commonwealth has bound itself to return more than was necessary in order to meet the test of an adequate remedy at law. Therefore, even if it appeared as a fact that some discount must be accepted by those who sell warrants issued under Section 10, it is probably that such discount would not exceed the interest which had accumulated on the tax from the date of its payment to the date of the rendition of the judgment. Furthermore, the State of Kentucky has no bonded indebtedness and is entirely solvent. Subject to the requirement of uniformity, the power of the General Assembly to tax for public purposes of the State is unlimited, and with this unlimited power residing in the General Assembly, this court will not assume that under Section 10 an aggrieved taxpayer can not recover within a reasonable time the full amount of the taxes paid.

Neither are we impressed with the contention of the plaintiff that Section 10 does not afford an adequate remedy at law, because under it a taxpayer would be compelled to resort to a multiplicity of suits to recover the various payments made under the Act. There is no necessity for a multiplicity of suits under Section 10. That section specifically provides that—

"A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as ma-y payments as may have been made, and which are not barred by the limitation of two years herein, imposed."

This is the law even though such a provision had not been incorporated in Section 10. Therefore, the plaintiff may united in one suit its claims growing out of each payment of taxes made under the Act up to the time of filing its suit, and that action would fully determine every question which could be determined in an equitable action. There would be no necessity for other suits, except possibly to [fols. 83-86] avoid the running of the statute of limitations pending the final determination of the suit already filed. A court of equity will not interfere on the ground of multiplicity of suits, where such multiplicity consists of suits

by the same plaintiff against the same defendant for causes of action arising out of the same facts and legal princi-les. A multiplicity of suits in such a situation would be a multiplicity of the plaintiff's own making, and would afford no ground for equitable intervention. Boise Artesian Water Co. v. Boise City, 213 U. S. 276; Standard Oil Co. v. Atlantic Coast Line Co., 13 Fed. (2d) 653. We will not assume that after the validity of the tax has been once definitely settled in an action at law, the State will make any attempt to enforce further collections.

Finally, the fact that the Act imposes drastic penalties for failure to comply with its terms, and pay the tax when due, affords no basis for equitable intervention. The Act visits these penalties upon the taxpayer only in event of failure to comply with its terms and pay the tax. To test the validity of this Act in an action at law, it is not necessary for the plaintiff to refuse to pay the tax and take the hazard of the cou-ts deciding against him when the State undertakes in a legal action to enforce the penalties. All the taxpayer is required to do is to pay the tax, and when he has done this, he not only avoids the imposition of penalties, but has open to him a simple and direct way in a common law suit of attacking the validity of the law and of recovering the taxes paid, with interest thereon.

We, therefore, conclude that the remedy afforded by Section 10 of the Act is an adequate one within the Federal rule, and the motion to dismiss for want of equitable jurisdiction must be sustained.

November 6, 1931.

Chas. H. Moorman, U. S. Circuit Judge. A. M. J. Cochran, U. S. District Judge. Chas. I. Dawson, U. S. District Judge.

Nichols, Morrill, Wood, Marx & Ginter, Cincinnati, O.; Trabue, Doolan, Helm & Helm, Louisville, Ky., Attorneys for Plaintiff.

J. W. Cammack, Attorney General, Frankfort, Ky.; S. H. Brown, Asst. Attorney General, Frankfort, Ky.; H. S. Gentry, Batson, Cary & Welch, Louisville, Ky.; Leslie W. Morris, Frankfort, Ky., Attorneys for Defendants.

[fols. 87-90] SUPREME COURT OF THE UNITED STATES

October Term, 1932

Nos. 27, 28, 29, 30

27

THE STEWART DRY GOODS CO., Appellant,

vs.

JOHN B. LEWIS, SELDEN R. GLENN, et al.

28

FRED LEVY et al., Appellants,

vs.

JOHN B. LEWIS, SELDEN R. GLENN, et al.

29

J. C. PENNEY CO., Appellant,

vs.

JOHN B. LEWIS, SELDEN R. GLENN, et al.

30

KROGER GROCERY & BAKING CO., Appellant,

vs.

JOHN B. LEWIS, SELDEN R. GLENN, et al.

Appeals from the District Court of the United States for the Western District of Kentucky

PER CURIAM—Filed in District Court Dec. 10, 1932

After interlocutory injunction had been granted, these cases went respectively to final hearing upon motions to dismiss the bills of complaint, and these were dismissed solely upon the ground that plaintiffs had an adequate remedy at law. The Court is of the opinion that the decisions cannot be sustained merely upon the face of the statute

invoked (Kentucky Acts of 1930, Chap. 149, Sec. 10) in view of the allegations of the bills of complaint that the only remedy provided is to obtain warrants upon the General Fund of the State in the hands of the State Treasury to be paid if and when funds are available for the payment of such warrants in the usual and orderly course; that there are now outstanding many such warrants drawn by the Auditor of Public Accounts upon the General Fund in the hands of the State Treasurer, which have been outstanding since June, 1927, and cannot be collected by the owners or holders for lack of funds in the Treasury; and that there were at the time of the beginning of these suits outstanding warrants aggregating $9,880,502.76 drawn by the Auditor of Public Accounts upon the State Treasurer, presented for payment, but not paid for lack of funds. (See State Budget Commission v. Lebus, 244 Ky. 700, 703, 714, as to warrants outstanding.) Defendants' answers denied the above-mentioned allegations, but it does not appear that there has been a hearing upon evidence of the issue tendered and no findings of fact upon the subject have been made by the courts below.

The decrees are reversed and the causes remanded to the District Courts, of three judges, for final hearing upon the merits, without prejudice to a determination upon evidence with respect to the questions of the status of outstanding warrants upon the General Fund in the State Treasury, and whether warrants of the sort contemplated by section 10 of the Act in question are accorded preference in payment over other warrants and the basis, if any, for the assurance that such preference will be continued so that in the event of actions by the plaintiffs at law under Section 10 they would be afforded a certain, reasonably prompt and efficacious remedy. Davis v. Wakelee, 156 U. S. 680, 688; Atlantic Coast Line Railroad Company v. Daughton, 262, U. S. 413, 426.

October 24, 1932.

[fol. 91] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY

In Equity. No. 3908

[Title omitted]

ORDER GRANTING INTERLOCUTORY INJUNCTION—Filed Dec. 10, 1932

This day came the parties, plaintiff and defendants, by their respective counsel, and the plaintiff renewed its motion for an interlocutory injunction, made herein January 24, 1931.

Said motion having been heretofore heard and submitted, and the Court being sufficiently advised, it is considered, ordered and adjudged that said motion be sustained, and that the defendants and each of them be, and each of them is hereby, enjoined and restrained until the further order of Court herein:

(1) From enforcing or executing, either directly or indirectly, against this plaintiff and/or other taxpayers similarly situated, the provisions of Chapter 149 of the Acts of the General Assembly of Kentucky at its 1930 session, entitled:

"An Act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this act."

(2) From instituting or maintaining against this plaintiff and/or other taxpayers similarly situated, any prosecution or action at law, or any suit or suits in equity, to recover of or from the plaintiff or other taxpayers similarly situated any portion of the alleged tax sought to be exacted of them under said Act, or for the infliction of any of the penalties prescribed in said Act for the non-payment of such tax or for failure to make or file any reports or returns required thereunder, or from taking any steps look-

ing to the prosecution of the plaintiff or any of its agents [fol. 92] or servants or employes, or any other person, firm or corporation similarly situated, or any of their agents or servants or employes, for a violation of said Act in any of its provisions.

The interlocutory injunction herein granted shall, until further order of Court herein, continue in effect as to the plaintiff and as to each retail merchant listed of record (by order entered herein March 30, 1931, and supplemented as to Ben Snyder, Incorporated, by later order) as included in the same class of taxpayers as plaintiff, and shall remain in full force and effect as to the plaintiff and each of said taxpayers so listed, until the final determination of this cause by this court, or until further order of Court herein.

To all of which the defendants and each of them object and except.

Provided, however, that the plaintiff, for itself only, and each of said taxpayers so listed, desiring to avail himself or itself of the benefit of said interlocutory injunction pending the final determination of this cause, for himself or itself only (and not one for another) shall within thirty (30) days from the entry of this order execute such bond or make such deposit of money or securities as required herein and as may be reasonably necessary to secure the Commonwealth of Kentucky against loss of any taxes accruing for the calendar years 1930, 1931 and 1932 under the Act assailed herein by plaintiff, in the event the validity of said Act should be finally established, and also against the loss of any interest or court costs or other proper charges that may be or become due from each such taxpayer under said Act.

The amount of any such bond given and the amount or value of securities or money deposited by the plaintiff or by any taxpayer entitled hereunder to the benefit of the interlocutory injunction herein granted, shall be fixed at an amount equal to the estimated taxes claimed from said taxpayer for the taxable period of the years 1930, 1931 and 1932, and said bond shall be secured by corporate surety [fols. 93–98] or by a ple-ge and deposit of negotiable securities acceptable to the Attorney General of Kentucky, and if the parties cannot agree upon the amount of such bond or the amount or character of such negotiable securities, then the amount of such bond or the amount and character of

negotiable securities, and the pledge and deposit thereof, shall be as prescribed by the regular Judge of this Court, without the necessity of calling in the other two Judges for that purpose.

In the event the plaintiff or any one of said taxpayers entitled hereunder to the benefit of the interlocutory injunction herein granted shall fail to execute such bond or to give such security as may be required of it or him or them, within thirty (30) days from the entry of this order, said interlocutory injunction as to such taxpayer so failing shall be thereupon immediately dissolved and it shall afford no further protection herein to such taxpayer.

Upon the execution by the plaintiff or by any one of said listed taxpayers entitled hereunder to the benefit of the interlocutory injunction herein granted, of a bond secured as herein provided, or the making by the plaintiff or such taxpayer of a pledge or deposit of securities as herein provided, the bond or bonds heretofore executed by the plaintiff in this cause shall be cancelled as to all future liability, and any such pledge or deposit released as to all future liability, and all deposits of securities theretofore made by the plaintiff or by any such taxpayer shall be released, and such deposited securities shall be redelivered to the p-rsons respectively depositing same.

Chas. H. Moorman, A. M. J. Cochran, Chas. I. Dawson.

Bailey P. Wooten, Attorney General. Trabue, Doolan, Helm & Helm; Nichols, Morrill, Wood, Marx & Ginter, Solicitors for Pltf.

[fol. 99] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

In Equity. No. 3908

[Title omitted]

AMENDMENT TO BILL OF COMPLAINT—Filed June 1, 1933

The plaintiff, by leave of Court, amends its Bill of Complaint herein in respect to the matters hereinafter set out, and by way of amendment now makes the following averments:

Paragraph I

Amending Paragraph 2 of its original Bill of Complaint plaintiff repeats the averments contained therein and in addition thereto states that since the filing of its original Bill of Complaint, J. Dan Talbot has succeeded Clell Coleman as the Auditor of Public Accounts of Kentucky and has been substituted for Clell Coleman as a party defendant to this action.

Paragraph II

Amending Paragraph 5 of its original Bill of Complaint, plaintiff repeats the allegations contained therein and in addition thereto states:

During the years, 1930, 1931 and 1932 the number of stores owned by the plaintiff in the State of Kentucky, the total gross sales without deductions in all of said stores, and the average gross sales in each of said stores, were as follows:

Year	Number of stores	Total sales	Average sales per store
1930	289	$14,653,448.22	$50,703.97
1931	254	13,496,915.40	53,137.46
1932	249	11,447,611.81	45,974.34

[fol. 100]

Paragraph III

Amending Paragraph 9 of its original Bill of Complaint plaintiff repeats the averments contained herein and in addition thereto states:

That the tax claimed by the Commonwealth of Kentucky on plaintiff's sales for the year 1931, exclusive of credits and exemptions, amounts to $127,919.15; and for the year 1932 the tax claimed by the Commonwealth of Kentucky, exclusive of credits and exemptions would amount to $107,526.11.

Paragraph IV

Amending Paragraph b of Section 10 of its Bill of Complaint, and especially that portion which appears on page 19 of the printed Bill of Complaint, the plaintiff repeats the averments herein with respect to the year 1929 and 1930 and states that during the year 1930 the plaintiff paid in the Commonwealth of Kentucky for special State license, excise, occupational and corporation license taxes under the

provisions of the laws then in force, the sum of $15,369.00, being an average of $53.18 for each of its stores. During the year 1931 the plaintiff paid $15,643.84 for special State license, excise, occupational and corporation license taxes, being an average of $61.59 for each store. During the year 1932 plaintiff paid in the Commonwealth of Kentucky for special State license, excise, occupational and corporation license taxes $12,271.75, being an average of $49.28 per store.

All other grocery stores doing a similar business in competition with the plaintiff in the Commonwealth of Kentucky during said period paid in said special taxes approximately the same sum per store as was paid by the plaintiff, and the amount of special taxes so paid is permitted by said Act to be deducted from the amount of taxes assessed under this Act so that in practical effect and operation retail merchants having sales of $400,000.00 or less will not be required to pay any taxes under the Act.

[fol. 101] Paragraph V

For further amendment to Paragraph 10 of its original Bill of Complaint, especially sub-paragraph e on page 24, plaintiff repeats the averment therein contained and states that it will be required to pay a tax in excess of $431.83 per store for each of said stores for each year. The average tax per store for 1931 would be $503.62. Competing merchants; however, under the operation and effect of the taxing measure are practically exempted from taxation while the plaintiff would be required to pay an excessive, prohibitory, oppressive and confiscatory tax in addition to all other taxes on its stores, the plaintiff thereby being denied the equal protection of the laws and the plaintiff being thereby deprived of its property without due process of law, and its effect upon the plaintiff and other taxpayers similarly situated is unjust, unequal, discriminatory and arbitrary.

Paragraph VI

Amending its original Bill of Complaint, plaintiff further states that in its actual operation for the years 1930, 1931 and 1932, said challenged Act has, in fact, produced the following results as disclosed by the records of the State Tax Commission of Kentucky, which included complete returns from all taxpayers to April 17, 1933 with the excep-

tion of the plaintiff and other- listed by order of court herein as entitled to the benefit of this litigation and of the restraining orders heretofore granted herein.

Aside from the plaintiff and the other taxpayers in the several classes represented in this litigation and protected by the restraining orders issued herein, it appears from the records of the State Tax Commission that there are or were in the State of Kentucky 24,163 retail merchants who were required to and did make reports to said Commission for the calendar year 1930, and 20,382 retail merchants who were required to and did make reports to said Commission for the calendar year 1931, and 14,597 retail merchants who were required to and did make reports to said Commission for the calendar year 1932.

[fol. 102] The following summaries show the actual operation and effect of said challenged Act as to the taxpayers who have made the reports required of them under said Act, to and including April 17, 1933.

(Here follows side folio 103)

[fol. 103]

Analysis of Kentucky Gross Retail Sales Tax Returns for the Y

Number of Reports Filed by Retail Merchants—	Nu
Showing Retail Sales less than $400,000	24
Showing Retail Sales between 400,000 and 500,000	
Showing Retail Sales between 500,000 and 600,000	
Showing Retail Sales between 600,000 and 700,000	
Showing Retail Sales between 700,000 and 800,000	
Showing Retail Sales between 800,000 and 900,000	
Showing Retail Sales between 900,000 and 1,000,000	
Showing Retail Sales in excess of $1,000,000	
Totals	24

Analysis of Reports Showing Tax Liability—	Num ret
Showing Sales less than $400,000	24
Showing Sales between 400,000 and 500,000	
Showing Sales between 500,000 and 600,000	
Showing Sales between 600,000 and 700,000	
Showing Sales between 700,000 and 800,000	
Showing Sales between 800,000 and 900,000	
Showing Sales between 900,000 and 1,000,000	
Showing Sales in excess of $1,000,000	
Totals	24,

Number of Merchants Reporting Sales of—	Sho t liab
Less than $10,000	8,
$ 10,000 and under $ 25,000	4,
25,000 and under 50,000	1,
50,000 and under 75,000	
75,000 and under 100,000	
100,000 and under 150,000	
150,000 and under 200,000	
200,000 and under 250,000	
250,000 and under 300,000	
300,000 and under 400,000	
Over $400,000	
Totals	16,

[fol. 103]

SCHEDULE "A"

Analysis of Kentucky Gross Retail Sales Tax Returns for the Year 1930, Filed During the Period from the Inauguration of the Tax to April 17, 1933

Number of Reports Filed by Retail Merchants—	Number filed	Number indicating tax	Number indicating no tax
Showing Retail Sales less than $400,000	24,128	16,413	7,715
Showing Retail Sales between 400,000 and 500,000	13	7	6
Showing Retail Sales between 500,000 and 600,000	8	5	3
Showing Retail Sales between 600,000 and 700,000	5	4	1
Showing Retail Sales between 700,000 and 800,000	4	2	2
Showing Retail Sales between 800,000 and 900,000	1	0	1
Showing Retail Sales between 900,000 and 1,000,000	0	0	0
Showing Retail Sales in excess of $1,000,000	4	3	1
Totals	24,163	16,434	7,729

Analysis of Reports Showing Tax Liability—	Number of returns	Gross sales	Gross tax	Credits allowed	Net tax	Credits shown in excess of tax liability
Showing Sales less than $400,000	24,128	340,197,497.00	167,880.34	78,659.58	89,220.76	226,979.91
Showing Sales between 400,000 and 500,000	13	5,866,935.00	3,454.81	2,193.44	1,261.37	6,709.42
Showing Sales between 500,000 and 600,000	8	4,416,568.00	3,440.42	2,123.02	1,317.40	5,306.50
Showing Sales between 600,000 and 700,000	5	3,234,563.00	3,266.68	1,498.12	1,768.56	177.20
Showing Sales between 700,000 and 800,000	4	2,989,019.00	4,110.66	2,727.57	1,383.09	2,298.47
Showing Sales between 800,000 and 900,000	1	814,559.00	636.15	636.15	0	1,755.24
Showing Sales between 900,000 and 1,000,000	0	0	0	0	0	0
Showing Sales in excess of $1,000,000	4	5,329,123.00	25,491.24	14,099.48	11,391.76	4,593.15
Totals	24,163	362,848,264.00	208,280.30	101,937.36	106,342.94	247,819.89

Number of Merchants Reporting Sales of—	Showing tax liability	Showing no tax liability
Less than $10,000	8,808	5,374
$ 10,000 and under $ 25,000	4,436	1,556
25,000 and under 50,000	1,911	508
50,000 and under 75,000	596	149
75,000 and under 100,000	242	45
100,000 and under 150,000	217	41
150,000 and under 200,000	91	20
200,000 and under 250,000	48	12
250,000 and under 300,000	28	3
300,000 and under 400,000	36	7
Over $400,000	21	14
Totals	16,434	7,729

[fol. 104] SCHEDULE "B"

Statement Showing Number of Retail Merchants Reporting Gross Sales Taxes for the Year 1930 Classified by Amount of Tax Paid, Filed During the Period from the Inauguration of the Tax to April 17, 1933

Number of taxpayers reporting tax less than 50¢	2,640
" " " " " 50c to 1.00	2,192
" " " " " 1.00 to 2.00	2,748
" " " " " 2.00 to 3.00	1,754
" " " " " 3.00 to 4.00	1,187
" " " " " 4.00 to 5.00	890
" " " " " 5.00 to 10.00	2,054
" " " " " 10.00 to 15.00	818
" " " " " 15.00 to 20.00	431
" " " " " 20.00 to 25.00	342
" " " " " 25.00 to 50.00	495
" " " " " 50.00 to 100.00	176
" " " " " 100.00 to 200.00	60
" " " " " 200.00 to 300.00	6
" " " " " 300.00 to 400.00	4
" " " " " 400.00 to 500.00	1
" " " " " 500.00 to 600.00	....
" " " " " 600.00 to 700.00	2
" " " " " 700.00 to 800.00	1
Over $1,000.00	3
Total	15,804
Undetermined and unclassified	630
	16,434

(Here follows side folio 105)

[fol. 105]

Analysis of Kentucky Gross Retail Sales Tax Returns for t

Number of Reports Filed by Retail Merchants—	Num fil
Showing Retail Sales less than $400,000	20,
Showing Retail Sales between 400,000 and 500,000	
Showing Retail Sales between 500,000 and 600,000	
Showing Retail Sales between 600,000 and 700,000	
Showing Retail Sales between 700,000 and 800,000	
Showing Retail Sales between 800,000 and 900,000	
Showing Retail Sales between 900,000 and 1,000,000	
Showing Retail Sales in excess of 1,000,000	
Totals	20,

Analysis of Reports Showing Tax Liability—	Numb retu
Showing Sales less than $400,000	20,
Showing Sales between 400,000 and 500,000	
Showing Sales between 500,000 and 600,000	
Showing Sales between 600,000 and 700,000	
Showing Sales between 700,000 and 800,000	
Showing Sales between 800,000 and 900,000	
Showing Sales between 900,000 and 1,000,000	
Showing Sales in excess of 1,000,000	
Totals	20,

Number of Merchants Reporting Sales of—	Show ta liabi
Less than $10,000.00	8,
$10,000 and under $25,000	1,
25,000 and under 50,000	1,
50,000 and under 75,000	
75,000 and under 100,000	
100,000 and under 150,000	
150,000 and under 200,000	
200,000 and under 250,000	
250,000 and under 300,000	
300,000 and under 400,000	
Over $400,000	
Totals	12,

[fol. 105]

SCHEDULE "A"

Analysis of Kentucky Gross Retail Sales Tax Returns for the Year 1931, Filed During the Period from January 1, 1932 to April 18, 1933

Number of Reports Filed by Retail Merchants—	Number filed	Number indicating tax	Number indicating no tax
Showing Retail Sales less than $400,000	20,351	12,173	8,178
Showing Retail Sales between 400,000 and 500,000	10	6	4
Showing Retail Sales between 500,000 and 600,000	9	6	3
Showing Retail Sales between 600,000 and 700,000	3	3	0
Showing Retail Sales between 700,000 and 800,000	2	1	1
Showing Retail Sales between 800,000 and 900,000	3	2	1
Showing Retail Sales between 900,000 and 1,000,000	2	2	0
Showing Retail Sales in excess of 1,000,000	2	2	0
Totals	20,382	12,195	8,187

Analysis of Reports Showing Tax Liability—	Number of returns	Gross sales	Gross tax	Credits allowed	Net tax	Credits shown on reports in excess of tax liability
Showing Sales less than $400,000	20,351	290,824,180.00	145,489.13	78,719.31	66,769.82	179,339.94
Showing Sales between 400,000 and 500,000	10	4,520,653.00	2,520.64	1,513.05	1,007.59	3,260.06
Showing Sales between 500,000 and 600,000	9	4,887,385.00	3,572.59	2,212.57	1,360.02	5,699.06
Showing Sales between 600,000 and 700,000	3	1,927,791.00	2,161.17	700.00	1,461.17	.....
Showing Sales between 700,000 and 800,000	2	1,472,166.00	2,296.25	1,391.17	905.08	3,109.00
Showing Sales between 800,000 and 900,000	3	2,549,814.00	5,548.72	2,429.98	3,118.74	237.08
Showing Sales between 900,000 and 1,000,000	2	1,895,680.00	5,213.29	1,084.94	4,128.35	.....
Showing Sales in excess of 1,000,000	2	2,389,404.00	9,994.07	3,607.85	6,386.22	.....
Totals	20,382	310,467,073.00	176,795.86	91,658.87	85,136.99	191,645.14

Number of Merchants Reporting Sales of—	Showing tax liability	Showing no tax liability
Less than $10,000.00	8,531	4,942
$10,000 and under $25,000	1,818	2,160
25,000 and under 50,000	1,006	759
50,000 and under 75,000	388	145
75,000 and under 100,000	175	45
100,000 and under 150,000	128	68
150,000 and under 200,000	63	27
200,000 and under 250,000	24	12
250,000 and under 300,000	19	11
300,000 and under 400,000	21	9
Over $400,000	22	9
Totals	12,195	8,187

[fol. 106]

SCHEDULE "B"

Statement Showing Number of Retail Merchants Reporting Gross Sales Taxes for the Year 1931 Classified by Amount of Tax Paid, Filed During the Period from January 1, 1932 to April 18, 1933

Number of Taxpayers Reporting Tax less than					50¢			2,220
"	"	"	"	"	50¢	to	1.00	1,838
"	"	"	"	"	1.00	"	2.00	2,323
"	"	"	"	"	2.00	"	3.00	1,239
"	"	"	"	"	3.00	"	4.00	733
"	"	"	"	"	4.00	"	5.00	585
"	"	"	"	"	5.00	"	10.00	1,490
"	"	"	"	"	10.00	"	15.00	642
"	"	"	"	"	15.00	"	20.00	339
"	"	"	"	"	20.00	"	25.00	212
"	"	"	"	"	25.00	"	50.00	400
"	"	"	"	"	50.00	"	100.00	126
"	"	"	"	"	100.00	"	200.00	31
"	"	"	"	"	200.00	"	300.00	7
"	"	"	"	"	300.00	"	400.00	2
"	"	"	"	"	400.00	"	500.00	1
"	"	"	"	"	500.00	"	600.00	0
"	"	"	"	"	600.00	"	700.00	0
"	"	"	"	"	700.00	"	800.00	0
"	"	"	"	"	800.00	"	900.00	1
"	"	"	"	"	900.00	"	1,000.00	2
Over $1,000.00								4
Total								12,195

(Here follows side folio 107)

[fol. 107]

Analysis of Kentucky Gross Retail Sales Tax Returns fo

Number of Reports Filed by Retail Merchants—

Showing Retail Sales less than $400,000	
Showing Retail Sales between 400,000 and 500,000	
Showing Retail Sales between 500,000 and 600,000	
Showing Retail Sales between 600,000 and 700,000	
Showing Retail Sales between 700,000 and 800,000	
Showing Retail Sales between 800,000 and 900,000	
Showing Retail Sales between 900,000 and 1,000,000	
Showing Retail Sales in excess of 1,000,000	
Totals	

Analysis of Reports Showing Tax Liability—

Showing Sales less than $400,000	
Showing Sales between 400,000 and 500,000	
Showing Sales between 500,000 and 600,000	
Showing Sales between 600,000 and 700,000	
Showing Sales between 700,000 and 800,000	
Showing Sales between 800,000 and 900,000	
Showing Sales between 900,000 and 1,000,000	
Showing Sales in excess of 1,000,000	
Totals	

Number of Merchants Reporting Sales of—

Less than 10,000	
$10,000 and under $25,000	
25,000 and under 50,000	
50,000 and under 75,000	
75,000 and under 100,000	
100,000 and under 150,000	
150,000 and under 200,000	
200,000 and under 250,000	
250,000 and under 300,000	
300,000 and under 400,000	
Over 400,000	
Totals	

[fol. 107]

SCHEDULE "A"

Analysis of Kentucky Gross Retail Sales Tax Returns for the Year 1932, Filed During the Period from January 1, 1933, to April 17, 1933

Number of Reports Filed by Retail Merchants—	Number filed	Number indicating tax	Number indicating no tax
Showing Retail Sales less than $400,000	14,582	8,068	6,514
Showing Retail Sales between 400,000 and 500,000	4	2	2
Showing Retail Sales between 500,000 and 600,000	5	5	.....
Showing Retail Sales between 600,000 and 700,000	1	.....	1
Showing Retail Sales between 700,000 and 800,000	2	1	1
Showing Retail Sales between 800,000 and 900,000	1	1	.....
Showing Retail Sales between 900,000 and 1,000,000	1	.....	1
Showing Retail Sales in excess of 1,000,000	1	1	.....
Totals	14,597	8,078	6,519

Analysis of Reports Showing Tax Liability—	Number of returns	Gross sales	Gross tax	Credits allowed	Net tax	Credits shown on reports in excess of tax liability
Showing Sales less than $400,000	14,582	176,783,514.26	88,522.10	52,573.72	35,948.38	152,954.91
Showing Sales between 400,000 and 500,000	4	1,835,261.79	1,035.27	752.99	282.28	6,163.47
Showing Sales between 500,000 and 600,000	5	2,764,557.75	2,071.04	963.54	1,107.50	.....
Showing Sales between 600,000 and 700,000	1	601,558.29	556.23	556.23	.....	35.73
Showing Sales between 700,000 and 800,000	2	1,522,598.66	2,574.30	1,277.24	1,297.06	908.68
Showing Sales between 800,000 and 900,000	1	864,205.61	1,949.44	415.00	1,534.44	.....
Showing Sales between 900,000 and 1,000,000	1	939,417.13	2,535.04	2,535.04	.....	117.45
Showing Sales in excess of 1,000,000	1	1,001,903.32	3,169.03	422.00	2,747.03	.....
Totals	14,597	186,313,016.81	102,412.45	59,495.76	42,916.69	160,180.24

Number of Merchants Reporting Sales of—	Showing tax liability	Showing no tax liability
Less than 10,000	5,903	4,157
$10,000 and under $25,000	1,185	1,688
25,000 and under 50,000	636	446
50,000 and under 75,000	181	96
75,000 and under 100,000	58	46
100,000 and under 150,000	50	38
150,000 and under 200,000	25	18
200,000 and under 250,000	11	9
250,000 and under 300,000	13	6
300,000 and under 400,000	6	10
Over 400,000	10	5
Totals	8,078	6,519

[fol. 108] SCHEDULE "B"

Statement Showing Number of Retail Merchants Reporting Gross Sales Taxes for the Year 1932 Classified by Amount of Tax Paid, Filed During the Period from January 1, 1933 to April 17, 1933

Number of Taxpayers Reporting Tax						less than 50¢				1,667
"	"	"	"	"	of	50¢	to	1.00		1,247
"	"	"	"	"	"	1.00	"	2.00		1,389
"	"	"	"	"	"	2.00	"	3.00		813
"	"	"	"	"	"	3.00	"	4.00		494
"	"	"	"	"	"	4.00	"	5.00		369
"	"	"	"	"	"	5.00	"	10.00		1,000
"	"	"	"	"	"	10.00	"	15.00		381
"	"	"	"	"	"	15.00	"	20.00		195
"	"	"	"	"	"	20.00	"	25.00		114
"	"	"	"	"	"	25.00	"	50.00		164
"	"	"	"	"	"	50.00	"	100.00		50
"	"	"	"	"	"	100.00	"	200.00		9
"	"	"	"	"	"	200.00	"	300.00		2
"	"	"	"	"	"	300.00	"	400.00		1
"	"	"	"	"	"	400.00	"	500.00		0
"	"	"	"	"	"	500.00	"	600.00		0
"	"	"	"	"	"	600.00	"	700.00		0
"	"	"	"	"	"	700.00	"	800.00		0
"	"	"	"	"	"	800.00	"	900.00		0
"	"	"	"	"	"	900.00	"	1,000.00		0
"	"	"	"	"	over	1,000.00				3
Total										8,078

[fol. 109] Paragraph VII

Further amending Paragraph 10 of its original Bill of Complaint, plaintiff repeats all of the averments therein contained and extends such averments to include and apply to taxes and penalties claimed of plaintiff on account of its gross sales for the calendar years subsequent to 1930.

Paragraph VIII

Further amending its Bill of Complaint, plaintiff says that for more than ten years past there has been a constantly increasing deficit in the general fund of Kentucky, which has been continuously during said period and is now wholly insufficient to meet the warrants drawn upon it by the Auditor of Public Accounts in discharge of claims properly allowable against and payable out of it, and by reason thereof, holders of warrants drawn against it have been compelled to hold the same for as much as five years, awaiting the accumulation in the General Fund of funds sufficient to pay such warrants in their proper sequence as provided by law.

In addition thereto, there are many other undisputed claims against the General Fund which have been held up for long periods of time in the office of the Auditor and for which no warrants have been issued by the Auditor although such claims are properly allowable and payable out of the General Fund. Without a prolonged and expensive accounting, it is impossible to state the amount of such claims for which no warrants have been issued, but they aggregate a large sum of money, amounting to many thousands of dollars.

Under the law of Kentucky it is the duty of the State Treasurer to pay outstanding warrants against the general fund in the order in which they are issued and as money appropriated and available for the purposes of the general fund reaches the Treasury.

[fol. 110] Under the law of Kentucky provided by the statutes thereof and as construed by the Court of Appeals, unpaid warrants against the general fund drawn first in point of time are required to be paid in priority to warrants drawn later in point of time, and if the payment thereof should exhaust the general fund warrants subsequently issued must await their turn in serial order before payment thereof can be compelled by process of law.

If there is no money in the general fund available for the payment of such warrants in the order prescribed by law the State Treasurer cannot pay such warrants and the Court cannot by mandamus compel him to pay the same.

The mounting deficit in the General Fund was recognized by the General Assembly of Kentucky at its 1924 session by the enactment of Chapter 122, Acts of 1924, which submitted to a vote of the people a bond issue of $6,000,000 to pay warrants then outstanding against the General Fund. Such bond issue was defeated at the polls.

At its 1926 session, the General Assembly enacted Chapter 13 of the Acts of 1926, submitting to the people of the State, for a vote, a bond issue of $4,000,000 for the purpose of raising money with which to pay warrants against the General Fund then outstanding. This bond issue was likewise defeated at the polls.

At the time the challenged Act was in process of enactment, it was a notorious fact, which was well known to the members of the General Assembly and to the officials of the State, that warrants drawn against the General Fund for the refund of taxes prescribed in said Act could not and would not be paid out of said Fund for several years, and, knowing these facts, the General Assembly made no provision to levy any tax for the augmentation of the General Fund. The only provision made for the payment of [fol. 111] warrants *theretofore* outstanding was to enact the challenged law and therein to appropriate one-half the taxes exacted thereunder, to the payment of the *then* existing indebtedness of the Commonwealth, it being *already* provided by law that such payment should be applied on warrants in sequence according to their respective dates of issue.

At the time these suits were brought, as shown by a monthly financial statement officially issued by the State Treasurer of Kentucky, as of January 1, 1931, the amount of money in the General Fund on January 1, 1931, less minor accounts, was $12,565.81 as against which Fund there were at the time outstanding warrants, theretofore issued, aggregating $9,880,502.76, which had been drawn against the State Treasurer by the Auditor of Public Accounts and had been presented for payment but were not paid for lack of funds.

At the 1932 session, the General Assembly of the Commonwealth of Kentucky again recognized and declared the insolvency of the General Fund and its insufficiency to pay outstanding warrants issued against it by the Auditor of Public Accounts. Accordingly it enacted Chapter 20 of the Session Acts of 1932, the title of which Act reads in part as follows:

"An Act authorizing the funding of certain indebtedness of the Commonwealth of Kentucky which is evidenced by outstanding state warrants, by the issuing of funding bonds and acknowledging and confirming the validity of such warrants and the indebtedness evidenced thereby."

In the preamble and body of said Act, the General Assembly ascertained and declared the following facts:

(1) That there were then outstanding warrants beginning with warrant No. A 49, dated July 5, 1927, and including all unpaid interest thereon.

(2) That there was then no money in the State Treasury available for the payment of such warrants or any part thereof.

[fol. 112] (3) That some of such warrants have been issued and outstanding for approximately five years.

In State Budget Commission v. Lebus, 244 Ky. 701, 714, the Court of Appeals affirmed a judgment of the Franklin Circuit Court, holding invalid said Chapter 20 of the Session Acts of 1932, on the ground that it did not provide for submitting the proposed bond issue to a vote of the people, as required by the State Constitution.

The facts with respect to the condition of the General Fund are now, and for years past have been, as above declared by the General Assembly in the Acts hereinbefore set forth, excepting that the deficiency in the said General Fund has shown a progressive increase and there is no prospect of such deficiency being reduced.

Since the adjournment of the 1932 session of the General Assembly, the deficiency in the General Fund has constantly increased and, as shown by a monthly financial statement officially issued by the State Treasurer of Kentucky as of November 1, 1932, the amount of then outstanding warrants drawn by the Auditor of Public Accounts

upon the General Fund of the Commonwealth was $14,279,558.11 as of October 31, 1932, and there was no money whatever in the General Fund, but, on the contrary, it had been overdrawn by reason of its indebtedness to other funds of the State in the sum of $275,261.48.

By reason of the facts hereinbefore set forth, a warrant against the General Fund which plaintiff might obtain under Section 10 of the challenged Act at the end of such litigation as is authorized therein could not, consistently with the law of the State as expounded by the Court of Appeals, be paid out of said General Fund for several years.

By reason of such insolvency of the General Fund, warrants drawn against it can not be collected with reasonable [fol. 113] or any promptness, and they cannot be sold except at a discount of from 10 to 15 per cent of their face value.

This fact has been recognized by the defendants herein, members of the State Tax Commission of Kentucky, who gave their depositions in the Franklin Circuit Court in the suit above referred to, which reached the Court of Appeals of Kentucky as State Budget Commission v. Lebus, 244 Ky. 701, 714.

In said action, the defendant, Seldon R. Glenn, under oath, stated in his deposition, given at the State Capitol on May 23, 1932, that he was familiar with the present market for State warrants against the General Fund, and that such warrants on such market were worth 87 to 88 cents on the dollar, but that there was not a ready market for them at any price, and his opinion was that, unless something is done to relieve the situation such as upholding the validity of the 1932 Funding Act held void by the Courts, before September, 1932, outstanding warrants would sell at 75 per cent of face value.

In like manner, the defendant, John B. Lewis, at the same time and place, stated under oath that the last sale of State warrants that he knew of was made at 90 cents on the dollar; and he added that he understood buyers were not offering 90 then, but were offering a little less than that. He also stated that in the event said Funding Act should be held invalid—as it was held by the Courts—the warrants would go considerably lower, and he believed they would go below 75 cents on the dollar of face value.

Plaintiff states that it is now extremely difficult to find a purchaser for State warrants drawn by the Auditor of Public Accounts against the General Fund of the State, and that if and when a purchaser can be found it is impossible to realize upon a sale of such warrants a sum in excess of 80 to 90 per cent of their face value.

[fol. 114] Plaintiff says that no State warrants against the General Fund have been called for payment that have been issued since July 1, 1927, and in his deposition, given at the time and place and in the case above referred to, the defendant, Seldon R. Glenn, under oath, stated that the last call of warrants was made as of July 8, 1931, and it called for warrants that had been issued between June 12, 1927, and July 1, 1927, inclusive.

Had the plaintiff herein paid the taxes enacted of it under the challenged Act as and when due in February, 1931, and February, 1932, and had the defendants been required to issue warrants for the refund of said taxes as provided in Section 10 of the challenged Act, the plaintiff herein, under the law of the State as construed and applied by the Court of Appeals, would have been compelled ever since to hold said warrants, and would still be required to hold said warrants for years to come, unpaid, or to endeavor to sell same at a great discount, in addition to the loss of interest on said tax money, and plaintiff would not have had at the time of filing this bill, and it has not since had, any adequate remedy at law for obtaining a refund thereof under said challenged Act or any other Act of the Commonwealth of Kentucky.

The Commonwealth of Kentucky itself, under the advice of its Attorney General, declines to accept its own warrants in payment of its demands for taxes, even though such warrants may have been issued for necessary governmental purposes, such as the payment of jurors in the Circuit Courts of the State, and in point of fact, the executive officers of the State, in charge of its finances, have recently made public announcement of the fact that they intended, on behalf of the State, to apply to the Reconstruction Finance Corporation, organized under Act of Congress, for a loan to the State of Kentucky of a large sum of money to enable the State to meet the daily recurring govern-

[fol. 115] mental obligations in the matter of salaries of public officials. As a matter of fact, the State Treasurer

of Kentucky has only been able to pay salary checks of public officials through the expedient of encroaching upon other funds for the benefit of the General Fund, as shown by the overdraft in the General Fund hereinbefore set forth, as officially reported as of November 1, 1932.

In the opening paragraph of its annual report the Governor if Kentucky for the year 1931, the State Tax Commission of Kentucky called his attention to the condition of the General Fund, stating that the General Assembly, at its 1930 session, had enacted certain legislation transferring approximately one-half million dollars from the General Fund and providing for large appropriations made in favor of the School Equalization Fund, with no provision to pay same other than to issue warrants against the General Fund, and the Commission emphasized the fact that such legislation

"naturally caused an unprecedented deficit in the General Fund *for the year* of over $2,500,000.00."

thus adding to the deficiency in said fund theretofore existing.

Moreover, in said report, the State Tax Commission criticized

"the utter disregard of the General Assembly in late years for a balanced budget,"

and added:

"Since this law-making body holds the power of appropriating state funds and of fixing the tax rate to be levied for state purposes, it remains to be seen if any power, however great, can balance a state budget without their cooperation."

Wherefore, having amended its Bill in the respects hereinbefore set forth, plaintiff prays as in its original Bill of Complaint and for all other proper and equitable relief.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Attorneys for Plaintiff.

[fol. 116] *Duly sworn to by T. S. Burns. Jurat omitted in printing.*

[fol. 117] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

In Equity. No. 3908

[Title omitted]

ANSWER TO PLAINTIFF'S AMENDED BILL OF COMPLAINT—Filed July 8, 1933

Come the defendants, and by leave of Court, without waiving their objection heretofore made to the filing of plaintiff's amended bill of complaint, and for answer to same, plead as follows, to-wit:

Paragraph I

Defendants repeat all of the averments, denials and allegations contained in the answer to paragraph 2 of the original bill of complaint, but admit that it is true that J. Dan Talbott is now the Auditor of Public Accounts of the Commonwealth of Kentucky.

[fol. 118] Paragraph II

Defendants repeat all of the allegations, averments and denials contained in their original answer to paragraph 5 of the original bill of complaint, and in addition thereto state that they have not sufficient information to form a belief, and theerfore neither admit nor deny the allegations contained in the second literary paragraph of paragraph 2 of the amended bill of complaint, relating to the number of stores and the sales in said stores for the years 1930, 1931 and 1932, and neither admit or deny said allegations, but require strict proof thereof.

Paragraph III

Defendants repeat all of the allegations and denials contained in their answer to paragraph 9 of the original bill of complaint, and in addition thereto state that they have not sufficient information to form a belief as to the truth of the allegations contained in the second literary paragraph of paragraph 3, and therefore neither admit nor deny said allegations, but require strict proof thereof.

Paragraph IV

Defendants repeat all of the allegations, denials and statements contained in their answer to paragraph b of section 10 of its original bill of complaint, and in addition thereto state that they have not sufficient information to [fol. 119] form a belief as to the truth of the allegations contained in paragraph 4 of the amended bill of complaint, and therefore neither admit nor deny said allegations, but require strict proof thereof.

Paragraph V

Defendants repeat and reiterate all the denials, statements and allegations contained in their answer to paragraph 10 of the original bill of complaint, and especially to sub-paragraph 3 of said section, and in addition thereto deny that the plaintiff would be required to pay a tax in excess of $431.83 per store for each of its said stores for each year, or that said tax would be more than $300 per store, or that the average tax per store for 1931 would be $503.62, or would be more than $300 per store, or that competing merchants under the operation or effect of the taxing measure are practically exempted from taxation, or that plaintiff would be required to pay an excessive, prohibitory, oppressive or confiscatory tax in addition to its other taxes on its stores or at all, or that plaintiff is thereby or at all denied the equal protection of the laws or that plaintiff would be thereby or at all deprived of its property without due process of law, or that its effect upon plaintiff or other taxpayers similarly situated is unjust, unequal, discriminatory or arbitrary.

Paragraph VI

For answer to paragraph 6 of the amended bill of complaint, defendants state that they have not verified the correctness of the so-called analysis of the Kentucky Gross Sales tax returns filed in the amended bill of complaint, Schedule a & b, and that said so-called analysis was pre- [fol. 120] pared by plaintiff or its agency, and that therefore, they have not sufficient information to form a belief as to the truth of the allegations contained in paragraph 6 of the amended bill of complaint, or of the truth of the

accuracy of the so-called analysis, and therefore neither admit nor deny the allegations contained in said paragraph or the truth or accuracy of said so-called analysis, but require strict proof thereof.

Paragraph VII

Defendants repeat all the denials, allegations and averments contained in their answer to paragraph 10 of the original bill of complaint, and in addition thereto repeat said averments, allegations and denials for all the years subsequent to the year 1930, referred to in paragraph 7 of the amended bill of complaint.

Paragraph VIII

Defendants deny that for more than ten years past or at all there has been a constantly increasing deficit in the general fund of Kentucky, or that there is a deficit in said general fund; or that said fund is wholly or at all insufficient to meet the warrants drawn upon it by the Auditor of Public Accounts in discharge of claims properly allowable against or payable out of it; or that there are many or any undisputed claims against the general fund, held up for a long or any period of time in the office of the Auditor for which no warrants have been issued by the Auditor, or that it is impossible to state the amount of such claims for which no [fol. 121] warrants have been issued, or that said claims exist, or that they aggregate a large sum of money or any sum of money, amounting to many thousand or any dollars.

Deny that under the law of Kentucky, it is the duty of the State Treasurer to pay outstanding warrants against the general fund in the order in which they are issued, or as money is appropriated or is available for the purposes of the general fund reaches the Treasury.

Deny that under the law of the State of Kentucky, provided by the statutes thereof or as construed by the Court of Appeals, unpaid warrants against the general fund drawn first in point of time are required to be paid in priority to warrants drawn later in point of time.

Defendants deny that at the time the act in question was in the process of enactment, it was a notorious fact, or that said fact was known to the members of the General Assembly or to the officials of the State, that warrants drawn against the general fund for the refund of taxes

prescribed in said act could not or would not be paid out of said fund for several years, or that knowing these facts, the General Assembly made no provision to levy any tax for the augmentation of the general fund; or that the only provision made for the payment of the then existing indebtedness of the Commonwealth, or that it is already provided by law that such payment should be applied on warrants in sequence according to their respective dates of issue.

Deny that by reason of the facts set forth in plaintiff's bill of complaint, as amended, or at all, that any warrants against the general fund, which plaintiff might obtain un- [fol. 122] der section 10 of the challenged act, as authorized in said section, could not or would not, in accordance with the law of the State, as construed by the Court of Appeals, be paid for several years, or that such warrants would not be immediately paid.

Deny that said general fund is insolvent or that warrants drawn against it can not be collected with reasonable or any promptness, or that they can not be sold except at a discount of from ten to 15 per cent of their face value; or that they can not be sold at par value.

Deny that such facts have been recognized by the defendants herein, or that there were any depositions to that effect in the case of State Budget Commission v. Lebus, 244 Ky. 701, 714, or that any depositions were ever filed in said case.

Defendants deny that it is extremely difficult to find a purchaser for State warrants drawn by the Auditor against the general fund of the State, or that if an- when a purchaser can be found, it is impossible to realize upon a sale of such warrants a sum in excess of 80 to 90 per cent of their face value.

Defendants deny that no State warrants against the general fund have been called for payment that have been issued since July 1, 1927, or that the defendant, S. R. Glenn, stated in any deposition filed in the law suit referred to that the last call of warrants was made as of July 8, 1931, or it called for warrants that had been issued between June 12, 1927 and July 1, 1927, inclusive.

Deny that if plaintiff herein had paid the taxes enacted of it under the challenged act as and when due in February, 1931, or February, 1932, or had the defendants been required to issue warrants for the refund of said taxes as

provided in section 10 of the challenged act, the plaintiff herein, under the law of the State as construed or applied [fol. 123] by the Court of Appeals, would have been compelled ever since to hold said warrants, or would still be required to hold said warrants for years to come, or at all, unpaid, or endeavor to sell same at a great discount, or any discount, in addition to the loss of interest on said tax money, or that any interest would be lost on said tax money, or that plaintiff did not have at the time of the filing of this bill or has not since had any adequate remedy at law for obtaining a refund thereof under said challenged act or any other act of the Commonwealth of Kentucky.

Defendants deny that the executive officers of the State have made any announcement of their intention to apply on behalf of the State to the Reconstruction Finance Corporation for a loan to the State of Kentucky of a large or any sum of money to enable the State to meet the daily recurring governmental obligations in the matter of salaries of public officials. Deny that the State Treasurer has only been able to pay salary checks of public officials through the expedient of encroaching upon other funds for the benefit of the general fund, as shown by the overdraft in the general fund, as officially reported as of November 1, 1932.

Defendants deny each and every allegation contained in plaintiffs' bill of complaint as amended, not heretofore specifically denied, controverted or admitted.

For further answer, the defendants aver and allege as follows, to-wit:

Paragraph I

Defendants say that plaintiff has a plain, adequate, com- [fol. 124] plete and speedy remedy at law. That under the provisions of section 10 of the act challenged, as construed by the court of highest resort of Kentucky, plaintiff could sue for and recover any taxes improperly paid under any of the provisions of said act; that in the event of a judgment for the recovery of any such taxes, said judgment could and would be paid from the general expenditure fund of the Commonwealth of Kentucky, within a reasonable time after the rendition thereof.

Defendants state that the receipts in the said general expenditure fund, as shown by the official reports of the

Treasurers of the Commonwealth of Kentucky, for each of the fiscal years 1926 to 1932 inclusive, have been as follows:

For the fiscal year ending June 30,	1926....	$7,706,538.28
" " " " " " "	1927....	8,059,517.85
" " " " " " "	1928....	9,294,798.97
" " " " " " "	1929....	9,907,769.29
" " " " " " "	1930....	12,949,027.10
" " " " " " "	1931....	11,573,065.01
" " " " " " "	1932....	10,000,000.00 (Approximately)
" " " " " " "	1933....	9,000,000.00 (Approximately)

(Official Treasurer's report for the fiscal years 1932 and 1933 not yet published.)

Defendants say that there will be collected under the tax laws of this State and paid into the said general expenditure fund approximately Eight Million Dollars for the fiscal year ending June 30, 1934; that a great portion of said sum is already due and in process of collection; that in fact there is approximately Seven Million Dollars now due the general expenditure fund of the Commonwealth of Kentucky against which there are no preferred claims; [fol. 125] that money is constantly flowing into the said general expenditure fund from the operation of tax laws in force in this Commonwealth; that any judgment for refund of taxes paid by this plaintiff under the provisions of the challenged act will be a preferred claim against said general fund, under the laws of this Commonwealth as construed by the courts of this State.

Paragraph H

For a separate and distinct defense in point of law arising upon the face of the bill of complaint as amended herein, defendants say that the facts alleged in said bill of complaint as amended are insufficient to constitute a valid cause of action.

Wherefore, defendants pray as in their original answer.

Bailey P. Wooton, Attorney General of Kentucky. S. H. Brown, Assistant Attorney General. Francis M. Burke, Assistant Attorney General.

Batson, Cary & Welch, Louisville, Kentucky; Leslie W. Morris, Frankfort, Kentucky, of Counsel.

[fol. 126] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY

No. 3908

[Title omitted]

STIPULATION AS TO HEARING—Filed July 24, 1933

In the above-styled case it is stipulated by the parties, plaintiff and defendants, as follows:

(1) Upon the final hearing of this case, the parties, plaintiff and defendants, respectively, may read in evidence, as if they were depositions regularly taken on due notice to the opposing side, any or all of the ex parte affidavits heretofore filed or read in evidence upon the hearing of plaintiff's motion for an interlocutory injunction herein, and may also read in evidence all depositions heretofore taken and filed and heretofore read in evidence upon the hearing of plaintiff's motion for an interlocutory injunction herein,

Subject, however, in the case of such affidavits and depositions,

(a) to exceptions for competency and relevancy of the subject-matter or any portion thereof contained in any of said ex parte affidavits, and

(b) to the right of the adverse party, on due notice, to cross-examine orally any witness whose ex parte affidavit is so offered or read in evidence.

(2) The plaintiff shall conclude the taking of proof on its behalf, including the cross-examination of witnesses whose ex parte affidavits have been heretofore filed, on or before June 10, 1933.

All objections to mere matters of form or to the ex parte character of affidavits heretofore filed on the motion for an interlocutory injunction, and all objections on account of the ex parte character thereof, are waived, and all for-
[fol. 127] malities as to the cross-examination of witnesses giving such affidavits are hereby waived.

(3) Subject to all the provisions of this stipulation all the evidence offered or heard in this case or in the case

of Kroger Grocery & Baking Company v. John B. Lewis, et al., No. 3908, filed in the Eastern District of Kentucky, or in the cases of The Stewart Dry Goods Company v. John B. Lewis et al., No. 609, and Fred Levy et al. v. John B. Lewis, et al., No. 610, filed in the Western District of Kentucky, may be read in this case or in any one or all of the other three cases.

(4) The defendants shall conclude the taking of depositions or the cross-examination on their behalf of plaintiff's witnesses, on or before June 25, 1933.

(5) On or before June 10, 1933, each party shall give to the adverse party or parties a written notice specifying the ex parte affidavits proposed to be read by such party upon the final hearing and no ex parte affidavits other than those so specified shall be read on behalf of such party or parties.

(6) It is further stipulated that the following statement made up from the record of the State Treasurer of Kentucky by Jerry King, bookkeeper in the State Treasurer's Office correctly sets forth as to each of the dates given below (a) the balance to credit of General Fund, and (b) outstanding warrants against the General Fund as follows:

Date	Balance to credit of general fund		Oustanding warrants against general fund
June 30, 1922	$297,967.85		$4,702,709.11
June 30, 1923	2,590,470.14		5,947,750.40
June 30, 1924	167,535.74		4,089,151.37
June 30, 1925	310,242.68		4,127,746.17
June 30, 1926	10,387.44		4,329,772.33
June 20, 1927	247,566.83	(Deficit)	4,664,820.89
June 30, 1928	440,328.14		6,715,347.99
June 30, 1929	1,880,084.77		8,060,920.69
June 30, 1930	1,826,244.05		8,533,384.79
Dec. 31, 1930	1,250,168.22		9,880,501.76
June 30, 1931	2,440,128.46		11,023,911.53
Dec. 31, 1931	838,269.63		12,637,990.48
June 30, 1932	1,302,267.69		13,851,414.57
Dec. 31, 1932	573,831.32		14,415,503.69
May 25, 1933	1,898,229.25		14,668,744.57

[fol. 128] (7) It is understood that neither side shall be required to produce for cross-examination by the adverse

party any witness whose ex parte affidavit may be offered or read under this stipulation.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors for Plaintiff. Bailey P. Wooton, S. H. Brown, Solicitors for Defendants.

[fols. 129 & 130] In United States District Court, Eastern District of Kentucky

No. 3908

[Title omitted]

Order Filing Tax Return of D. T. Bohon Co. as Exhibit—Filed Aug. 21, 1933

Upon certification of the official stenographer of the question of the introduction of the tax return under the Gross Sales Tax Law of the D. T. Bohon Company, filed with the State Tax Commission on September 8, 1931, it is hereby ordered that said return be filed as an exhibit in this case for such consideration as the court may deem proper.

Xen. Hicks, Circuit Judge. A. M. J. Cochran, District Judge. Chas. I. Dawson, District Judge.

[fol. 131] In United States District Court for the Eastern District of Kentucky

No. 3908

[Title omitted]

Order of Submission—Filed Aug. 21, 1933

This day the above styled case came on for hearing before Hon. Xenophon Hicks, Circuit Judge, Hon. A. M. J. Cochran, District Judge, and Hon. Chas. I. Dawson, District Judge.

By agreement of parties plaintiff and defendant the above styled case was heard together with the cases of Stewart Dry Goods Company v. John B. Lewis et al, Fred Levy et

al. v. John B. Lewis et al., and J. C. Penney Company v. John B. Lewis et al., pending in the District Court of the United States for the Western District of Kentucky, and the same evidence was heard in this case as in the said cases pending against the same defendants in the Western District, and was heard at the same time.

By agreement of the parties plaintiff and defendant the proof heard and all exhibits filed as set out in the order of submission herein dated February 14, 1931, was likewise read and heard upon the final submission hereof, together with the stipulation filed in these cases in the Clerk's Office of the Western District on or about July 24, 1933, and now filed by order of Court.

In addition to the said evidence, plaintiffs by counsel filed and read the depositions and exhibits therewith of W. P. Sullivan, W. R. Robinson, A. H. Brendel, Albert H. Morrill, Harry W. Schacter.

[fol. 132] Plaintiffs likewise read in evidence the following Statutes and Acts of the General Assembly of Kentucky and decisions of the Court of Appeals of Kentucky, as set out in their amended bills herein:

Ky. Statutes, Secs. 4688a-1, a-2 and a-4,
Rhea, Treas., v. Newman, 153 Ky. 604,
Bosworth, Treas. vs. Shuck, 118 Ky. 458,
Chap. 13 of the Acts of the General Assembly of Ky. of 1926,
Chap. 20 of the Acts of the General Assembly of Ky. of 1932,
State Budget Commission v. Lebus, 244 Ky. 701,

and certain paragraphs of the Report of the State Tax Commission of Kentucky for the year 1931, as set out in the amended bill.

Likewise defendants filed and read the depositions and exhibits therewith of Jerry King, James W. Martin, Clyde William Phelps, Selden R. Glenn, R. C. Ilg, Elam Huddleston.

Thereupon these cases were argued by counsel for the respective plaintiffs and defendants and ordered to be submitted.

It is further ordered and adjudged that the interlocutory injunction heretofore entered herein be and the same is

hereby continued in full force and effect until the final determination of this cause in this court.

August 21, 1933.

Xen. Hicks, Circuit Judge. A. M. J. Cochran, District Judge. Chas. I. Dawson, District Judge.

Have seen the foregoing Order:

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors for Plaintiff. Baily P. Wooton, Atty. Gen., L. H. Brown, Assistant Atty., Homer W. Batson, Leslie W. Morris, Solicitors for Defendants.

[fol. 133] In United States District Court for the Western District of Kentucky

#609

Stewart Dry Goods Company, Plaintiff,

vs.

John B. Lewis et al., Defendants

#610

Fred Levy et al., Plaintiffs

vs.

John B. Lewis et al., Defendants

#611

J. C. Penney Company, Plaintiff,

vs.

John B. Lewis et al., Defendants

Before Hicks, Circuit Judge, and Cochran and Dawson, District Judges

Opinion—May 23, 1934

Dawson, District Judge:

These three cases are before us on final submission and each of them involves the validity of Chapter 149 of the

1930 Acts of the General Assembly of the Commonwealth of Kentucky, commonly known as the Retail Merchants Gross Sales Tax Act. The case of Kroger Grocery & Baking Company v. John B. Lewis et al., in the Eastern District of Kentucky, and involving the same questions, was heard and considered by us at the same time. On a former hearing of these cases we dismissed the petitions on the ground that the [fol. 134] plaintiffs had an adequate remedy at law. An appeal was taken to the Supreme Court, and that court held that, in view of the allegations of the bills as to the condition of the General Expenditure Fund of the State, it could not be said, in the absence of proof controverting the allegations of the bills, that Section 10 of the Act upon its face afforded an adequate remedy at law. In reversing the case, the Court said:

"The decrees are reversed and the causes remanded to the District Courts, of three judges, for final hearing upon the merits, without prejudice to a determination upon evidence with respect to the questions of the status of outstanding warrants upon the General Fund in the State Treasury and whether warrants of the sort contemplated by Section 10 of the Act in question are accorded preference in payment over other warrants, and the basis, if any, for the assurance that such preference will be continued so that in the event of actions by the plaintiffs at law under Section 10 they would be afforded a certain, reasonably prompt and efficacious remedy."

We have interpreted this language of the Court to authorize us to again consider the question of the adequacy of the remedy at law under Section 10 of the Act in the light of such proof as might be offered by the parties on this subject.

Proof has been taken on this question which establishes the fact that the uniform practice of the Treasurer of the Commonwealth of Kentucky has been to pay warrants issued by the Auditor for the refund of taxes when presented, and in advance of outstanding interest-bearing warrants, and that such has been the practice of the present Treasurer of the Commonwealth of Kentucky, whose term of office does not expire until January, 1936. It is further established by the evidence that the present State Treasurer has followed [fol. 135] the practice of keeping himself in financial posi-

tion to refund all taxes which are paid under legal protest, and that he will be in a position to and will do so with reference to the taxes involved in these actions in event it shall be finally determined that such taxes were illegally collected, notwithstanding the fact that there were outstanding as of June 30, 1933, approximately fifteen million dollars of interest-bearing warrants against the General Expenditure Fund, out of which fund Section 10 of the Act directs refunds under the Act to be made. We know of no opinion of the Court of Appeals of Kentucky giving its sanction to this practice, nor does the record disclose that the Attorney General of the State has ever ruled that the practice was authorized by any statute of the State. Certainly the practice is consonant with common justice; but in view of the doubt expressed by the Supreme Court as to whether Section 10 of the Act authorizes such preferential treatment, and in view of the further fact that if refunds under the Act are not given preference it is uncertain when they would be paid, we feel constrained to hold that the remedy at law given by Section 10 of the Act does not afford that certainty necessary to repel equity jurisdiction.

We therefore come to a consideration of the merits of the cases.

The pertinent provisions of the Act are:

"Section 1. The words 'retail merchant', as used in this act shall mean and include every person, firm, association, co-partnership or corporation opening, establishing, operating or maintaining any 'store', as defined herein, for the purpose of and selling goods, wares or merchandise at retail in this State, except those actually engaged in gardening or farming and selling garden or farm products raised by them in this State. The term 'store', as used in this act, shall be construed to mean and include any store or stores [fol. 136] or any mercantile establishment or establishments in this State which are owned, operated, maintained or controlled by the same 'retail merchant', as defined herein, either domestic or foreign, in which goods, wares or merchandise of any kind are sold at retail. The provisions of this act shall be construed to apply to every 'retail merchant' and 'store', as defined herein, which is controlled or held with others by majority stock ownership or ultimately

controlled or directed by one management or association of ultimate management.

Section 2. Every retail merchant, as defined herein, shall pay an annual license tax for the opening, establishing, operating or maintaining of any store or stores, as defined herein, determined by computing the tax on the amount of gross sales as follows:

One-twentieth of one per cent of the gross sales of Four hundred thousand ($400,000.00) Dollars or less; two-twentieths of one per cent on the excess of the gross sales over Four hundred thousand ($400,000.00) Dollars and not exceeding Five hundred thousand ($500,000.00) Dollars; five-twentieths of one per cent on the excess of the gross sales over Five hundred thousand ($500,000.00) Dollars and not exceeding Six hundred thousand ($600,000.00) Dollars; eight-twentieths of one per cent on the excess of the gross sales over Six hundred thousand ($600,000.00) Dollars and not exceeding Seven hundred thousand ($700,000.00) Dollars; eleven-twentieths of one per cent on the excess of the gross sales over Seven hundred thousand ($700,000.00) Dollars and not exceeding Eight hundred thousand ($800,000.00) Dollars; fourteen-twentieths of one per cent on the excess of the gross sales over Eight hundred thousand ($800,000.00) and not exceeding Nine hundred thousand ($900,000.00) Dollars; seventeen-twentieths of one per cent on the excess of the gross sales over Nine hundred thousand ($900,000.00) Dollars and not exceeding One million ($1,000,000.00) Dollars; one per cent on the excess of the gross sales over One million ($1,000,000.00) Dollars.

Section 3. Every retail merchant, as defined herein, in order to ascertain the amount of taxes due and payable under the next preceding section, shall file with the State Tax [fol. 137] Commission on or before the first day of February each year a written report verified by the affidavit of the owner or chief officer on such forms as it may prescribe, giving the number and location of its store or stores, as defined herein, the name and post office address of its owner or principal officer, the name and address of its officer or agent in charge of its business at each separate store, the nature and kind of business, the total gross sales during the preceding year ending the thirty-first day of December, and

such other facts bearing on the proper taxation as the Tax Commission may require.

The State Tax Commission may, in any case, require such additional information as it may deem necessary to enable it to perform its duties herein. It shall be the duty of the State Tax Commission from such reports, and from such additional information as it may obtain, to ascertain the amount of taxes due, and to certify to every such retail merchant the amount of taxes due for the preceding year, based upon such reports and information as it may ascertain. Upon final action by the State Tax Commission, it shall certify to the Auditor of Public Accounts and to the retail merchant the amount of such tax due by each retail merchant, as defined herein, and it shall be the duty of each retail merchant to pay the amount of such tax to the Auditor of Public Accounts not later than thirty days thereafter.

In reporting the gross sales for the year, 1930, retail merchants shall include only those sales made between the date that this act becomes effective and December 31, 1930, and the license tax due for the year 1930 shall be based on the amount of those sales only.

Section 4. The license or excise tax levied herein, shall not be in lieu of any special state license, excise, occupational or corporation license tax due under the provisions of any law now in force, or that may hereafter be enacted. Should any retail merchant, as defined herein, be liable for and pay any special state license, excise, occupational or corporation license tax under the laws now in force, or that may hereafter be enacted, credit may be taken on the tax levied in this act for the amount of such special license, excise, occupational or corporation license tax so paid not to exceed the amount of the license or excise tax levied herein."

[fol. 138] Plaintiffs contend that the Act violates the Fourteenth Amendment to the Federal Constitution in that it denies them the equal protection of the law and deprives them of their property without due process of law; that it violates the Federal Constitution in that it discriminates against and burdens interstate commerce, and that it violates the Bill of Rights of the State Constitution, which prohibits the exercise of arbitrary power over the lives, liberty and property of citizens and secures to all the in-

alienable right of acquiring and protecting property, and is so arbitrary and confiscatory as to be unauthorized as an excise or license tax under Section 181 of the Constitution. Some claim is also made that it violates other provisions of the Constitution of Kentucky, but these contentions apparently are not seriously urged, and we shall not notice them.

Does the Act Deny to the Plaintiffs the Equal Protection of the Law?

It is the contention of the plaintiffs that equal protection of the law under the Fourteenth Amendment is denied by the Act because:

(1) The classification of the persons taxed into eight different groups, according to the amount of gross sales, and a corresponding stepping up of the rate, is not justified by any conceivably substantial distinction between the classes, but is wholly arbitrary and discriminatory.

(2) The credits allowed by Section 4 of the Act operate, in most cases, to exempt from the tax those falling in the class having annual gross sales of less than $400,000.00, and that this section also operates to give a preference to [fol. 139] those entitled to such credits over those taxpayers who have no special license or excise taxes upon which to claim the credits authorized by Section 4.

It should always be remembered that the power of the State to tax for public purposes within its constitutional sphere is as unlimited as is the power of the National Government within its sphere, except for the equality clause of the Fourteenth Amendment.

It has often been written that the equal protection provision of the Fourteenth Amendment is not a guarantee of equality of the operation or application of State legislation upon all the citizens of a State. All that it intends to secure to citizens is that the laws of a State shall have equality of operation and application on persons according to their relations. That is to say, it is a guarantee to every citizen that he shall be accorded the same treatment by the laws of his State as is accorded to other citizens in his class and similarly circumstanced. As applied to taxation, it has been repeatedly declared by the Supreme Court that this provision of the Constitution does not prohibit classi-

fication further than that the classification must be rested upon some ground of difference having a fair and substantial relation to the object of the legislation. The exemption of certain classes of property from taxation, or the imposition of different rates of taxation upon different classes of property or persons, is not prohibited by the equal protection provision of the Fourteenth Amendment, provided the classification is not unreasonable or arbitrary; and this is true as to excise, license and occupational taxation, as well as property taxation. It is not necessary that the classification shall be one that appeals to the judgment or sense of fairness of courts. It is enough if the classifi- [fol. 140] cation is reasonably founded on the "purposes and policies of taxation." Generally speaking, the judgment of the legislative body is conclusive as to classification unless it is based upon so unsubstantial a difference in the classes affected, or is so arbitrary and unreasonable as to preclude the assumption that the classification was made in the good faith exercise of legislative judgment and discretion. These principles are so well settled that citation of authority is hardly necessary, but among the cases sustaining the principles above enunciated are: Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S. 232; Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283; Campbell v. California, 200 U. S. 87; Royster Guano Co. v. Virginia, 253 U. S. 412; Watson v. Comptroller, 254 U. S. 122; Stebbins v. Riley, 268 U. S. 137; Quong Wing v. Kirkendall, 223 U. S. 59; McLean v. Arkansas, 211 U. S. 539; Armour Packing Co. v. Lacy, 200 U. S. 226; Connolly v. Union Sewer Pipe Co., 184 U. S. 540; Alaska Fish Co. v. Smith, 255 U. S. 44.

The decisions are equally clear that in order to sustain classified taxation of things or persons the difference between the classes need not be great. We think it safe to say that slight differences, such as in ability to pay, in character of property or circumstances of persons taxed, will sustain State tax classification against attack under the equal protection clause of the Fourteenth Amendment. Further, we think it may be laid down as a sound rule that even though the Court may doubt or question the existence of the distinction or difference forming the basis of classification for State taxation, yet if the matter is one about which reasonable men may disagree, the judgment and discretion of the legislative body should not be interfered with.

Measured by these rules, we are unable to say that the [fol. 141] Act in question violates the equal protection clause of the Fourteenth Amendment. It is well settled and the plaintiffs concede, that classification for taxation based upon mere volume is not open to attack under the Fourteenth Amendment. Plaintiffs contend, however, that it is a long cry from classification upon volume, by the application of the same rate to all classes, to a classification which steps up the rate on the respective classes determined according to volume. Conceivably there might be some merit in this contention, if the law under attack here imposed increasing rates upon the entire volume of business done by those in the higher classes. But such is not the case here. All those who fall exclusively within the $400,000.00 class have applied to them exactly the same rate, and each taxpayer in each higher classification gets the benefit of exactly the same rate, not only of other taxpayers in his particular classification, but he and all others in his class likewise get the same rate applied to that portion of their sales which falls within the lower classifications as is exacted of those taxpayers who fall exclusively within such lower classifications.

Therefore, it seems quite clear to us that the rates applied in this Act apply equally to all in the same class. Hence, the claim of the plaintiffs that classification of taxpayers according to volume and the application of different rates to different classes amounts to a denial of equal protection of the law, comes at last to the proposition that such classification is so unreasonable and arbitrary as to preclude the assumption that the classification was made in the good faith exercise of the taxing power of the State.

Having in mind the principles heretofore adverted to, [fol. 142] we can not agree to this proposition. The Court judicially knows that there is in the public mind a quite widely accepted theory that taxation may properly be based upon ability to pay, and this theory has often been translated into legislative action. There is a widely accepted theory of economics that, as a general proposition, ability to pay increases with volume of business, because, generally speaking, increased volume of business means increased profits. We recognize, of course, that this theory of economics is not universally accepted, but, on the contrary, is

vigorously opposed by another schools of economic thought. These opposing theories were vigorously advanced in these cases by business men and economists in their testimony. If economists and business men disagree on these propositions, how can it be said that legislative classification in harmony with one of these schools of thought to the exclusion of the other is not reasonably founded in the "purposes and policies of taxation," or that such classifications precludes the assumption that it was in the good faith exercise of legislative judgment and discretion?

It is vigorously urged upon us that the provision of Section 4 of the Act which allows a credit to the extent of special license, excise, occupational or corporation license taxes paid by the retail merchant operates to deny equal protection to those taxpayers who are required to pay no such taxes, and as an illegal discrimination in favor of those taxpayers in the lower brackets whose special taxes paid under other laws of the State are sufficient in amount to almost or entirely liquidate the tax here involved. This view is an entirely superficial one. No individual taxpayer under this law has any vested right in the continuation of a corporation license tax imposed by State law on his cor- [fol. 143] porate competitor, nor in the continuation of any other special license tax any of his competitors has heretofore been required to pay. Certainly the Legislature, in the imposition of the tax here involved, could have repealed all special license taxes which were imposed by law upon those coming within the ambit of the Act under consideration. If there are any retail merchants affected by this Act who, prior to its enactment, were not required to pay any special license taxes, they had the advantage over their competitors from whom such taxes were exacted. Section 4, to the extent that it allows the payment of such taxes as a credit, simply eliminates a discrimination, though not an illegal one, which theretofore existed. The fact that these credits will substantially liquidate the tax of many of the taxpayers whose sales amount to less than $400,000.00 is simply an incident in the operation of the law. Taxpayers in the higher brackets, where they pay such special taxes, get exactly the same credits. Those who complain of these credits because they are not entitled to like credits put themselves in the anomalous position of complaining because they have not heretofore been subject to special license or other special taxes.

It seems to us that the claim of the department stores, that the law in requiring them to treat the operation of all their departments as one unit, and of the chain stores, that the law in requiring them to similarly treat the operation of all of their stores, amounts to a discrimination against them and in favor of the retail merchant operating a single non-department store, is equally wanting in merit. This unitary classification of department stores and chain stores undoubtedly conduces to simplification in the collec- [fol. 144] tion of the tax. The taxation is not based upon the number of stores the taxpayer owns, but upon his gross sales. It is in the nature of a license or excise tax, and we know of no constitutional inhibition which would prohibit the State from requiring each taxpayer to report the result of all of his business in the State and pay taxes on the aggregate result. The seeming inequality urged because of this feature of the law arises from the taxpayer's method of doing business, and not from any inherent inequality in the law itself.

Does the Act Deny Due Process Under the Fourteenth Amendment?

Oftentimes it is difficult to test State legislation, particularly tax legislation, by the due process clause of the Fourteenth Amendment. As pointed out by Mr. Chief Justice Taft in Truax v. Corrigan, 27 U. S. 312, it is more or less customary to treat the due process and the equal protection clauses of the Fourteenth Amendment together; but, as he observed in that case, "while they overlap, and a violation of one may oftentimes involve a violation of the other, the spheres of the protection they offer are not coterminous." It is conceivable that a State taxing statute may be based on a proper classification and give absolute equality between persons in the same class, so as to make it immune from attack under the equal protection clause, and yet amount to a denial of due process.

In considering the question whether a State taxing law denies due process under the Fourteenth Amendment, a consideration of what amounts to a denial of due process by Congress under the Fifth Amendment is most helpful, [fol. 145] because it is well settled that the restraint imposed upon State Legislatures by the due process clause

of the Fourteenth Amendment is exactly the same as that imposed upon Congress by the due process clause of the Fifth Amendment. Coolidge v. Long, 282 U. S. 582; Heiner v. Donnan, 285 U. S. 312.

In the case of Brushaber v. Union Pacific Co., 240 U. S. page 1, the Supreme Court, in discussing the limitation of the due process clause of the Fifth Amendment on the taxing power of Congress, said:

"So far as the due process clause of the Fifth Amendment is relied upon, it suffices to say that there is no basis for such reliance since it is equally well settled that such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring upon the one hand a taxing power and taking the same away on the other by the limitations of the due process clause. * * * And no change in the situation here would arise even if it be conceded, as we think it must be, that this doctrine would have no application in a case where although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment, or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion."

From this language it seems clear that if congressional legislation, under the guise of taxation, amounts to confiscation of property, or is so foreign to the practices of government in taxation as to shock the sense of justice, it would violate the due process clause of the Fifth Amendment, and this principle is re-affirmed in Heiner v. Donnan, supra, [fol. 146] and in Nichols v. Coolidge, 274 U. S. 531. This rule, therefore, furnishes a safe guide for determining if State tax legislation transgresses the due process clause of the Fourteenth Amendment.

In thinking of valid taxation, State or National, we instinctively exclude legislation which, either because of the rate imposed or because of other features, amounts to confiscation of the taxpayer's property, whether that property is tangible effects or his business.

Under the Act here involved the effective tax rate, without allowing for deductions of the special taxes referred to in Section 4 of the Act, applicable to taxpayers with gross sales of $1,300,000.00 is in excess of one-half of one per cent; to taxpayers with sales of $5,000,000.00, in excess of 86/100 of one per cent; to taxpayers with $7,000,000.00 of gross sales, 9/10 of one per cent; and to taxpayers with $11,000,000.00 of sales, in excess of 93/100 of one per cent; and as the volume of sales increases beyond this figure, the effective rate gradually approaches, although it can never quite reach, one per cent, due to the fact that the taxpayer in the higher bracket gets the benefit of the application of the lower rates to that part of his gross sales which falls within the lower classifications. Therefore, if the proof satisfactorily showed that one per cent of gross sales represents the net profit normally realized by any branch or subdivision of the retail mercantile industry, we would have no hesitation in holding the tax confiscatory—at least as to that branch or subdivision of the industry. The burden is upon the plaintiffs who are attacking the law to show that it is confiscatory; but this burden is not sustained merely by showing that it is confiscatory when applied to the business of the least efficient members of the industry taxed. [fol. 147] The test is: What is its effect generally upon the class taxed, or what is the effect generally upon any branch or subdivision of that class? We think the proof falls far short of showing that one per cent of gross sales represents the net profit normally realized by retail merchants as an entire class, or normally realized by any branch or subdivision of the industry. On the contrary, we think the preponderance of the proof is to the effect that the profit is normally from two to two and one-half per cent of gross sales, after deduction of taxes, and that in many lines of retailing the profit is even higher.

Quite a good deal of proof has been introduced which shows that the tax would have been substantially confiscatory as applied to the business of the Kroger Grocery & Baking Company during the three years of 1930, 1931 and 1932; but the proof further strongly tends to show that there was lack of efficiency in the operation of the business of this concern during those years. The testimony of Mr. Morrill, the new President of that concern, shows that under his administration the efficiency of the operations of

that company have been so improved that for the first six months of the year 1933 the net profits amounted to $2,294,000, as compared to substantially $1,475,000 for the entire year 1930; to $2,199,000 for the entire year 1931, and to $2,441,000 for the entire year 1932; and that the net profits, after deduction of taxes for the first six months of 1933 amounted to 2.49 per cent of gross sales, as compared to a net profit of slightly in excess of one-half of one per cent for 1930, slightly less than one per cent for 1931, and slightly in excess of one per cent for 1932. There is nothing in the record to show that the experience of this company on its business in Kentucky is substantially different from that in its business as a whole.

We feel constrained, therefore, to hold that the proof [fol. 148] fails to establish that in its application to those in the higher brackets the tax amounts to confiscation. We must confess that it appears to us that the tax falls very heavily on those in the higher brackets; but inasmuch as it falls short of confiscation, relief must be secured at the hands of the Legislature—not from the courts.

Does the Tax Discriminate Against Interstate Commerce, or Constitute a Burden on Interstate Commerce?

We think this question is conclusively decided against the contention of the plaintiffs by the opinion of the Court of Appeals of Kentucky in the case of Moore v. State Board of Charities & Corrections, 239 Ky. 729. The plaintiffs vigorously assail the authority of this case, upon the ground that a legal fraud was practiced upon the State Courts, in that there was no real controversy between the parties to that litigation. We can not escape the fact, however, that the validity of the Act was squarely presented to the Court of Appeals in that case. That court had jurisdiction of the subject matter and of the parties, and while the action which led to the opinion in that case originated after these actions had been filed in this court, that fact can have no effect upon the binding force of the opinion of the State Court, in so far as it deals with the meaning and interpretation of the Act. The opinion of that court as to the meaning and scope of the Act is binding upon all State officials, and is binding upon us. Truax v. Corrigan, 257 U. S. 312. But of course the opinion of that court as to the practical results of the application of the Act so construed involves

a finding of fact and is not binding upon us. That court in the opinion referred to specifically held that the Act does [fol. 149] not apply to sales made in interstate commerce, and further held that, properly interpreted, Section 1 does not and was not intended to discriminate against farm and garden products raised in other States and sold in this State.

Does the Act Violate the Bill of Rights of the State Constitution, or is it Unauthorized by Section 181 of that Instrument?

The tax involved here must find its justification in Section 181 of the State Constitution, the pertinent part of which provides:

"The General Assembly may, by general laws only, provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations and professions, or a special or excise tax; and may, by general laws, delegate the power to counties, towns, cities and other municipal corporations to impose and collect license fees on stock used for breeding purposes, on franchises, trades, occupations and professions."

This section has been frequently considered by the Court of Appeals of the State, and it is now well settled that it must be read in connection with the Bill of Rights contained in the State Constitution, which forbids the exercise of arbitrary power over the lives, liberty and property of citizens, and secures to all the inalienable right of acquiring and protecting property, and that, when so read, Section 181 confers no power to prohibit, or substantially prohibit by taxation, a legitimate business, or to resort to unreasonable classification in taxation. Fiscal Court of Owen County v. Cox, 132 Ky. 738; City of Louisville v. Pooley, 136 Ky. 286; Sperry & Hutchinson v. Owensboro, 151 Ky. 389. Thus, we have presented under the Bill of Rights con- [fol. 150] tained in the State Constitution and under Section 181 of that instrument exactly the same questions we have disposed of in our consideration of the due process and equal protection clauses of the Fourteenth Amendment, and it necessarily follows that the claim of the plaintiffs that the Act violates the State Constitution in the particulars referred to must be denied.

The temporary injunction heretofore issued will be dissolved, and the permanent injunction prayed for denied. Inasmuch as we feel confident the plaintiffs will desire to appeal these cases to the Supreme Court, the temporary injunction will be continued in force for thirty days following the entry of the decree herein directed to be prepared, and if before the expiration of that period steps have been taken to appeal the cases, such temporary injunction will be continued until final disposition of the cases by the Supreme Court.

In view of the unsettled economic condition of the country, and in view of the possibility that after a reasonable trail the law may prove confiscatory as to some branches or subdivisions of the retail mercantile business, we fell constrained to leave these cases on the docket, without prejudice, to the right of the plaintiffs, after such reasonable trial, to apply to this court to reopen and rehear the causes on the single question of confiscation. See: Opinion of the Supreme Court of December 4, 1933, in Glenn et al. v. Field Packing Company.

Counsel may prepare and present for entry a decree conforming to the views herein expressed.

Judge Cochran dissents.

December 20, 1933.

(Signed) Xen. Hicks, U. S. Circuit Judge. (Signed) Charles I. Dawson, U. S. District Judge.

[fol. 151] Trabue, Doolan, Helm & Helm, Louisville, Ky.; Nichols, Morrill, Wood, Marx & Ginter, Cincinnati, O., Attorneys for Plaintiffs.

Bailey P. Wootton, Attorney General, Frankfort, Ky.; S. H. Brown, Assistant Attorney General, Frankfort, Ky.; Batson, Cary & Welch, Louisville, Ky.; Leslie W. Morris, Frankfort, Ky.; Attorneys for Defendants.

[fol. 152] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF KENTUCKY

No. 609

THE STEWART DRY GOODS COMPANY, Plaintiff,

vs.

JOHN B. LEWIS et al., Defendants

No. 610

FRED LEVY et al., Plaintiffs,

vs.

JOHN B. LEWIS et al., Defendants

No. 611

J. C. PENNY COMPANY, Plaintiff,

vs.

JOHN B. LEWIS et al., Defendants

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY

No. 3908

THE KROGER GROCERY & BAKING COMPANY, Plaintiff,

vs.

JOHN B. LEWIS et al., Defendants

DISSENTING OPINION—Filed May 23, 1934

COCHRAN, J.:

I fell constrained to dissent from the majority opinion of the court.

Certainly the step up in rate of tax as compared with that in volume of sales may be so great as to be arbitrary and unreasonable. It seems to me that such is the case here. The tax imposed for sales amounting to $400,000.00 is $200 and for those amounting to $1,000,000.00 plus is

$10,000.00. The percentage of step up in volume was 250—in tax imposed 5000 per cent or twenty times as much.

In the case of City of Newport vs. Frankel, 192 Ky. 408, it was held that a city ordinance providing that a moving picture theatre charging an admission fee of fifteen cents [fol. 153] should pay an annual tax of $450 and one charging twenty cents $5,000 was arbitrary and unreasonable. The step up in volume was 33⅓ per cent and in tax 1,000 per cent or thirty times as much. I am unable to make out that legislation providing a step up in tax twenty times as much as the step up in volume is so much less than that providing thirty times as to remove it from being arbitrary and unreasonable. Difference in business may make this decision inapt.

The classification which the Act makes seems to me arbitrary and unreasonable on another ground. There are four distinct classes of retailers, singly operated units, department stores, chain stores and mail order houses. Their points of difference are many. The chain store has many features and advantages which definitely distinguish it from the singly operated unit. The same is true as to a department store. That such is the case was recognized and held in State Board of Tax Comm'rs., vs. Jackson, 283 U. S. 527. It was emphasized in Liggett vs. Lee, 288 U. S. 517. It may be added that a department store has features and advantages definitely distinguishing it from the singly operated unit. The Act ignores this natural and inevitable classification. It classes all retailers of whatever nature together and then reclassifies them according to their volume of sales. Each retailer has to pay the same tax as every other retailer having the same volume of sales. The singly operated unit has to pay the same rate of tax as the chain store or department store having the same volume of sales notwithstanding both have advantages, greater in case of the chain store, which makes for greater profits, over it. Likewise the department store has to pay the same rate as the chain store with the same volume of sales notwithstanding the chain store has advantages, which makes for greater profits, over it.

In the Titusville case retailers and wholesalers were treated by the municipality differently in the tax imposed [fol. 154] per volume of sales. So here it seems to me that it was arbitrary and unreasonable not to treat singly oper-

ated units, department stores and chain stores differently in the rate of tax imposed per volume. If the rate of tax was to be determined per volume it should have been different as to each class of retailers.

The arbitrary and unreasonable character of the Act seems to me to be demonstrated by the operation of the Act. The returns for the year 1930, 1931 and 1932 are in the record. Mention will be made only of the returns for 1930, as they are the most complete. 24,163 retail merchants made returns for that year. Their gross sales amounted to $362,848,264 and the tax paid by them to $106-342,94. It is reasonable to assume that these returns cover all retail merchants in the state except plaintiffs and those not plaintiffs but protected by the temporary injunction, twenty five in number. The gross sales of the plaintiff, Stewart Dry Goods Company, a corporation operating a department store containing seventy-seven departments in Louisville amounted to $3,000,000, the tax upon which is a little over $23,000.00. Those of the plaintiffs, Levy Brothers, a partnership operating a department store in Louisville, amounted to $1,250,000, the tax upon which is almost $5,500.00. The gross sales of the plaintiff, J. C. Penny Co., in this state, a corporation, a chain store operating department stores in and out of this state, twenty-one of which are located in this state, are not before me. The tax thereon seems to be about $10,000.00. And the gross sales in this state of the plaintiff, The Kroger Grocery & Baking Company, a corporation, a chain store operating retail groceries in and out of this state, 263 of which are located in this state, amounted to $14,500,000.00 in round numbers, the tax upon which is approximately $124,000.00. The tax of the Great Atlantic & Pacific Tea Company, one of the twenty-five protected by the injunction, is estimated at approximately $120,000.00 and the taxes of the other merchants so protected is placed at about $50,000.00. This [fol. 155] makes the whole tax not over $450,000.00. Of this tax the Kroger Grocery & Baking Company and The Great Atlantic & Pacific Tea Company pay more than one half though their aggregate gross sales are only 8% of the gross sales in the state. The tax of the Kroger Grocery & Baking Company on $14,500,000.00 gross sales is more than $18,000.00 in excess of that paid by 24,163 merchants on $362,000,000.00 gross sales. The Stewart Dry Goods Com-

pany operating a single department store in Louisville pays $23,000.00 taxes on $3,000,000.00 of gross sales, nearly one fourth as much as the 24,163 merchants making returns upon gross sales amounting to $362,000,000.00. Of those 24,163 merchants only 35 of them made gross sales in excess of $400,000.00. The sum yielded by the tax is a measly sum as compared with the needs of the state and twenty-nine merchants out of over 24,000 pay three-fourths of this sum. In the case of the plaintiff, The Kroger Grocery & Baking Company, its profit in this state was in round numbers $172,000.00. Deducting from this the tax leaves $48,000.00 as net profit, or ⅓ of 1% of the gross sales. The net profit in 1931 would have been less than $40,000.00 and in 1932 there would have been a loss of $9,000.00. The same tax applied to its entire system would turn a profit of $1,400,000.00 into a loss of $700,000.00.

Apparently the sum yielded by the tax is contributed to generally by the retail merchants throughout the state. As a matter of fact, by reason of the credits against the tax, which the act authorizes, and which possibly of itself may render it unconstitutional, more than two-thirds of the retail merchants of the state make no contribution whatever to that sum. The Statute is both vindictive and deceptive.

Another particular in which it seems to me that the Act is unconstitutional is that it discriminates against garden and farm products raised in other states, and in that it excepts from its provision retail merchants selling garden [fol. 156] and farm products raised by them in this state. A retail merchant who sells such products raised elsewhere is subject to the tax. The plaintiff, The Kroger Grocery & Baking Company, comes within that category. It operates a farm of 360 acres in Ohio named "Country Club Farm" after the "Country Club" brand, one of its best known brands. On that farm it produces cattle, sheep, hogs, poultry, milk and garden and other farm products which are sold at retail in this state. The language of the exception is "those actually engaged in gardening or farming and selling garden or farm products raised by them in this state." The Court of Appeals of Kentucky in the case of Moore vs. State Board, 239 Ky. 729, construed this exception as follows:

"However, we are of the opinion that the phrase 'in this state' was meant to modify the word 'selling' and not

'raised'. The whole import of the Act is the levy of a tax measured by sales made in this state. It is the sales which count, not the place where the goods sold are produced. It was plainly the purpose of the act to exempt from its operation those engaged in gardening and farming and selling their own products, such sales the Legislature intended to be without the operation of the act and it was of no moment to that body where the produce sold was raised."

The construction placed on the exception is as if it read "those actually engaged in gardening and farming and selling in this state garden or farm products raised by them." It seems to me that construing it to mean as if it so read is taking unauthorized liberty with the language of the Act. There is one consideration, however, which makes it certain that the legislation had no such meaning. To so read the statute exempts the plaintiff, The Kroger Grocery & Baking Company, from the act. The exemption is not of persons, but of retail merchants so engaged in selling and that plaintiff is such a merchant. It is inconceivable that the legislature intended to make such an exemption. Then, if it be taken that it did, this circum-[fol. 157] stances of itself would seem to affect the validity of the act. It will hardly do to hold that the plaintiff, The Kroger Grocery & Baking Company, shall not pay the tax and The Great Atlantic & Pacific Tea Company shall. This is a case, as I see it, where this court is not bound to follow the state court in its construction of the act. It is governed by the statement on this subject in the case of Edward Hines Trustees vs. Martin, 268 U. S. 458, 463.

On the other question involved I think that the plaintiffs have a plain and adequate remedy at law in this court. Where this state levies a tax which the taxpayer claims is illegal and pays under protest, it is exacted from him by duress and the official into whose hands it comes and the state itself hold it in trust to repay to the taxpayer if it is held by the courts to have been illegal. It cannot and should not be used for the purpose for which it was levied and collected, at least, until the lapse of a reasonable time for the taxpayer to assert his right. Nothing else appearing it is to be taken that this trust will be respected. In this state it has been the invariable practice to so treat taxes so paid and upon its being held that the tax is

illegal to repay it at once. This is unaffected by the present wretched financial condition of the state. If the tax paid has not been kept intact so as to enable such repayment to be made there is always enough cash in the general fund sufficient for that purpose. Sections 4688-1 to 4688a-2 and 4689, Kentucky Statutes, do not relate to warrants drawn by the Auditor on the Treasurer to repay illegal taxes which have been collected. They relate solely to warrants so drawn in favor of voluntary creditors of the state. Hence they have no bearing here. Section 162, Kentucky Statutes, relates to warrants drawn to pay such taxes. A decision of the Kentucky Court of Appeals is not needed to make good any of these propositions. Their correctness is apparent. A recognition of the invariable practice of [fol. 158] the state officials to respect the trust imposed by payment under protest of taxes claimed to be illegal and an indication that the Appellate Court of the state will enforce such trust is to be found in the case of Talbott, Auditor vs. Childers, Executor, 247 Ky. 568. It involved the question as to whether a succession tax paid by an executor in order to procure the right to transfer corporate stock could be recovered when it had not been made under protest. The court in demonstrating the need for such a protest made at the time the tax was paid, said:

"So that the Collector thereof may become forewarned that an effort would be later made to recover the amount, either in whole or in part, and so that the distributors of such tax to said agencies entitled to it might become advised that payments so made are not permanent but only tentative, subject to be refunded by whatever proceeding payor might thereafter take."

See also case of Talbott vs. Urquhart's Exors., 250 Ky. 143.

Section 10 of the act here involved expressly authorizes the taxpayer to bring an action to recover the tax which he has paid under protest. This authority is unlimited and amounts to a consent on the part of the state that it may be sued in this court. If judgment is rendered in its favor this court has jurisdiction by mandamus to compel repayment of the tax. If limited to the general fund therefor, there is alway- sufficient in that fund out of which it can be paid. But it is not to be expected that it will be so

limited. It should be taken that the tax paid, if paid under protest, will be kept intact so that it can be repaid upon such adjudication. There is nothing in the act against this.

A. M. J. Cochran, Judge.

May 23, 1934.

[fol. 159] In United States District Court, Eastern District of Kentucky

In Equity. No. 3908

[Title omitted]

Motion by Complainant for Findings and Conclusions, etc.—Filed March 26, 1934

The complainant in the above-styled case (by agreement heard in connection with the suits against the same defendants brought in the United States District Court for the Western District of Kentucky, at Louisville, by The Stewart Dry Goods Company—No. 609, Fred Levy, et al.—No. 610, and The J. C. Penney Company—No. 611, and tried upon the same evidence in all four cases) moves the Court:

(1) To file herein the printed copy of suggested findings of fact and conclusions of law herewith tendered on behalf of complainant, and to adopt and enter same as the Court's findings of fact and conclusions of law, in accordance with the request heretofore made by this complainant, and

(2) To file herein the printed copy of a memorandum submitted on behalf of complainant in opposition to the findings of fact and conclusions of law proposed herein on behalf of defendants.

Nichols, Morrill, Wood, Marx & Ginter; Trabue, Doolan, Helm & Helm, Solicitors for Complainant.

[fol. 160] Kentucky Gross Sales Tax Cases

Findings of Fact and Conclusions of Law Proposed on Behalf of Complainants

I

Findings Describing Business Done by Complainants and Classes Represented Thereby

1. The Stewart Dry Goods Company is the largest and one of the oldest department stores in the city of Louisville,

Kentucky. It sells a great variety of merchandise commonly sold in department stores, at retail, in various ways; i. e., over the counter for cash, to customers who charge their purchases and to whom delivery is made, both in Kentucky and across the river in Indiana, and to customers in and out of the State who order by mail. All its said business is conducted in one store building seven stories high and in a basement department. The merchandise sold by Stewart in its store is sold by competing merchants in the city of Louisville, some of whom conduct department stores, as more fully described in the record.

Among other merchants who conduct retail department stores similar in character to Stewart but selling a smaller volume of merchandise are Kaufman-Straus Company, Herman Straus & Sons Company, John C. Lewis Company, J. Bacon & Sons and Ben Snyder, all of whom do a competing business in the city of Louisville, Kentucky, with their business housed in one building, and who are taxed at a lower rate than the Stewart Company.

2. Levy Bros. is a common-law partnership composed of certain individuals, engaged principally in the sale of men's and boys' clothing and a number of related articles. Their store was established and has been maintained at the same location in one building in the city of Louisville since 1861.

Merchandise is sold by Levy Bros. to cash-and-carry customers, and to charge-and-delivery customers, both in Ken- [fol. 161] tucky and Indiana. They are in direct competition with a number of other retail clothing merchants, many of whom are incorporated and through the deduction of the corporation license tax paid by them are to that extent exempted from the payment of any tax under the challenged Act.

One competing retail clothing merchant which is incorporated is Richman Brothers Company, which is part of a nation-wide chain of clothing stores, but conducts only one store in the entire State of Kentucky, the said store being conducted in Louisville, in direct competition with Levy Bros.

Other competing retail clothing merchants include the retail clothing departments of department stores and specialty clothing stores likewise incorporated.

3. The J. C. Penney Company is a corporation which operates a number of department stores in a number of dif-

ferent States. This company operates 21 department stores in the State of Kentucky. Each of said stores is located in a different city. Each of said stores sells at retail dry goods, shoes, clothing, notions, piece goods and similar articles of merchandise commonly sold by department stores.

For a more specific description of the J. C. Penney stores and the competitive conditions encountered by said stores in each of the 21 communities where said stores are located in Kentucky, reference is made to the affidavits of its 21 store managers, included in the record.

Among other merchants engaged in a similar business are Sears-Roebuck Company and Montgomery Ward & Company, each of which companies operates a number of retail department stores in numerous States of the United States, including Kentucky.

Said department stores conducted by J. C. Penney Company are in direct competition with other department stores and specialty stores in their respective communities, which sell similar merchandise under similar conditions and by similar methods.

4. The Kroger Grocery & Baking Company is an Ohio corporation which conducts what is commonly called a chain of retail grocery stores in a number of States. It operates approximately 250 retail grocery stores in different parts of the State of Kentucky. In many communities it has only one store. In the large communities it has a number of stores. These stores sell all kinds of groceries, meats, vegetables and farm produce, at retail, to cash-and-carry customers.

[fol. 162] Among other retail merchants engaged in a similar business in the State of Kentucky are the Great Atlantic & Pacific Tea Company, which operates approximately 300 stores; the Glass Company, which operates approximately 15 stores; and Steiden Stores, which operates a number of stores in the city of Louisville and vicinity.

There are also a large number of grocery stores associated together in co-operative organizations throughout the State of Kentucky, including the Independent Grocers' Alliance, which is a nation-wide organization of grocery stores having approximately 10,000 members in the United

States and a large number in the State of Kentucky, and the James Company, the Merchants' Wholesale Grocery Company, and the National Grocery Company.

In every community there are a number of retail grocery stores operated by individuals and by corporations and partnerships.

All of the foregoing chains, co-operatives and other grocery store merchants are in direct competition and engaged in a similar retail grocery business.

II

Warrants Against General Fund

1. The state of the General Fund of Kentucky on the dates set out hereunder is indicated by the figures which appear after the respective dates:

Date	Balance to credit of general fund		Outstanding warrants against general fund
6/30/1922	$ 297,967.85		$ 4,702,709.11
6/30/1923	2,590,470.14		5,947,750.40
6/30/1924	167,535.74		4,089,151.37
6/30/1925	310,242.68		4,127,746.17
6/30/1926	10,387.44		4,329,772.33
6/30/1927	157,566.83	deficit	4,664,820.89
6/30/1928	440,328.14		6,715,347.99
6/30/1929	1,880,084.77		8,060,920.69
6/30/1930	1,826,244.05		8,533,394.79
12/31/1930	1,250,168.22		9,880,501.76
6/30/1931	2,440,128.46		11,023,911.53
12/31/1931	838,269.63		12,637,990.48
6/30/1932	1,302,267.69		13,851,414.57
12/31/1932	573,831.32		14,415,403.69
5/25/1933	1,898,229.25		14,668,744.57
6/30/1933			15,197.005.42

[fol. 163] 2. Interest-bearing warrants against the General Fund, at the commencement of this action and at all times during the pendency of this suit have been selling under par. At times they have sold as low as eighty-three cents on the dollar.

3. Warrants once stamped interest-bearing by the State Treasurer are uniformly paid in the order of their issue.

4. No interest-bearing warrants issued since 1927 have been paid.

5. Section 9 of the challenged Act appropriates the taxes levied thereunder, one-half to the State Board of Charities and Corrections, for the specific purpose of repairing, maintaining and constructing permanent improvements for use of the institutions under its control, and the other half for the specific purpose of liquidating any idebtedness of the Commonwealth. Not more than one-half of such taxes could in any event be used to augment the General Fund.

6. It has been the practice of the present State Treasurer, when warrants for the refund of taxes adjudged to have been illegally collected are presented to him for payment, without having been stamped "interest bearing," to pay same with reasonable promptness out of accumulations then or thereafter made in the particular fund against which the warrant is drawn when augmented by such illegal collections. Substantial refunds of taxes illegally collected have in fact been thus made in the two years prior to July 1, 1933.

Conclusions of Law Based on Above Findings of Fact

1. There is doubt as to whether warrants received from the State in the event the taxes were paid and an action at law was maintained would be given preference over the interest-bearing warrants now outstanding.

2. The presence of this doubt makes it uncertain when warrants would be paid.

3. The Court of Appeals of Kentucky has held that it is the duty of the Treasurer to pay outstanding warrants in the order they were issued. Rhea, Treasurer, v. Newman, 153 Ky. 604.

4. By reason of the foregoing, Section 10 of the Act in question does not afford the plaintiffs an adequate remedy at law.

[fol. 164] III

Facts Relative to Fourteenth Amendment

1. The challenged Act is a revenue measure and has no relationship to the public health, safety or morals.

2. The tax fixed, exclusive of exemptions, is as follows:

Sales of	$100,000	Rate of		1/20	of	1%	or a	tax	of	$ 50.00
Second	$100,000 of sales	"	"	"	"	"	"	"	"	50.00
Third	$100,000 of sales	"	"	"	"	"	"	"	"	50.00
Fourth	$100,000 of sales	"	"	"	"	"	"	"	"	50.00
Fifth	$100,000 of sales	"	"	2/20	"	"	"	"	"	100.00
Sixth	$100,000 of sales	"	"	5/20	"	"	"	"	"	250.00
Seventh	$100,000 of sales	"	"	8/20	"	"	"	"	"	400.00
Eighth	$100,000 of sales	"	"	11/20	"	"	"	"	"	550.00
Ninth	$100,000 of sales	"	"	14/20	"	"	"	"	"	700.00
Tenth	$100,000 of sales	"	"	17/20	"	"	"	"	"	850.00
Eleventh	$100,000 of sales	"	"	1%			"	"	"	1,000.00
On each $100,000 of sales thereafter, 1%.										

3. Exemptions granted under the challenged Act include the corporation license tax (Ky. Stat., § 4189-1 et seq.) levying an annual tax at the rate of 70c on each $1,000 of business transacted in the State, or on the asset value of the capital stock of such corporation, with a minimum tax of $10.00; license taxes on the occupation of selling malt liquors ($75); spirituous and vinous liquors ($100); spirituous, vinous and malt liquors ($200); playing cards ($10); pistols ($10); bowie knives, dirks, brass knucks, sling shots ($10); merchants or druggists who sell liquor ($100); cigarettes ($10); soda fountain ($2.50), etc. (Ky. Stat., § 4224); oleomargarine ($10); ice cream and soft drinks ($10); (Ky. Stat., § 4224a-1). Various other State license taxes are also levied and would also come within the credits allowed by the challenged Act.

4. There are approximately 25,000 retail stores in the State of Kentucky.

5. For the year 1930, 24,163 returns were filed by merchants subject to the Act in question. These 24,163 merchants had gross sales in the amount of $362,848,264.

[fol. 165] 6. Of the merchants reporting, 24,128 showed sales of less than $400,000. Their aggregate gross sales amounted to $340,197,497. Of the merchants falling in this group, 16,413 paid no tax. The total tax levied against this group after deducting credits is $89,220.76. (Brendel 1930 Reports.)

7. The following is a correct analysis of reports of other merchants for the year 1930, showing the number of returns in the various groups, their gross sales in the same group, and the net tax after deduction for credits:

	Number of returns	Gross sales	Net tax
Sales less than $400,000	24,128	$340,197,497.00	$89,220.76
Sales between $400,000 and $500,000	13	5,866,935.00	1,261.37
Sales between $500,000 and $600,000	8	4,416,568.00	1,317.40
Sales between $600,000 and $700,000	5	3,234,563.00	1,768.56
Sales between $700,000 and $800,000	4	2,989,019.00	1,383.00
Sales between $800,000 and $900,000	1	814,559.00	0
Sales between $900,000 and $1,000,000	0	0	0
Sales in excess of $1,000,000	4	5,329,123.00	11,391.76
Totals	24,163	$362,848,264.00	$106,342.94

8. The following is a correct analysis of returns, gross sales and net tax for the year 1931 after deduction for credits:

	Number of returns	Gross sales	Net tax
Sales less than $400,000	20,351	$290,824,180.00	$66,769.82
Sales between $400,000 and $500,000	10	4,520,653.00	1,007.59
Sales between $500,000 and $600,000	9	4,887,385.00	1,360.02
Sales between $600,000 and $700,000	3	1,927,791.00	1,461.17
Sales between $700,000 and $800,000	2	1,472,166.00	965.08
Sales between $800,000 and $900,000	3	2,549,814.00	3,118.74
Sales between $900,000 and $1,000,000	2	1,895,680.00	4,128.35
Sales in excess of $1,000,000	2	2,389,404.00	6,386.22
Totals	20,382	$310,467,073.00	$85,136.99

[fol. 166] 9. The following is a correct analysis of returns filed during the period from January 1, 1933 to April 17, 1933, showing the number of returns, gross sales and net tax for the year 1932:

	Number of returns	Gross sales	Net tax
Sales less than $400,000	14,582	$178,783,514.26	$35,948.38
Sales between $400,000 and $500,000	4	1,835,261.79	282.28
Sales between $500,000 and $600,000	5	2,764,557.15	1,107.50
Sales between $600,000 and $700,000	1	601,558.29	0
Sales between $700,000 and $800,000	2	1,522,598.66	1,297.06
Sales between $800,000 and $900,000	1	864,205.61	1,534.44
Sales between $900,000 and $1,000,000	1	939,417.13	0
Sales in excess of $1,000,000	2	1,001,903.32	2,747.03
Totals	14,597	$186,313,016.81	$42,916.69

10. In addition to the merchants listed above, there were approximately 25 who had sales in excess of $400,000, these being all the merchants who have given bonds and who are protected by the injunction herein.

11. Taking the full calendar year to ascertain the effect of the challenged Act in current actual operation, the sales and resulting taxes of the respective complainants are as follows:

		Sales	Taxes
Levy Bros:	1930	$1,554,151.52	$8,456.91
	1931	1,320,075.00	6,116.14
	1932	930,457.40	2,458.89
Stewart Dry Goods Company:	1930	3,821,636.94	29,987.26
	1931	3,618,126.00	27,823.41
	1932	2,812,683.00	19,829.43
J. C. Penney Company:	1930	2,236,148.06	15,411.00
	1931	2,169,523.59	14,282.59
	1932	1,924,550.86	11,783.36
Kroger Grocery & Baking Company:	1930	14,653,448.00	124,215.48
	1931	13,496,915.00	112,377.31
	1932	11,447,611.00	95,254.37

[fol. 167] 12. The total annual tax which the challenged Act would produce, according to the testimony of State officials, is $500,000. Of this amount, the following merchants are called on to pay (averaging the years 1930, 1931 and 1932) approximately the following amounts respectively:

Levy Bros	$5,677.31
Stewart Dry Goods Company	25,880.03
J. C. Penney Company	13,825.65
Kroger Grocery & Baking Company	110,615.26
Great Atlantic & Pacific Tea Company	120,000.00

(As shown by its bonds filed herein.)

13. There is no relation between sales volume and net earnings or profit.

14. The rate of profit realized from sales made at retail varies with the character of goods sold.

15. Goods sold on credit are included in gross sales, whether payment therefor is made or not.

16. The management of a store or stores is the fundamental factor in determining whether or not a profit is realized or the amount of profit realized.

17. Some stores operate upon a large profit derived from a small volume of sales, while others operate upon a small margin of profit with a large volume of sales. Whether a store pursues one policy or the other, depends upon the judgment of its management.

18. Sales made by merchants taxed under the challenged Act in one or more tax brackets as therein provided are in direct competition with sales made by merchants engaged in selling the same character of goods taxed in other brackets.

19. There is no relationship between the percentage of profit, or loss, sustained by retail merchants as a class, and the classifications made in the challenged Act.

20. The increase in rates, from bracket to bracket, prescribed by the challenged Act, is without regard to any actual or assumed increase in profits per dollar of sales classified in the higher brackets.

[fol. 168] 21. There are distinct differences in the form and merchandising of chain stores as compared with the form and merchandising of department stores and specialty stores.

22. The Kroger Grocery & Baking Company operated 5,302 stores in the United States in 1930; 4,980 stores in 1931; 4,816 stores in 1932. It operated 289 stores in Kentucky in 1930; 254 stores in 1931; and 249 stores in 1932.

23. The average sales per store for The Kroger Grocery & Baking Company in Kentucky were approximately $50,000. Each of the stores was in direct competition with grocery stores located in the neighborhood. The sales of some of its competitors exceed the sale of the Kroger stores with which they compete.

24. Because of the varying rates and the deduction of special license taxes, competing stores, whose sales are not aggregated with those of other stores, pay practically nothing under the challenged Act, while the Kroger stores, by reason of the forced aggregation and the high rate placed on increased sales, have to pay an average tax in the neighborhood of $450.00 per store.

25. The Kroger Company has at all times been properly authorized to do business in the State of Kentucky. It is a corporation having approximately 16,000 stockholders widely scattered throughout the United States.

26. The retail sales of Kroger in the United States have been as follows:

1930	$267,094,345.26
1931	244,371,147.17
1932	213,159,742.69
1933	91,997,867.55 in first six months.

The Kentucky sales for this three-year period have been as follows:

1930	$14,653,448.00
1931	13,496,915.00
1932	11,447,611.00

27. Kroger has paid all taxes imposed upon it by the State of Kentucky, has purchased a large amount of its supplies [fol. 169] in that State, and has expended a large amount of money in the way of salaries, purchase of produce, expense of transportation, etc.

28. The Stewart Dry Goods Company has sales of approximately $3,000,000 a year, and its taxes under the challenged Act are in the neighborhood of $25,000. It operates 77 different departments, including dry goods, draperies, clothing for women and misses, clothing for men and boys, books and stationery, furs, furniture, musical instruments and millinery, for a more specific description of which reference is made to the affidavit of its President, Robert J. McKim. The merchandise sold in said departments is similar to the merchandise sold by competing merchants in other department stores and in specialty stores specializing in shoes, millinery and other specialties. Each department is charged, in bookkeeping, with its own floor space, adver-

tising, pay roll, taxes and other items of overhead. Each department is, in practice, a separate unit, distinct from other departments and in charge of its own manager. The annual sales do not exceed $400,000 in any single department.

29. In many instances the sales of a particular department of Stewart's are approximately the same as the sales of one or more specialized stores selling the same line of goods, and in many instances the sales of the Stewart department are considerably lower than the sales of specialized stores competing with Stewart in the particular line of goods handled. Stewart is required to aggregate the sales in all departments, and each department pays a tax at the higher rates, whereas competing stores pay a tax at the lower rates or pay no tax at all.

30. The amount of goods purchased by Stewart for sale in particular departments is likewise smaller than the amounts purchased by individual merchants or specialized stores, in numerous instances.

31. Levy Brothers are individuals who operate, as partners, a department store having sales of approximately $1,250,000, upon which they are required to pay a tax of approximately $5,500.

32. The Levy Brothers store is departmentalized but the principal items which it sells are men's and boys' clothing, wearing apparel, etc., for a more specific description of [fol. 170] which reference is made to the affidavit of Fred Levy. The merchandise sold therein is of a similar nature to merchandise sold in competitive stores and is sold in a similar way.

33. In many instances sales by Levy Bros. came in competition with sales by other retail merchants selling the same line of goods, who under the challenged Act are not taxed at all or are taxed at a much lower rate. In this respect the situation of Levy Bros. is the same as that of the Stewart Dry Goods Company, as set forth in finding number 29, supra.

34. Under the Act, Levy Bros., as a partnership, are not allowed any deduction on account of a corporation license tax, allowed as a deduction by the challenged Act, to their corporate competitors.

35. Various departments in the department stores compete directly with chain store organizations which have only one store in the State of Kentucky and thereby are taxed at the lower rate, although such chain stores have all advantages of mass buying enjoyed by chain store organizations.

36. Byck Brothers operate a department store in the city of Louisville and have sales of approximately $700,000. They also operate a department by lease in the department store of Wolf, Wile Department Store, at Lexington, Kentucky. This department at Lexington is in no way affected by the sale of goods in Louisville, but competes directly with stores in Lexington. Its volume of sales is approximately $50,000 a year, but it is required to pay at the rate of almost 1% as against 1/20th of 1% by its competitors. Thus its sales will be added, without reason, either to the sales of Byck Brothers of Louisville or to the sales of Wolf, Wile in Lexington.

[fol. 171] Conclusions of Law Based on the Foregoing Findings of Fact

1. The Act denies complainants the equal protection of the law, and for this reason is unconstitutional.

2. The Act is an example of designed, hostile and vindictive discrimination in that it selects a few individuals and places on them a tax burden, while at the same time it exempts from the imposition of the tax a large majority of competing retail merchants. The merchants selected to bear the burden of the tax have only a small proportion of the gross retail sales in the State of Kentucky.

3. There is no legitimate basis for the excessive increase in rates of taxation provided by the Act. There is no legitimate basis for subdividing the sales of a retail merchant into the various brackets provided for in the Act and imposing upon sales in such brackets the increased rates of taxation prescribed by the Act for the higher brackets. The jump in the rates has no proper taxable relationship to the differences in the amount of sales.

4. The graduated rates, exemptions and deductions and the classifications attempted to be set up under the Act in question are unjustified because there is no difference be-

tween the members of the various so-called classes having any relationship to any legitimate purpose or policy of the challenged Act.

IV

Findings of Fact in Regard to Interstate Commerce

1. A substantial volume of the trade of the Stewart Dry Goods Company consists of sales made in interstate commerce to customers in other States buying merchandise by telephone, mail or personally from Stewart, to be delivered at their residences in such other States.

2. The Kroger Grocery & Baking Company ships packaged articles from outside the State of Kentucky to its stores in that State, where said articles are sold in the original containers in which they are packed for shipment.

[fol. 172] 3. The Kroger Grocery & Baking Company operates a farm outside of the State of Kentucky, where it raises produce and other garden and farm products, which are sold at retail in its Kentucky stores.

V

Findings of Fact Relative to Decision of Moore v. State Board of Charities and Correction, 239 Ky. 729

1. The cross-petition of D. T. Bohon Company in the case of Moore v. State Board of Charities and Correction, reported in 239 Ky. 729, was not filed until after this case had been submitted to this Court, and was not decided until six months after such submission.

2. The D. T. Bohon Company, cross-petitioner in the Forrest Moore case, represented to the State Courts of Kentucky in that action that it was a taxpayer. Actually the D. T. Bohon Company had no tax to pay, and its prosecution of the case on the theory that it was a taxpayer and aggrieved by the Act which it pretended to challenge, was not in good faith. Therefore, the Forrest Moore case did not present a *bona fide* controversy between contesting litigants as to either the validity or construction of the challenged Act.

Finding of Law Bearing on the Above Facts

1. The decision in the Moore case is not binding on this Court.

2. The challenged Act taxes retail merchants as the term "retail merchants" is used in said Act. Under the challenged Act there is exempted from the term "retail merchants" those actually engaged in gardening or farming and selling garden or farm products raised by them in the State of Kentucky.

3. The challenged Act is unconstitutional because it taxes interstate commerce.

4. The challenged Act is unconstitutional because it violates the Interstate Commerce Clause of the Federal Constitution in that it imposes a tax upon merchants who sell in the State of Kentucky farm products raised by them [fol. 173] outside the State of Kentucky and exempts merchants selling in the State of Kentucky farm products raised by them in that State.

5. Under the construction contended for by the defendants, merchants selling farm products raised by them are exempt without regard to where the farm products are raised. Under this construction, the challenged Act is unconstitutional because it violates the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution.

6. Under the construction contended for by the defendants, the complainant, The Kroger Grocery & Baking Company, is entitled to the injunction because it is one of the parties excepted from the term "retail merchants" as defined by the Act, if the construction contended for should be adopted.

7. The challenged Act is arbitrary, unequal and unconstitutional under the construction contended for by the defendants, because it exempts The Kroger Grocery & Baking Company and applies to other merchants doing a similar business, such as the Stewart Dry Goods Company and the Great Atlantic & Pacific Tea Company.

VI

Facts Relative to Unconstitutionality by Reason of Deprivation of Complainants' Property Without Due Process of Law

1. The percentage of profits to sales earned by the Kroger Company for the years 1930, 1931 and 1932 amounted to .55% for 1930; .90% for 1931; 1.15% for 1932.

Kroger sales in Kentucky for 1930, 1931 and 1932 are as follows:

1930	$14,653,448.00
1931	13,496,915.00
1932	11,447,611.00

The Kentucky tax for those three years was as follows:

1930	$124,215.48
1931	112,377.31
1932	95,254.37

[fol. 174] The percentage of profit in Kentucky to sales before the tax for 1930, 1931 and 1932 has been as follows:

1930	1.18%
1931	1.13%
1932	.75%

After the tax, percentage of profit was .33% for 1930; 29% for 1931; and the loss of .078% for 1932.

2. The profit per Kroger store before the tax has been as follows:

1930	$598.00
1931	598.00
1932	347.00

The tax per store for the same period of time has been computed as:

1930	$429.00
1931	442.00
1932	382.00

3. Profits of department stores average 1% for each dollar of sale.

4. Because of the graduated rates the tax in question can not be shifted.

Conclusions of Law Based on the Foregoing Facts

1. The challenged Act violates the Constitution of the United States in that it is confiscatory and deprives complainants of their property without due process of law.

2. The challenged Act violates Section 181 of the Constitution of the State of Kentucky for the reason that the returns imposed are confiscatory and represent an arbitrary prohibition of legitimate business and unreasonable classification for the purpose of taxation.

3. Complainants are entitled to a permanent injunction as prayed for in their Bill of Complaint.

Respectfully submitted, Nichols, Morrill, Wood, Mark & Ginter; Trabue, Doolan, Helm & Helm, Solicitors for Complainants.

[fol. 175] In United States District Court, Western of Kentucky

#609

Stewart Dry Goods Company, Plaintiff,

vs.

John B. Lewis, et al., Defendants

#610

Fred Levy, et al., Plaintiffs,

vs.

John B. Lewis, et al., Defendants

#611

J. C. Penney Company, Plaintiff,

vs.

John B. Lewis, et al., Defendants

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY

#3098

THE KROGER GROCERY & BAKING COMPANY, Plaintiff,

vs.

JOHN B. LEWIS, et al., Defendants

Findings of Fact and Conclusions of Law—Filed May 23, 1934

Findings of Fact

The court, pursuant to Equity Rule 70½, makes the following findings of fact:

State Warrants

1. The state of the General Fund of Kentucky on the dates set out hereunder is indicated by the figures which appear after the respective dates.

[fol. 176]

Date	Balance to credit of general fund	Outstanding warrants against general fund
6/30/1922	$297,967.85	$4,702,709.11
6/30/1923	2,590,470.14	5,947,750.40
6/30/1924	167,535.74	4,089,151.37
6/30/1925	310,242.68	4,127,746.17
6/30/1926	10,387.44	4,329,772.33
6/30/1927	257,566.83 deficit	4,664,820.89
6/30/1928	440,328.14	6,715,347.99
6/30/1929	1,880,084.77	8,060,920.69
6/30/1930	1,826,244.05	8,533,394.79
12/30/1930	1,250,168.22	9,880,501.76
6/30/1931	2,240,128.46	11,023,911.53
12/31/1931	838,269.63	12,637,990.48
6/30/1932	1,302,267.69	13,851,414.57
12/31/1932	573,831.32	14,415,403.69
5/25/1933	1,898,229.25	14,668,744.57
7/30/1933	.....	15,197,005.42

2. Claims against the Commonwealth of Kentucky, whether for refund of taxes or on account of other obligations of the State, are first audited by the Auditor of Public Accounts, and, if found correct, he issues a State warrant for the amount thereof, which is, in effect, an order on the Treasurer for the amount of the claim. These warrants are made payable out of different funds, some out of the

General Fund, and others out of other funds set aside by legislative act for specific State purposes. If the Treasurer has on hand in the fund against which the warrant is drawn sufficient funds to pay same at the time it is presented, it is usually paid; otherwise it is stamped interest bearing, and after warrants have been stamped interest bearing they are called and paid in the order in which they are issued. Due to lack of funds, however, to the credit of the General Fund, no interest bearing warrants against that fund issued since 1927 have been paid.

3. Outstanding interest bearing warrants against the General Fund of the State, during all the time since the passage of the Act in question in these cases, have [fol. 177] sold below par, the price at times being as low as eighty-three cents on the dollar.

4. It has been the practice of the State Treasurer in recent years to pay in cash, upon presentation, warrants issued for refund of taxes, and such has been the uniform practice of the Treasurer who has been in office at all times since the passage of the Act in question, and he has at all times since he has been in office followed the practice of keeping himself in financial position to refund all taxes paid under legal protest when required so to do, and he at all times has been in a position so to do with reference to the taxes involved in these actions. There is no statute in Kentucky, however, specifically authorizing such preferential treatment of tax refund warrants, nor has the Court of Appeals of the State ever held that such practice is authorized by the laws of the State.

5. Unless warrants drawn under Section 10 of the Act were given preferential treatment in payment, they could not be collected within a reasonable time.

Conclusions of Law Based Upon the Above Findings of Fact

Inasmuch as there is doubt of the authority of the Treasurer of the State to give preference in payment to warrants issued under Section 10 of the Act, that section fails to afford to the plaintiffs as certain, speedy, complete and efficient a remedy at law as is available to them in equity, and therefore these actions are cognizable in equity.

[fol. 178] Facts Relative to Fourteenth Amendment

1. The challenged Act is essentially a revenue measure.

2. The tax imposed by the Act, exclusive of the credits allowed, is as follows:

Sales of first four	$100,000	Rate of	1/20 of 1%	or a tax of	$200.00
Fifth	$100,000 of sales	" "	2/20 " "	" " " "	100.00
Sixth	$100,000 of sales	" "	5/20 " "	" " " "	250.00
Seventh	$100,000 of sales	" "	8/20 " "	" " " "	400.00
Eighth	$100,000 of sales	" "	11/20 " "	" " " "	550.00
Ninth	$100,000 of sales	" "	14/20 " "	" " " "	700.00
Tenth	$100,000 of sales	" "	17/20 " "	" " " "	850.00
Eleventh	$100,000 of sales	" "	1% " "	" " " "	1,000.00
On each	$100,000 of sales hereafter, 1%.				

3. Examples of the special license taxes and corporation taxes allowed as credits under Section 4 of the Act are: the corporation license tax of seventy cents on each one thousand dollars of business transacted by the corporation in the State, or on the value of the capital stock of the corporation; cigarette license tax of $10; soft drink license $2.50; oleomargarine license $3; playing cards $10; pistols $10; bowie-knives, dirks, etc. $100; etc.

4. There are approximately 25,000 retail stores in the State of Kentucky.

5. No merchant in Kentucky has an annual sales volume in excess of fifteen million dollars. Without giving effect to the credits authorized by Section 4 of the Act, there is shown below the amount of taxes which are payable by merchants falling in the respective brackets fixed by the Act, and also the effective rate of such tax expressed in percentage of gross sales.

[fol. 179]

Amount of sales	Total tax payable	Effective rate
$ 400,000	$ 200	.05
500,000	300	.06
600,000	550	.0917
700,000	950	.1357
800,000	1,500	.1875
900,000	2,200	.2444
1,000,000	3,050	.305
2,000,000	13,050	.6525
3,000,000	23,050	.7683
4,000,000	33,050	.8263
5,000,000	43,050	.861
10,000,000	93,050	.9305
15,000,000	143,050	.96

6. For the year 1930, 24,163 returns were filed by merchants subject to the Act, and these returns showed an aggregate of gross sales of $362,848,264. 24,128 of these reporting merchants showed gross sales of less than $400,000 each, and the aggregate gross sales of these 24,128 was $340,197,497. 16,413 of the merchants falling in this group, by reason of credits allowed by Section 4, paid no tax. The total tax levied against this group, after the allowance of credits, amounted to $89,220.76 for the year 1930.

7. The following is a correct analysis of the report filed by the 24,163 merchants above referred to for the year 1930, showing the number of returns in the various brackets, their gross sales in the same groups, and the net tax after deduction of credits allowed by Section 4, except that there is not shown the effect of the operation of the challenged Act upon the business of those merchants, (25 in number) who made no report, having availed themselves of the opportunity afforded by the court to post bond in order to secure the protection of the injunction issued in these cases.

[fol. 180]

	Number of returns	Gross sales	Net tax
Sales less than $400,000	24,128	$340,197,497	$89,220.76
Sales between $400,000 and $500,000	13	5,866,935	1,261.37
Sales between $500,000 and $600,000	8	4,416,568	1,317.40
Sales between $600,000 and $700,000	5	3,234,563	1,768.56
Sales between $700,000 and $800,000	4	2,989,019	1,383.09
Sales between $800,000 and $900,000	1	814,559	0
Sales between $900,000 and $1,000,000	0	0	0
Sales in excess of $1,000,000	4	5,329,123	11,391.76
Totals	24,163	$362,848,264	$106,342.94

8. The following is a correct analysis of the returns, gross sales and net tax, after the allowance of credits under Section 4, for the year 1931, excluding the operation of the Act on the business of those merchants who have posted bond, made no report and paid no tax.

	Number of returns	Gross sales	Net tax
Sales less than $400,000	20,351	$290,824,180	$66,769.82
Sales between $400,000 and $500,000	10	4,520,653	1,007.59
Sales between $500,000 and $600,000	9	4,887,385	1,360.02
Sales between $600,000 and $700,000	3	1,927,791	1,461.17
Sales between $700,000 and $800,000	2	1,472,166	905.08
Sales between $800,000 and $900,000	3	2,549,814	3,118.74
Sales between $900,000 and $1,000,000	2	1,895,680	4,128.35
Sales in excess of $1,000,000	2	2,389,404	6,386.22
Totals	20,382	$310,467,073	$85,136.99

[fol. 181] 9. Similarly, the following is a correct analysis of the returns of the same class of merchants for the year 1932, which had been filed up to and including April 17, 1933.

	Number of returns	Gross sales	Net tax
Sales less than $400,000	14,582	$178,783,514.26	$35,948.38
Sales between $400,000 and $500,000	4	1,835,261.79	282.28
Sales between $500,000 and $600,000	5	2,764,557.15	1,107.50
Sales between $600,000 and $700,000	1	601,558.29	.....
Sales between $700,000 and $800,000	2	1,522,598.66	1,297.06
Sales between $800,000 and $900,000	1	864,205.61	1,534.44
Sales between $900,000 and $1,000,000	1	939,417.13	.....
Sales in excess of $1,000,000	2	1,001,903.32	2,747.03
Totals	14,597	$186,313,016.81	$42,916.69

10. The evidence fails to show that there is no relation between sales volume and net earnings, nor does it satisfactorily rebut a widely accepted theory of economists that, as a general proposition, increased volume of sales results in increased profits and increased ability to pay. On the contrary, there is substantial evidence supporting the affirmative of each of these propositions.

11. The rate of profit realized from sales at retail generally varies with the character of goods sold.

12. Under the Act goods sold on credit are included in gross sales, whether payment therefor is made or not.

13. The management of a store or stores is one of the fundamental factors in determining whether or not a profit is realized, and the amount of profit.

[fol. 182] 14. As a general proposition, those merchants doing the largest volume of trade are enabled to secure the highest type of management.

15. In the field of retail merchandising large scale enterprises, properly and prudently managed, enjoy economies in operation, such as the ability to purchase in large quantities and wider spread of overhead, not generally enjoyed by those stores doing a small volume of business. Yet in exceptional instances some retail merchants enjoy a high rate of profit on a small volume of sales, while in other cases the margin of profit is very low, even though the sales volume be very large.

16. Sales made by merchants taxed under any of the brackets of the Act are in competition with sales made by merchants selling the same character of goods who are taxed under other brackets of the Act.

17. The Kroger Grocery and Baking Company operated 5,302 stores in the United States in 1930; 4,980 stores in 1931; and 4,816 stores in 1932. Of this number 289 were located in Kentucky in 1930; 254 in 1931; and 249 in 1932. The average annual sales per store of the Kroger Grocery and Baking Company in Kentucky over the past few years has been approximately $50,000. Most, if not all, of the stores of this company are in competition with other grocery stores located in the neighborhood, and the sales of some of these competing stores exceed the sales of the Kroger stores with which they compete. Some of these competitors of the Kroger stores are owned by merchants operating single stores with a relatively small volume of sales, and in some instances are entitled to enough credits under Section 4 of the Act to wipe out the tax liability [fol. 183] under the Act, whereas the competing Kroger stores, by reason of the fact that the Kroger tax liability is determined upon the aggregate sales of all of its stores, pay an average annual tax of between $425.00 and $450.00.

18. The retail sales of Kroger in the United States for the years 1930, 1931 and 1932 have been as follows:

1930	$267,094,345.26
1931	244,371,147.17
1932	213,159,742.69

and the Kentucky sales for this same three year period have been:

1930	$14,653,448
1931	13,496,915
1932	11,447,611

19. The gross sales of the Stewart Dry Goods Company are approximately $3,000,000 per year. Without taking account of the credits to which it is entitled under Section 4 of the Act, its annual tax under the Act is approximately $23,000, which would figure approximately 76/100 of one per cent of gross sales. This company operates seventy departments, each bearing its proportionate part of the expense of the whole establishment. No department has annual sales in excess of $400,000, and in a considerable number of instances the total sales of a particular department of Stewarts are approximately the same as the sales of specialized stores selling the same line of goods, and in some cases the sales of particular departments do not equal the sales of specialized stores in competition with that particular department. Department stores such as Stewart's do not enjoy any particular advantage over their specialty store competitors in purchasing, but do have over their specialized competitors some advantage, due to the fact that customers who come to purchase one article are attracted to articles and make purchases in other departments.

[fol. 184] 20. Levy Brothers are individuals, who operate as partners a department store in Louisville, Kentucky, with annual gross sales of approximately $1,250,000, on which they are required to pay a tax under the Act of approximately $5,500. Departments in this store compete with one or two chain store organizations which have only one store in the State of Kentucky. They also compete with individual specialized stores, which in some instances, because of the comparatively small volume of business done and credits allowed, pay little or no tax.

21. Byck Brothers operate a department store in Louisville, Kentucky, with annual gross sales of approximately $700,000. They also operate a department by lease in the Wolf-Wile Department Store at Lexington, Kentucky. This department in Lexington is in no way affected by the sale of goods in Louisville, but does compete directly with stores handling similar merchandise in Lexington, and its annual volume of sales is approximately $50,000. Under the Act, including the sales of this department, the tax of Byck Brothers is approximately 14/100 of one per cent of its gross sales. In a general way, this concern has the same problem of competition with single specialized stores as have Stewart Dry Goods Company and Levy Brothers, with relatively the same advantages.

Conclusions of Law on the Foregoing Findings of Fact.

By reason of the foregoing findings of fact, we conclude that the Act does not deny the plaintiffs the equal protection of the law, within the meaning of the Fourteenth Amendment, in any of the particulars asserted by the plaintiffs.

[fol. 185] Findings of Fact with Reference to Interstate Commerce

1. A considerable volume of the trade of the Stewart Dry Goods Company consists of sales made to customers in other States who buy merchandise by telephone, mail or personally from Stewarts, to be delivered at their place of residence in such other State. The record, however, fairly justifies the conclusion that such sales are actually consummated in Kentucky.

2. The Kroger Grocery and Baking Company ships packaged articles from outside the State of Kentucky to its stores in that State, where such articles are sold in the original containers in which they are packed for shipment. The retail sales of such articles, however, are separate and distinct transactions had after the goods have come to rest and become a part of the stock of merchandise of the particular store making the sale, such retail sales being entirely consummated in Kentucky.

3. The Kroger Grocery and Baking Company operates a farm in Ohio, where it raises farm and garden products,

a portion of which is placed in some of its stores in Kentucky and sold by retail from such stores. The amount of such farm and garden products, however, is relatively small as compared to the total of such products handled by such stores.

Findings of Fact Relative to the Decision of Moore vs. State Board of Charities & Corrections, 239 Ky., 729

1. The case of Moore vs. State Board of Charities & Corrections, supra, was filed on the 22nd day of December, 1930, which was prior to the filing of any of these actions.

[fol. 186] 2. The D. T. Bohon Company, cross-petitioner in the Forrest Moore case, represented to the State courts of Kentucky in that action that it was a taxpayer under the Act, and the case was decided on the theory that such statement was true, but the Bohon cross-petition was filed in the Moore case after the institution of these actions and after their submission on plaintiffs' motions for temporary injunction.

Conclusions of Law Upon the Above Facts

1. The decision in the Moore case by the State court, as to the meaning and scope of the Act in question, is binding upon this court.

2. As the Act has been interpreted and construed by the Court of Appeals of Kentucky in the Moore case, it does not violate the commerce clause of the Federal Constitution in any of the particulars urged by the plaintiffs.

Facts Relative to Claim of Confiscation

1. The evidence fails to show that the tax imposed is generally so burdensome upon those taxed as to deprive them of any opportunity to make a reasonable profit in their business.

2. The Kroger Grocery and Baking Company, for the year 1930, realized a net profit of 55/100 per cent on its entire gross sales; 9/10 per cent for 1931; and 1/15 per cent for 1932. These figures, however, are not typical of the experience of the class taxed, nor of any subdivision of such class; nor do they present a fair picture of the oper-
[fol. 187] ation of that company under reasonably efficient

management. For the first six months of 1933, under the management of Mr. Morrill, who became President of the company in 1930, the net profit of the company was $2,294,000, as compared to approximately $1,475,600 for the entire calendar year 1930; $2,199,000 for the entire year 1931, and $2,441,000 for the entire year 1932; and the net profit for the first six months of 1933, after deduction of taxes, amounted to 2.49 per cent of gross sales.

Conclusion of Law Based on the Foregoing Facts

Under the facts found, the tax imposed by the Act is not confiscatory, and therefore does not violate the due process clause of the Fourteenth Amendment, nor does it violate Section 181 of the Constitution of Kentucky or the Bill of Rights of that instrument.

These specific findings of fact are not to be construed as in derogation of any of our conclusions of fact set out in the opinion and not herein enumerated.

May 23, 1934.

(Signed) Xen. Hicks, U. S. Circuit Judge. (Signed) Charles I. Dawson, U. S. District Judge.

[fol. 188] In United States District Court, Eastern District of Kentucky

Equity. No. 3908

The Kroger Grocery & Baking Company, Complainant,

vs.

John B. Lewis, et al., Defendants

Order and Decree—Filed June 19, 1934

This cause, having been heard, on the merits, was submitted on August 21, 1933, upon the stipulations, proof and record set out in the order of submission entered as of that date, and the Court thereafter, to wit, on May 23rd, 1934, filed its opinion herein, concurred in by a majority of the Judges, Judge Cochran dissenting therefrom, as set out in his dissenting opinion filed May 22, 1934, and now made part of the record herein.

Complainant, on March 26, 1934, moved the Court, before entry of any decree herein, to find the facts specially, upon which its decree is based, and to state separately its conclusions of law thereon, and to enter of record such findings and conclusions.

Thereafter, complainant, on March 24, 1934, and defendants on the — day of ——, 1934, by their respective counsel, tendered findings of fact and conclusions of law proposed by them respectively, and moved the Court to adopt same as set forth in their respective motions entered of record.

The Court, having considered this cause in chief and upon the respective motions made by the complainant and by the defendants as to findings of fact and conclusions of law proposed by them respectively, and being now advised, orders and decrees herein as follows:

[fol. 189] I

(1) Complainant's motion entered herein December 26, 1933, for findings of fact and conclusions of law, is hereby sustained, and the Court, in compliance therewith, now filed herein its findings of fact and its conclusions of law and orders the same to be entered of record, such findings of fact and conclusions of law being concurred in by a majority of the Court and dissented from in part by Honorable Andrew M. J. Cochran.

(2) Except to the extent set forth or indicated in the findings of fact and conclusions of law this day filed herein by the Court as a compliance with Equity Rule 70½, the motion of complainant entered herein March 24, 1934, to adopt and enter the findings of fact and conclusions of law tendered with complainant's said motion of that date, is hereby overruled: to which the complainant excepts.

(3) In like manner, except to the extent set forth or indicated in the findings of fact and conclusions of law this day filed herein by the Court as a compliance with Equity Rule 70½, the motion of defendants entered herein —— —, 1934, to adopt and enter the findings of fact and conclusions of law tendered with defendants' said motion of that date, is hereby overruled: to which the defendants jointly and severally except.

[fol. 190] II

Pursuant to its option filed herein May 23, 1934, and its findings of fact and conclusions of law filed herein on the 21st day of May, 1934, the Court now adjudges and decrees:

(1) That the complainant is without an adequate remedy at law, and therefore the motion of defendants to dismiss the complaint as amended, for want of jurisdiction in equity, is denied: to which ruling the defendants except.

(2) That complainant take nothing by its bill of complaint as amended herein; that on final hearing upon the merits same is dismissed; and that defendants recover of complainant their costs herein expended: to all of which the complainant excepts.

(3) That complainant having this day stated in Court its intention to appeal from this decree insofar as it denies the relief sought by it and dismisses its bill of complaint as amended, it is, for the reasons set forth in the Court's opinion filed herein January 6, 1932, hereby ordered and adjudged that the interlocutory injunction heretofore granted in this cause shall be continued in effect as to the complainant and as to each retail merchant listed of record (by order entered herein March 30, 1931, and supplemented, as to other intervening taxpayers, by later orders) as included in the same class of taxpayers as complainant, and such interlocutory injunction shall remain in full force as to the complainant and each of said taxpayers so listed, until the final determination of complainant's said appeal: to all of which the defendants except.

Provided, however, that the complainant, for itself only, [fol. 191] and each of said taxpayers so listed desiring to avail himself or itself of the benefit of said restraining order pending such appeal, for himself or itself only (and not one for another), in addition to the bonds heretofore given by them respectively, with the approval of the District Judge for this District, shall within thirty (30) days from the entry of this decree execute such bond or make such deposit of money or securities as may be reasonably necessary to secure the Commonwealth of Kentucky against loss of any taxes, interest, court costs, or any other proper

charges that may be or may become due from such taxpayer for the calendar year 1933 under the Act assailed herein by complainant, in the event the validity of such Act should be finally established.

The amount of any such additional bond so given, or the amount or value of securities or money deposited by any taxpayer, shall be fixed at an amount equal to the estimated taxes claimed from such taxpayer for the calendar year 1933.

The parties to this action, through their respective counsel, may by agreement between them determine the amount of any such additional bond to be executed by any taxpayer, and the surety thereon, or the nature, kind and amount of money or securities to be deposited in lieu of bond, and if the parties, through their counsel, can not agree thereon, same shall be fixed by the District Judge of the District in which this cause is pending.

In the event the complainant or any one of said taxpayers shall fail to execute such bond or to give such security as is required of it or him or them to cover taxes accrued for the calendar year 1933, within thirty (30) days from the entry of this order and decree, said restraining order, as to such taxpayer so failing, shall be thereupon immediately dis-
[fol. 192] solved, as to taxes accrued for the calendar year 1933, and shall afford no further protection of such taxpayer as to such taxes for the calendar year 1933, but the taxpayer shall be entitled to the benefit of the injunction as to prior years for which it has executed a bond or made deposit of money or securities under orders heretofore entered in this cause.

The bonds heretofore executed by the complainant or by any taxpayer herein for any of the taxable years prior to the calendar year 1933 shall be continued in full force and effect pending the final determination of this cause on appeal, and in like manner all deposits of securities heretofore made shall be continued in pledge for the purposes for which such deposits respectively were made.

(Signed) Xen. Hicks, Circuit Judge. (Signed) Chas. I. Dawson, District Judge.

[fol. 193] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

In Equity. No. 3908

[Title omitted]

ORDER APPROVING BONDS—Filed July 21, 1934

This matter came on for hearing on the application for approval of the bonds filed in this cause, pursuant to the order entered June 19, 1934.

It appearing to the court that the following concerns have filed bonds with the proper sureties and/or secured by deposits in accordance with the order of June 19, 1934, it is hereby ordered that as to all such concerns the bonds shall be substituted for all previous bonds filed on behalf of such concerns and liability on such bonds is hereby terminated and said bonds are cancelled and the sureties thereon are relieved from the obligations assumed therein.

Concerns filing new bonds to cover taxes for the tax years of 1930, 1931, 1932 and 1933, and the amount of said new bonds are as follows:

The Kroger Grocery & Baking Company, bond in the amount of $398,000.00 secured by United States Treasury certificates in the amount of $398,000, deposited with the First National Bank of Louisville, pursuant to escrow agreement, copy of which is attached to the bond.

The Great Atlantic & Pacific Tea Company, bond in the amount of $445,000, secured by United States certificates of deposit and United States Treasury bonds in the amount of $445,000, deposited with the First National Bank of Louisville, pursuant to escrow agreement, copy of which is attached to the bond.

[fol. 194] The Melville Shoe Corporation, bond in the amount of $500.00.

S. H. Kress Company, bond in the amount of $600.00.

Walgreen Drug Stores, Inc., bond in the amount of $340.00.

It further appearing that certain concerns have filed bonds to cover taxes for the said year 1933, which bonds are to be held in addition to bonds previously filed, it is hereby ordered that as to such concerns previous bonds

filed by them be and they shall remain in full force and effect. Concerns falling in this category are:

S. S. Kresge Company. Previous bond covering taxes for tax year 1930, 1931 and 1932, $40,000; additional bond covering taxes for year 1933 in the amount of $12,000.00.

Sears Roebuck & Company. Previous bond covering taxes for tax year 1930, 1931 and 1932, $7,500.00; additional bond covering 1933 taxes $2,500.00.

F. W. Woolworth Company. Previous bond covering taxes for tax year 1930, 1931 and 1932, $37,500.00; additional bond covering taxes for the year 1933, $12,500.00.

It is hereby ordered that all the new bonds referred to herein be and they hereby are approved and that the previous bonds of S. S. Kresge Company, The Sears Roebuck & Company and F. W. Woolworth Company continue in force.

(Signed) Charles I. Dawson, Judge.

[fol. 195] In United States District Court, Eastern District of Kentucky

In Equity. No. 3908

[Title omitted]

Petition for Appeal—Filed Sept. 12, 1934

The plaintiff, The Kroger Grocery & Baking Company, conceiving itself aggrieved by the order and decree entered herein by this court on the 19th day of June, 1934, in the above entitled cause, insofar as said order and decree denies the motion of this plaintiff, after notice and hearing, for an interlocutory injunction restraining the defendants as prayed for in the motion of the plaintiff for such interlocutory injunction and insofar as said order and decree dismisses the Bill of Complaint as amended, and denies to the plaintiff a permanent injunction or any injunctive or other relief, hereby appeals to the Supreme Court of the United States from said order and decree.

The appeal herein prayed for is taken upon the grounds and for the reasons specified in the assignment of errors filed herewith.

[fol. 196] Plaintiff prays that said appeal be allowed and that a citation be issued thereon directed to the above named defendants, John B. Lewis, W. P. Sullivan and Emerson Beauchamp, individually and as members of the State Tax Commission of the Commonwealth of Kentucky and J. Dann Talbott, individually and as Auditor of Public Accounts of the Commonwealth of Kentucky commanding them and each of them to appear before its Supreme Court of the United States, to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record, proceedings and papers upon which said order and decree was entered be duly authenticated and sent to the Supreme Court of the United States.

Nichols, Morrill, Wood, Marx & Ginter; Trabue, Doolan, Helm & Helm, Attorneys for Plaintiff.

[fol. 197] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY

In Equity. No. 3908

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Sept. 12, 1934

The plaintiff, by counsel, respectfully represents that in the records and proceedings had in the above entitled cause and in the rendition of the decree herein appealed from there is manifest error, for which said decree should be reversed and as cause for such reversal the plaintiff makes the following assignments of error:

1. The Court erred in failing to hold that the challenged act designedly denies to plaintiff and to other retail merchants similarly situated the equal protection of the laws, in that by reason of its classifications prescribed in Section 2 thereof, and its exemptions and credits or reductions provided in Section 4 thereof, and its consequent widely-varying rates of taxation, it unjustly and unreasonably discriminates against plaintiff and other retail merchants having a large volume of annual gross retail sales and in favor of other retail merchants having gross annual retail sales in smaller volume, through its unreasonable and arbitrary

exaction of taxes from plaintiff at excessive and grossly [fol. 198] disproportionate rates arbitrarily levied in the higher brackets of said Act upon gross retail sales of larger volume, as compared with greatly reduced rates levied in its lower brackets upon other retail merchants having gross retail sales of smaller volume and therefore taxed at greatly reduced rates or, by reason of credits or deductions allowed them, not taxed at all.

2. The Court erred in failing to hold that the classification of retail merchants for purposes of taxation prescribed in Section 2 of the challenged act does not rest upon a reasonable basis, and does not have any reasonable relation to the subject matter of the Act, and therefore effects an unjust and unreasonable discrimination against this plaintiff in the matter of taxation upon its gross annual retail sales as compared with the gross annual retail sales of other retail merchants having a smaller volume of such sales, and thus denies to plaintiff the equal protection of the laws guaranteed to it by the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

3. The Court erred in failing to hold, upon the evidence adduced that the challenged Act, in its actual operation and effect, exempts, wholly or substantially so, from the burdens of taxation levied by said Act, competing retail merchants similarly situated, who have a smaller volume of gross sales than plaintiff, while at the same time levying upon plaintiff with its larger volume of gross sales, excessive and exorbitant rates of taxation, wholly out of arithmetical proportion or any reasonable proportion to the volume of sales of other retail merchants exempted wholly, or substantially so, from the burdens of said Act.

[fol. 199] 4. The Court erred in failing to hold that the challeneged Act denies to plaintiff the equal protection of the law in that, in practical effect, it operates to impose upon plaintiff a grossly excessive and disproportionate burden of the taxes levied under said Act, merely because of the larger volume of plaintiff's gross sales, and at the same time exempts, wholly or in part, from the burdens of said taxing law, competitors of the plaintiff engaged in the same general business of retail merchants—all in complete disregard of capital invested by the taxpayer, or his abil-

ity to pay, or his earnings, income or profits accruing from his business of retail merchant, and likewise in disregard of the fundamental factor of management.

5. The Court erred in failing to hold, upon the evidence adduced at the hearing, that the challenged Act denies the plaintiff the equal protection of the law, and unjustly and unreasonably discriminates against the plaintiff by reason of the fact that the plaintiff, for the calendar years 1930, 1931 and 1932, had gross sales in Kentucky with resulting taxes under the challenged Act as follows:

	Sales	Net taxes
1930	$14,653,448.00	$124,215.48
1931	13,496,915.00	112,377.31
1932	11,447,611.00	95,254.37

whereas for said years respectively a vast number of other competing retail merchants similarly situated with the plaintiff had gross sales in Kentucky with resulting taxes under the challenged Act as follows:

	Number of merchants	Sales	Net tax less deductions
1930	24,163	$362,848,264.00	$106,342.94
1931	20,382	310,467,073.00	85,136.99
1932	14,597	186,313,016.81	42,916.69

[fol. 200] 6. The Court erred in holding that the decision of Moore v. State Board of Charities and Corrections, reported in 239 Ky. 729, was binding upon the Court.

7. The Court erred in failing to hold that the challenged Act violated the Interstate Commerce Clause of the Federal Constitution in that it imposed a tax upon merchants who sell in the State of Kentucky farm products raised by them outside of the State of Kentucky and exempts merchants selling in the State of Kentucky farm products raised by them in that State.

8. The Court erred in failing to hold that the challenged Act is a burden on interstate commerce by reason of the fact that it taxes the sale of products moving in such commerce.

9. The Court erred in failing to hold that the challenged Act is a burden on interstate commerce and discriminates

against products of States other than Kentucky by reason of the fact that it imposes a tax on the sale of farm products grown outside of Kentucky and exempts such products raised in Kentucky.

10. The Court held that the construction of the statute adopted by the Court of Appeals of Kentucky in the case of Moore v. State Board of Charities and Corrections, 239 Ky. 729, was binding on the Court in considering the plaintiff's case. In the case referred to, the Court of Appeals of Kentucky held that the statute exempted those merchants engaged in gardening and farming and selling their own products in the State of Kentucky. Upon the adoption of such construction the Court erred in failing to hold that under such construction the challenged Act denied the plaintiff the equal protection of the laws guaranteed to it by the Fourteenth Amendment to the Constitution of the United States.

11. The Court erred, after adopting the construction of the statute referred to in Paragraph 10 hereof, which pro- [fol. 201] vided for the exemption of merchants engaged in gardening and farming and selling their own products, in failing to hold that under such construction the plaintiff is exempt and is not required to pay the tax.

12. The Court erred in failing to hold that the tax levied by the challenged Act is confiscatory and therefore deprives the plaintiff of its property without due process of law in violation of the Fourteenth Amendment to the Federal Constitution.

13. The Court erred in failing to hold that the challenged Act violates Section 181 of the Constitution of the State of Kentucky.

14. The Court erred in finding that the tax imposed upon the plaintiff and others similarly situated is not so burdensome generally upon those taxed as to deprive them of any opportunity to make a reasonable profit in their business.

15. The Court erred in finding that the net profits derived by plaintiff from the conduct of its business during the years 1930, 1931 and 1932 are not typical of the experience of the class taxed, or of those taxpayers in like

situation with the plaintiff, and further erred in finding that such percentages of profit realized by the plaintiff during the years 1930, 1931 and 1932 do not present a fair picture of the operation of that company under reasonably efficient management, and further erred insofar as it may be considered to have found that the management of the company during the years 1930, 1931 and 1932 was not reasonably efficient.

[fol. 202] Prayer for Reversal

Wherefore, for each and all of the reasons set forth in the foregoing assignment of errors, plaintiff prays that the decree herein appealed from be reversed with directions to the District Court to set aside said decree and in lieu thereof to render a decree in all respects in accordance with the prayer of plaintiff's Bill of Complaint.

Nichols, Morrill, Wood, Marx & Ginter; Trabue, Doolan, Helm & Helm, Solicitors for Plaintiff.

[fol. 203] In United States District Court, Eastern District of Kentucky

In Equity. No. 3908

[Title omitted]

Order Allowing Appeal—Filed Sept. 12, 1934

This day came the parties, plaintiff and defendants, by their counsel, and plaintiff filed herein its petition for appeal to the Supreme Court of the United States from the final decree herein rendered by this court on June 19, 1934, and filed also its assignment of errors in support of said petition.

Therefore, it is ordered by the court—

1. That the appeal to the Supreme Court of the United States prayed for by the plaintiff, as set forth in its petition for appeal, be and it hereby is allowed as prayed for in said petition.

2. That a transcript of such parts of the record and proceedings herein as the parties may by præcipe duly desig-

nate, be transmitted, duly authenticated, to the Supreme Court of the United States in the manner provided by law.

3. That a citation be issued admonishing the defendants and each of them to be and appear in the Supreme Court of the United States within thirty days from this date as provided by law.

[fols. 204-208] 4. That an appeal bond for costs and damages upon said appeal in the penal sum of $1,000.00 shall be given by the plaintiff, conditioned as provided by law, and in view of the fact that the plaintiff and all other taxpayers claiming the benefit of the temporary restraining order issued in this case have complied with the order and decree of this court entered June 19, 1934, by giving a bond or other approved security for the payment of estimated taxes that may become due from them respectively for the tax years 1930 to 1933, inclusive, it is now ordered that said appeal bond for costs and damages required herein shall act as a supersedeas bond as well as a bond for costs and damages on appeal.

5. The citation upon appeal shall be issued and the surety thereon herein required shall be approved by the District Judge presiding in the Western District of Kentucky.

(Signed) Xen. Hicks, U. S. Circuit Judge. (Signed) Charles I. Dawson, U. S. Dist. Judge.

[fol. 209] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY

In Equity. No. 3908

[Title omitted]

STIPULATION REGARDING RECORD ON APPEAL—Filed Sept. 24, 1934

It is hereby stipulated and agreed by the parties:

(a) That the narrative statement of the testimony of W. P. Sullivan, W. R. Robinson, A. H. Brendel, Albert H. Morrill, Harry W. Schacter, Jerry King, James W. Martin, Clyde William Phelps, Seldon R. Glenn, R. C. Ilg, and Elam

Huddleston, made a part of the record, is a correct statement of the testimony contained in the depositions of the above parties taken in this cause. It is further agreed that the narrative may be used as part of the record in the appeal to the Supreme Court of the United States as a substitute for the deposition introduced in the three-judge court.

(b) That the Clerk of the United States District Court may certify the record as presented by counsel without comparing the same with the original papers filed with the court.

(c) The affidavits of L. M. Ross, Manager of the J. C. Penney Company, Lexington, Kentucky; C. R. Leininger, Manager of the J. C. Penney Company, Bowling Green, Kentucky; E. R. Probasco, Manager of the J. C. Penney Company, Corbin, Kentucky; B. E. Van Antwerp, Manager of the J. C. Penney Company, Frankfort, Kentucky; W. G. Howell, Manager of the J. C. Penney Company, Henderson, Kentucky; E. C. Purvis, Manager of the J. C. Penney Company, Hopkinsville, Kentucky; M. S. Gesley, Manager of the J. C. Penney Company, Maysville, Kentucky; A. C. [fol. 210] Miller, Manager of the J. C. Penney Company, Middlesboro, Kentucky; O. A. Rhodes, Manager of the J. C. Penney Company, Owensboro, Kentucky; W. T. Morgan, Manager of the J. C. Penney Company, Central City, Kentucky; W. G. Jenkins, Manager of the J. C. Penney Company, Georgetown, Kentucky; Robert Wright, Manager of the J. C. Penney Company, Madisonville, Kentucky; H. H. Craven, Manager of the J. C. Penney Company, Mayfield, Kentucky; T. B. Jones, Manager of the J. C. Penney Company, Mt. Sterling, Kentucky; P. O. Wolverson, Manager of the J. C. Penney Company, Paris, Kentucky; C. W. Gowin, Manager of the J. C. Penney Company, Princeton, Kentucky; B. E. Willis, Manager of the J. C. Penney Company, Richmond, Kentucky; J. D. Delano, Manager of the J. C. Penney Company, Winchester, Kentucky; J. A. Gude, Manager of the J. C. Penney Company, Glasgow, Kentucky; and B. A. Aistrop, Manager of the J. C. Penney Company, Lancaster, Kentucky, are similar in substance and form except as to location, name and amount, for the territory in which the affiants reside, to the affidavit of H. C. Amstutz for Paducah, Kentucky, which affidavit is made a part of the record.

(d) That the record on appeal in the Supreme Court of the United States, which consists of the following:

1. Bill of Complaint;
2. Application for interlocutory injunction;
3. Motion for temporary restraining order;
4. Order convening three-judge court, filed January 20, 1931;
5. Temporary restraining order, entered January 29, 1931;
6. Order authorizing plaintiff to sue as representative of a class, entered January 31, 1931;
7. Order continuing temporary restraining order in force until hearing on application for interlocutory injunction, entered February 7, 1931;

[fol. 211] 8. Answer of the defendants;

9. Reply of the plaintiff;
10. Order of submission, filed February 14, 1931;
11. Order listing parties protected by temporary restraining orders, filed March 28, 1931;
12. Opinion of the court, filed November 6, 1931;
13. Order and decree denying interlocutory injunction and dismissing Bill of Complaint and continuing temporary restraining order in effect pending appeal upon the giving of bonds, entered December 10, 1931;
14. Order substituting J. Dann Talbott as party defendant in lieu of Clell Coleman;
15. Opinion of the Supreme Court of the United States reversing United States District Court and remanding case, filed January 18, 1933;
16. Order remanding case;
17. Order vacating previous decree of the United States District Court and reinstating cause, filed December 10, 1932;
18. Order continuing temporary restraining order pending hearing in conformance with opinion of the Supreme Court, filed December 10, 1932;
19. Order regarding bonds, filed December 20, 1932;
20. Order continuing time for filing bonds, filed January 9, 1933;
21. Order approving bonds, filed February 3, 1933;
22. Amended petition;
23. Answer to amended petition;
24. Stipulation, filed July 24, 1933;

25. Order filing return D. T. Bohan Company, filed August 21, 1933;
26. Order substituting parties, filed August 21, 1933;
27. Order of submission, filed August 21, 1933;
28. Opinion of the court, filed May 23, 1934;
29. Dissenting opinion of Honorable A. M. J. Cochran;
[fol. 212] 30. Motion for finding of facts, filed on behalf of complainant and suggested findings presented by plaintiff;
31. Findings of fact made by the court;
32. Order and decree, filed June 19, 1934;
33. Order approving bonds, filed July 21, 1934;
34. Petition for appeal;
35. Assignments of error;
36. Order allowing appeal;
37. Bond on appeal;
38. Citation and service;
39. This stipulation;
40. Statement of evidence including:

(a) Affidavits of following persons:

Arch B. Davis
Robert W. Lyons
John B. Bonham and exhibits attached to said affidavit
W. A. Steiden and exhibits attached thereto
Gilbert Schneider and exhibits attached thereto
D. T. Petty and exhibits attached thereto
Albert B. Berger and exhibits attached thereto
John E. Donahue and exhibits attached thereto
John Scanlon and exhibits attached thereto
Chris. Schumann and exhibits attached thereto
Louie J. Jones and exhibits attached thereto
Brack M. Ferrill and exhibits attached thereto
Albert C. Hueneke
Walter Wenderoth
[fol. 213] Francis Ballard
Rufus Blume
O. W. Vaughn
John C. Schwarz
Ernest Thompson
M. R. Anderson
C. J. Henry

Harmon Noe
R. W. Owens
Crawford Lee
G. H. Parker
Robert J. McKim
Fred Levy
Dann Byck
C. B. Turley
Milton Marx
Daniel M. Cohen
H. C. Amstutz
Ralph Wile
Paul H. Nystrom
James R. Karibo and exhibits attached thereto
M. A. Bash

(b) Narrative of testimony of Shirley E. Haas, W. P. Sullivan, W. R. Robinson, A. H. Brendel and exhibits attached thereto; Albert H. Morrill, Harry W. Schacter, and affidavit of James Stiles;

(c) Affidavit of Henry F. Walradt and exhibits attached thereto;

(d) Affidavit of James W. Martin and exhibits attached thereto;

(e) Narrative of testimony of James W. Martin and exhibits attached thereto;

(f) Affidavit of Clyde W. Phelps;

(g) Narrative of testimony of Clyde William Phelps;

(h) Affidavit of B. T. Brewer;

[fol. 214] (i) Narrative of testimony of Walter Burr, Jerry King, Seldon R. Glenn, R. C. Ilg, and Elam Huddleston;

41. Order approving statement of evidence.

(Signed) Nichols, Morrill, Wood, Marx & Ginter; Trabue, Doolan, Helm & Helm, Attys. for Plaintiff.
(Signed) B. P. Wootten, Atty. Gen. of Ky.
(Signed) S. H. Brown, Asst. Atty. Gen.

[fol. 215] IN UNITED STATES DISTRICT COURT

Statement of Evidence

[fol. 216] AFFIDAVIT OF ARCH B. DAVIS

STATE OF KENTUCKY,
County of Jefferson, ss:

Arch B. Davis, being first duly sworn, states:

I am vice-president of the Citizens-Union National Bank in Louisville, Kentucky. I have held that position for approximately fifteen years.

By virtue of my position I have bought, sold, and collected a large number of State Warrants of all varieties, particularly Highway, Institutional and General Warrants. I believe that I have handled as large a number of Warrants through our bank as any individual in the State.

My experience in dealing with warrants against the General Fund has been that said warrants are seldom paid in less than twenty months from the time when they are stamped interest bearing and I estimate that the average time within which said warrants are paid is two and a half to three years from the date when so stamped. Warrants are paid, in practice, in the order of their being so stamped. The last call by the State Treasurer included General Warrants stamped interest bearing on June 11, 1927, which would indicate that no warrants against the General Fund stamped since that date have been paid.

The financial statement issued by the State Treasurer as of December 31st, 1930, shows the state of the General Fund to be as follows:

Amount of warrants outstanding against the General Fund	$9,880,502.76
Amount in General Fund available to pay off same	12,565.81

The length of time probably elapsing before the payment of a warrant is, of course, an element to be considered in determining its value.

Arch B. Davis.

[Duly verified.]

[fol. 217] AFFIDAVIT OF ROBERT W. LYONS

STATE OF OHIO,
Hamilton County, ss:

Robert W. Lyons, being first duly sworn, makes the following declaration under oath:

I am Executive Vice-President of the National Chain Store Association, which is a trade group comprising a large percentage of the leading retail organizations in this country which own and operate under a common management, more than one store. For the purpose of this affidavit I shall adopt the expressions "chain stores" and "individual merchants" used in the title to House Bill No. 111, Acts of 1930, of the Kentucky General Assembly, as follows: "Chain stores" as meaning more than one store under single ownership and control as contrasted with "individual merchants," meaning a store, the owner of which, owns no other store. Among the functions of the National Chain Store Association is that of collecting and interpreting economic data relating to or influencing the operation of "chain stores." My duties as chief executive of said Association require constant study of the economics of distribution and constant research into the facts and circumstances of the various types of merchandising. My training, in preparation for such work, began in college with the study of economics, finance and law.

In 1915, I was employed as Manager of the Trade Extension and Research Department for the Indianapolis Division of a great rubber manufacturing company. Continuing in this field, I became sales representative, special representative, district sales manager, and finally general sales manager. Succeeding this, I became general sales manager of three furniture manufacturing companies operating under unified financial control. Following this, I was actively engaged in the practice of law for a period of five years. For the past two years and one-half, I have been the executive officer of the National Chain Store Association. Acting in this capacity, I testified as an expert witness in the District Court of the United States for the Southern District of Indiana, Indianapolis Division, in the case of Lafayette A. Jackson, plaintiff, vs. State Board of Tax Commissioners and the State of Indiana, William A.

[fol. 218] Hough, Pliny H. Wolford and Phillip Zoercher, as members of the State Board of Tax Commissioners of the State of Indiana, and James M. Ogden, Attorney General of the State of Indiana, defendants, in connection with the economics of distribution, as well as the functions and operating practices of the "chain stores" and its related or competitive retailing mechanisms. I was duly qualified as an expert witness in the said case and my testimony was so accepted.

The best available records disclose that retailing in the United States is accomplished through approximately 1,500,000 retail stores, of which number approximately 150,000 retail stores are units in some "chain" of stores. Study further discloses that these 1,500,000 retail outlets do approximately forty-four billion dollars worth of business annually. Study further discloses that these 150,000 "chain stores" do a known volume of approximately 13.5% of the total annual volume of retail business in the United States, or approximately six billion dollars annually exclusive of petroleum products sale. These 150,000 "chain store" retailing units are owned and controlled by approximately 8,000 unrelated and distinct management companies with a nation-wide distribution of stock ownership among several hundred thousand shareholders. Competition among the many chain store operating companies is very intense and keen and no co-operation or confederation of any kind exists or has existed for the purpose of lessening such competition.

There are approximately 25,000 retail stores in the State of Kentucky, doing an annual volume of sales of approximately $535,000,000. Of the total number of retail stores in the State of Kentucky, about 24,000 are single stores of "individual merchants" and 976 are "chain stores." The annual volume of sales of the single stores of "individual merchants" in Kentucky is approximately $462,750,000, and the annual volume of sales of "chain stores" in Kentucky is approximately $72,225,000. There are about 24,108 retail merchants in the State of Kentucky doing an annual volume of sales of $535,000,000. In the recent retail and wholesale trade census for eleven cites, commonly known as the Eleven Cities Census, conducted by the United States Bureau of the Census, an analysis was made of the significant facts of retail trade in an area embracing roughly, [fol. 219] 10% of the retail sales of the United States.

This study disclosed that 98.23% of all independent retail stores do an annual business of less than $250,000 and that only 1.77% of all independent retail merchants do an annual volume of business in excess of $250,000 each. Applying these ratios to the State of Kentucky, it is mathematically certain that 23,682 merchants do an annual business of less than $250,000 each and less than 400 merchants do an annual business in excess of $250,000. While no definitive study has been made to show what percentage of retail merchants do an annual volume of business in excess of $400,000, yet it is mathematically certain to be only a fraction of 1% of the total number of merchants. Only 14 of the "chain store" merchants operating in Kentucky do an annual volume of business in that state in excess of $400,000. From available information it is my belief that not more than 25 other merchants in Kentucky do an annual volume in excess of $400,000.

The chain store system of retail merchandising does not present any inherent or fundamental advantages over the single store unit of merchandising. Repeated study under the auspices of the U. S. Government, the U. S. Chamber of Commerce, various universities and many independent research organizations have emphasized that retail merchandising success is determined not by the type of merchandising structure or mechanism, but by the degree of the merchant's adherence to well established principles of merchandising. The fundamental requirements of successful merchandising which apply equally and are available equally to "chain store" and single stores of "individual merchants" are as follows:

1. A retail store must be well located, must have ready access to consumers.

2. The store must be attractive in its interior design and must constitute a pleasant trading place for its consumers.

3. It must maintain a steady supply of adequate stocks of goods and salable merchandise.

4. The factor of service must be carefully weighed and measured in relation to the needs and demands of customers and the requirements of competition.

[fol. 220] 5. The relations of employees to consumers must be carefully studied and developed.

6. Good management must be present.

7. Prices must be fair.

The "individual merchant," through his familiarity with the community and through the co-operation of established realtors, is perhaps better able to secure attractive leases than the "chain stores."

In the matter of store design, a great many independent organizations exist to assist the owner of one store in making his place modern and attractive. The service departments of the widespread co-perative buying and selling organizations are giving expert guidance to the individual merchant in this field. Manufacturers of store fixtures and equipment, with their designing and engineering departments, are also assisting in this work.

The "chain stores" have no monopoly or control of merchandise of any character. There is not a single class or quality of merchandise in which they deal that is not available to the "individual merchant" operating the single unit store, nor does the factor of large scale buying differentiate the "chain store" operator from the "individual merchant" in respect to this element. It is clear, that the advantage of buying in quantity arises from the amount of capital employed and the amount of consumption available and not from the fact that the sales are made through multiple outlets rather than through one outlet. The economies in quantity buying do not continue beyond a certain point. A "chain store" owner or an "individual merchant" may acquire a car load of merchandise at a more reasonable figure both as to price and as to transportation cost, but the second car load so acquired will not necessarily represent an additional saving in price and in freight.

Economists have generally recognized that the industrial prosperity of the United States rests upon the production of standardized articles in large volume, at low cost per item. While there are several distinct practices in retailing as it relates to volume and price, yet it is well recognized that a very important modern trend in retailing has been the development of large volume sales at the lowest [fol. 221] possible prices. Other retailers have attained marked success by specialization in service and products at higher prices. The "chain stores" have been conspicuous in developing distribution on a large volume and low cost price per item basis with the resulting benefit to the great

mass of the American consuming public. The introduction of efficient methods in the distribution of merchandise has necessarily resulted in stimulating general competitive conditions; has resulted in reducing operating expenses which, in turn, has made it possible to sell the goods to the public at lower prices with the result that the entire public has benefited from the competition instituted by the "chain stores."

In order to accomplish large volume sales at a low price per unit sale, the retailer is required to accept a small percentage of profit on the individual sales which is illustrated by the fact that during the year 1930 the average earnings of all department stores handling great varieties of merchandise were only 1½% of their net sales and an even smaller percentage of gross sales because of the established practice of department stores in accepting the return of unsatisfactory merchandise and the fact that such merchandise represents a substantial volume which is necessarily deducted from gross sales, thereby inevitably modifying the percentage above given. In this connection it should be noted that the best managed companies in the retail grocery field are able to earn on their large volume of sales only from 1½% to 2% net. Figures from the extensive department store studies for 1928 of the Harvard Bureau of Business Research show that department stores with net sales of less than a million dollars are not able to earn as much as 1% on sales and that the earnings of stores with sales above $1,000,000 average only 1.96% of sales.

Because of the wide variation between gross sales and net sales, it is obvious that a tax of 1% on gross sales will command a tax payment greatly in excess of 1% on net sales. Such a tax will consume a large proportion of the net earnings of "chain stores" and department stores; the amount consumed by such a tax will vary from 50% to 66⅔% of all the net earnings of stores falling within the above averages.

[fol. 222] Furthermore, a sales tax so accelerated as to place disproportionate burdens upon various classes of retailers cannot as a practical matter be shifted to the consumer because of the fact that those who pay the highest rate are forced to compete with those who pay the lowest rate or nothing.

Furthermore, the retail price of many products is determined by Interstate or even International competition and the Kentucky retailer is powerless to successfully establish prices out of line with the market price so fixed. Kentucky retailers must also compete with various nonresident mail order and catalogue houses and all Kentucky retailers located in cities close to the State line are forced to compete with merchants across the State line who suffer from no such tax.

A disproportionate accelerated tax results in the further inequality of requiring the Kentucky department store, with a million dollars of aggregate sales, to compete at a disadvantage to its various departments with "chain store" specialty shops doing a larger volume of net sales in their particular line than does the department store while being required to pay only 1/20th as much tax, or perhaps none. This is illustrated by the case of Levy Brothers of Louisville, Kentucky, whose sales exceed a million dollars and who must compete on the sale of men's clothing with the Louisville store of the Richman Brothers Company, which is the only store of this company in Kentucky, but directly related to many other large stores in a national system. In the face of such competition, Levy Brothers cannot possibly raise their men's clothing prices to the consumer in order to offset the 1% tax which they will pay. Such a tax would necessarily come out of earnings and frequently out of capital and would be prohibitory and confiscatory on retail grocery store and department store enterprises.

The best available figures indicate that the average operating expense in retail grocery enterprise is about 18% of gross sales. It is manifest, therefore, that a tax of 1% on gross sales would, at a single stroke, increase the operating expenses of retail enterprise by 5.55%. Because of the intense price competition which characterizes all branches of present-day retail trade, it would be impossible for a limited group of retailers to readjust their retail [fol. 223] price so as to absorb an additional operating expense of 5.55%.

There is a common notion, which is quite unfounded, that certain types of retailing establishments enjoy special advantages not available to other types of retailers and that certain taxes should be based upon distorted graduations designed to correct existing inequalities. An examination

of competition in the retail grocery field will indicate the fallacy of such reasoning. The "chain stores" were the first to reduce food retailing to a basis of operating efficiency. It appeared temporarily that by the introduction of scientific management into the field of retailing, "chain stores" had secured a distinct advantage over competitive retailers. Almost immediately, however, there began to develop a nation-wide movement among independent retailers to group themselves into co-operative organizations known as "voluntary chains." Such organizations perform for their members much the same function performed by the regular "chain stores" in all matters of group buying, sales and display service, equipment, layout, advertising, accounting and stock control systems, etc. There are at the present time, more than 500 of these so-called "voluntary chains" of independent retailers, comprising more than 60,000 retail stores. A number of such "voluntary chain" store organizations operate in the State of Kentucky, among which are the following:

Independent Grocers' Alliance.
Associated Community Stores.
James Grocery Company.
Ohio Valley Grocery Company.
Merchants Wholesale Grocery Company.
National Grocery Company.

The advantages derived by membership in the "voluntary chain" are practically identical with the advantages enjoyed by the regular "chain store". Each represents a fundamental attempt to bring organized intelligence and scientific methods to the operating problems of retail distribution. By pooling their buying resources, the members of the so-called "voluntary chains" are able to purchase their supplies on an equal footing with any existing competition. The development of the "voluntary chain" has made it possible for the jobber to materially reduce his [fol. 224] handling, warehousing, shipping, unloading, clerical and selling expenses, and the savings thus effected are passed on to the retailers in the form of reduced prices, dividends or bonuses.

The retailer member of the "voluntary chain," furthermore, gets the advantage of the very best supervision and advice, with the result that his stock of merchandise does

not exceed that of the average regular "chain store" and his turnover of inventories is quite often more rapid than that of the regular "chain store," thus saving him substantial interest on invested capital. Like the regular "chain stores," the members of the "voluntary chain" are able to economize in their advertising expenses and secure the maximum results at the minimum of cost. Even where the individual retailer is not affiliated with the "voluntary chain" or co-operative organization, he enjoys many advantages in purchasing his supplies which the "chain store," because of the magnitude of its requirements, cannot enjoy. In purchasing butter, eggs, apples, potatoes and all kinds of vegetables and garden crops, the individual retailer has access to individual farmers or producers from whom he can purchase in small quantities, on a day-by-day basis, and to whom he can often make payment for such purchases by exchanging other merchandise in which he has a substantial margin of profit. As against such opportunities, the "chain store" must necessarily purchase in large quantities which are delivered to a central warehouse from which such quantity purchases must be redistributed to the individual store. The various wholesale and retail grocery associations of America have repeatedly insisted that their respective members could purchase and distribute at retail just as cheaply as the "chain store." The truth of this statement is obvious and "chain store" companies have repeatedly had the experience of opening a new store in an apparently favorable neighborhood only to find that previously established retailers were so alert and efficient as to make it advisable to close said store. Furthermore, "chain store" operating companies have often operated a new store successfully for a year or two years in competition with an indifferent retailer who has suddenly awakened to the necessities of competition and so thoroughly adjusted himself to it as to make it unprofitable [fol. 225] for the "chain store" to continue in that neighborhood.

Almost without exception, the existing differences in price and value offered by the "chain store" and competitive merchants can be traced directly to the differences in the service rendered by these respective types of retail establishments. In the matter of service to customers, the alert, individual merchant may easily have many advantages over his "chain store" competitor. His more inti-

mate knowledge of the tastes and peculiarities of his community, his capacity to render service of many kinds extending beyond the boundaries of those rules and regulations which are necessary to "chain store" operation, give him a distinct advantage in building customer good will. He has a great advantage over the "chain store" in directing his employees, in the general management of his store, and in the rapid adjustment of his prices to meet competition and is always immediately aware of every circumstance and requirement of his local situation.

There is a common misapprehension to the effect that "chain store" competition has resulted in driving out of business the individual, or so-called "independent merchant". The error of this conclusion is clearly indicated by a study of this question conducted by Dr. Paul C. Olsen of the University of Pennsylvania (following the recent Louisville Grocery Survey, conducted under the auspices of the United States Department of Commerce), in order to determine the exact influence of "chain store" development upon the mortality of competitive retailers in the grocery field. Dr. Olsen studied two periods of nine years each and so widely separated in point of time that in the first period, there were practically no "chain stores" in existence and in the second period, "chain stores" had reached the very peak of their development. The first period studied was from 1891 to 1899, inclusive. The second period studied was from 1921 to 1929, inclusive. Dr. Olsen's study discloses that from 1891 to 1899, inclusive, new retail grocery merchants entered the field in Louisville at the average rate of 23% per annum. The year by year figures for this period are as follows:

1891	24 per cent
1892	24 per cent
[fol. 226] 1893	22 per cent
1894	22 per cent
1895	23 per cent
1896	22 per cent
1897	21 per cent
1898	22 per cent
1899	23 per cent
Average	23%

Dr. Olsen's study also discloses that during this period from 1891 to 1899, inclusive, retail grocery merchants failed in Louisville at the average rate of 23% per annum. In other words, during this early period, when there was no "chain store" competition, the death rate among Louisville retail grocery businesses equaled 100% of the birth rate of such businesses. The year by year mortality figures for this period are as follows:

1891	22 per cent
1892	22 per cent
1893	22 per cent
1894	21 per cent
1895	27 per cent
1896	22 per cent
1897	23 per cent
1898	21 per cent
1899	24 per cent
Average	23%

Between the years 1921 to 1929, inclusive, chain stores reached their peak development in the City of Louisville and yet Dr. Olsen's survey discloses that during this period the birth rate for new businesses in the retail grocery field was 25% per annum. The year by year figures are as follows:

1921	25 per cent
1922	25 per cent
1923	25 per cent
1924	24 per cent
[fol. 227] 1925	26 per cent
1926	26 per cent
1927	25 per cent
1928	24 per cent
1929	22 per cent
Average	25%

Dr. Olsen's study also discloses that during the period from 1921 to 1929, the mortality rate among Louisville retail grocers fell substantially below the birth rate of said retail grocers—the mortality rate during this period averaging only 24% per annum as against a birth rate of 25%

per annum. The year by year mortality figures for this period are as follows:

1921	22 per cent
1922	21 per cent
1923	21 per cent
1924	25 per cent
1925	24 per cent
1926	27 per cent
1927	24 per cent
1928	24 per cent
1929	26 per cent
Average	24%

Even the most superficial examination will disclose that the so-called "chain stores" have been no more immune from failure than has any other class of commercial enterprise. While it often happens that the failure of a "chain store" organization represents such a large amount of capital and such substantial business problems that some larger or more successful organization absorb it rather than to allow it to liquidate in bankruptcy, just as happens in any other class of business where the units are large, the fact nevertheless remains that there have been many substantial "chain store" failures, among which are the following:

A. A. Adams Stores.
National Drug Company.
Schulte United.
[fol. 228] Neve Company.
National Grocery Company of Detroit.
Clarence Saunders Stores.
Almar Stores.
Page & Shaw.
Continental Chain Store Corporation.
City Stores Company.
G. & M. Stores.
Southern Stores Corporation.
Remington Hardware Stores.

Kentucky has had its representation among the list of "chain store" failures. The following "chain store" firms formerly operated in Kentucky and have either gone out of business through failure or gone into receivership or some equivalent re-organization program:

Home Owned Stores.
Cohn Stores.
United Chain Stores.
Clarence Saunders Stores.
Schulte Stores.

It is reasonable to expect that if a 1% gross sales tax, representing such substantial increase in operating cost, is added to the expense of doing a "chain store" business in the Stat of Kentucky, the resultant hardship will substantially increase the list of such failures.

Robert W. Lyons.

[Duly verified.]

AFFIDAVIT OF JOHN B. BONHAM

STATE OF OHIO,
Hamilton County, ss:

John B. Bonham, of lawful age, being first duly sworn, deposes and says as follows:

I am 47 years of age and reside with my family at Cleves, near Cincinnati, Ohio. I am at present Vice-President of The Kroger Grocery & Baking Company, in charge of the operations of that Company, which includes purchases, store operations, sales, transportation and advertising. I began in the grocery business a number of years ago at the [fol. 229] bottom and have worked my way gradually through every branch of the grocery business to my present position, which I have held for several years last past. I am thoroughly familiar and conversant with practically every phase of the grocery, meat and vegetable business, and of the methods, practices and economics of wholesale and retail food merchandising and distribution.

The Kroger Grocery & Baking Company is an Ohio corporation and its principal office and place of business is located at Seventh and Walnut Streets in the City of Cincinnati, Ohio. For convenience, I shall use the word "Kroger" in referring to The Kroger Grocery & Baking Company.

Kroger has been in business for approximately forty-seven (47) continuous years. The business was originated by B. H. Kroger, who, until recently, was President of the

Company, then Chairman of its Board of Directors, and is at present a Director. Our records show that B. H. Kroger commenced business in one grocery store, located at No. 66 East Pearl Street, in the City of Cincinnati, Ohio. Kroger still operates that store. He endeavored to sell good food to the public at the lowest possible price and applied all of his ability and industry to making a success of that store. His methods and policies brought him public patronage and good will and his business developed to such an extent that it was necessary for him, in order to serve his patrons to the best advantage, to open additional stores. As a result of good management and the application of progressive and efficient methods and practices of merchandising and the continued policy of selling good food, meat and vegetables at low prices, a large and increasing sales volume was developed and the reputation of Kroger stores spread from Cincinnati across the river to adjoining Kentucky towns and cities, including Covington, Newport, Bellevue, Dayton and vicinity. The number of customers who came to Kroger Cincinnati stores from across the river in Kentucky and to whom free deliveries were then made from Cincinnati stores made it advantageous and convenient for the customers to be served from stores located in Kentucky and more than thirty (30) years ago Kroger opened a retail grocery store in the State of Kentucky and this store was continued along the same [fol. 230] lines which had theretofore met with public favor and patronage. One of the first stores was located at the corner of Fifth and Columbia Streets, Newport, Kentucky, as early as March, 1897. By 1899 there were additional stores at the Northeast corner of Eighth and Monmouth Streets, Newport, Kentucky, Fifth and Scott Streets, Covington, Kentucky, and at the Northwest corner of Sixth and Berry Streets, Dayton, Kentucky. By 1905 Kroger had eight (8) stores located in Newport, Covington, Bellevue and Dayton, Kentucky, and seven (7) of said stores sold meat. All of these stores are still conducted. Our records show that more than twenty-five (25) years ago Kroger, in connection with said stores, publicly advertised —"It is the combination of highest quality groceries at lowest prices that has built up our immense business." The business of Kroger in Kentucky continued to grow, and in order to serve Kroger customers in the most convenient locations and to the best advantage, Kroger grad-

ually increased the number of stores and localities served in Kentucky over the past quarter of a century until today Kroger has two hundred and sixty-three (263) separate retail grocery stores in various localities throughout the State of Kentucky. Many of these stores were established in response to requests on the part of citizens requesting the establishment of such store in their community.

In the course of the development of the business, separate meat and vegetable departments were added to some of the larger stores and at the present time a number of the stores are known as complete food markets, selling groceries, meats, fruits and vegetables.

The business was not incorporated until April 3, 1902. Prior to that time it was largely owned and managed by B. H. Kroger. The growth of the business and competitive conditions made it necessary from time to time to secure additional capital and in 1902 the business was incorporated. Thereafter, the general public was given an opportunity to subscribe to the capital of said Company by the purchase of stock therein, and at the present time there are sixteen thousand seven hundred and eighty-five (16,785) separate individual stockholders, located in practically every State of the United States, including a large number who reside in the State of Kentucky. This number necessarily changes from day to day and has been gradually increased. Kroger business has grown in a similar [fol. 231] way across various State lines and Kroger is today engaged in business in the adjoining States of Indiana, Tennessee, West Virginia, Illinois and other States in the middle west.

Kroger, ever since the establishment of its first store in Kentucky, for a period of more than thirty (30) years, has complied with all of the laws of Kentucky and particularly with the laws relating to foreign corporations, and has at all times been properly authorized to do business in Kentucky.

Kroger has made large investments in the State of Kentucky. It has invested large sums in store fixtures and equipment of its stores and in improvements to leaseholds. It has entered into numerous leases for stores, warehouses, etc., in Kentucky, which, in many cases, have a number of years to run. Kroger owns a large warehouse located in the City of Louisville, Kentucky. Kroger also has large sums invested in various personal property in addition to

real estate and leaseholds, such as merchandise, transportation equipment, etc.

Kroger has also invested large sums in intangible items in order to build and develop customer good will and patronage, such as advertising in newspapers and other publications and by ways of posters, placards, etc. Kroger expenditures for real estate, rent, for improvements to leaseholds and for work and labor incident to the operation of its Kentucky warehouses and stores have all been made in Kentucky and, other than exceptional cases, have been made to residents of Kentucky. Kroger expenditures for advertising, previously referred to, have been largely expended in Kentucky publications. All of our stores and property in Kentucky are subject to the same taxes, licenses and fees as are imposed generally throughout the State and in the various counties and municipalities where our business is located.

Kroger is paying and has regularly paid, during all of the years it has been conducting a business in Kentucky, all taxes imposed by law, such as the property or ad valorem taxes, occupational taxes, license taxes, and county and municipal taxes. Kroger purchases the light, heat and power used in its business from Kentucky utilities. Generally speaking, except for the purchase of supplies and merchandise which Kroger must purchase, like everyone [fol. 232] else, from the available sources of supply, wherever the same may be located, the money received from the sale of merchandise in Kentucky is expended in Kentucky for taxes, rents, wages, light, heat, power, warehousing, transportation, advertising, etc. Kroger likewise purchases large quantities of supplies in Kentucky, as hereafter set forth. Kroger also pays $16,488.50 for special license taxes. This is the aggregate amount of the amount paid by the several stores and averages $62.32 per store.

As examples of the above, during the past year, Kroger expended in Kentucky for rent about Three Hundred forty-two Thousand ($342,000) Dollars; for salaries to employees, One Million Four Hundred Fifty-four Thousand ($1,454,000) Dollars; for the purchase of produce and other merchandise, Two Million Three Hundred Thirty-eight Thousand ($2,338,000) Dollars; and for transportation and truck operations, Three Hundred Fourteen Thousand ($314,000) Dollars. These sums are in addition

to the expenditures for taxes, equipment, advertising and permanent investments in real estate, warehouses, etc.

For convenience in the management of its business, Kroger has divided the territory served by it in Kentucky into four divisions. Each of these four divisions is served from a separate branch, namely the Louisville, Kentucky, the Cincinnati, Ohio, Charleston, W. Va., and Herrin, Illinois, branches. The Louisville branch serves from the warehouse located in that city, stores located in the following territory: Louisville, Lexington, Paris, Winchester, Georgetown, Frankfort, Shelbyville, Somerset, Danville, Pineville, Owensboro, Henderson, Hodgenville, Elizabethtown, Bowling Green, Bardstown, Mt. Sterling, Lancaster, Versailles, Carrollton, Midway, Nicholasville, Wilmore, La Grange, Campbellsville, Harlan, Mt. Vernon, Stanford, Lebanon, Springfield, London, Middleboro, Corbin, Madisonville, Hopkinsville, Eminence, Lawrenceburg, Owingsburg, Irvine, Harrodsburg and Owenton. Kroger has only one store in each of the twenty-nine last named municipalities. The Louisville branch also serves stores located in Evansville, East Auburn, Jeffersonville, and other towns in the State of Indiana. The manager of the Louisville branch is W. A. Steiden.

[fol. 233] The Cincinnati branch serves from a warehouse located in Cincinnati, Ohio, Kroger stores located in Covington, Newport, Dayton, Bellevue, Cynthiana, Ludlow, Ft. Thomas, Maysville, Clifton, Southgate, Alexandria, Silver Grove, Erlanger, Bromley, Florence, Ft. Mitchell, Elsmere, Augusta, Williamstown, Carlyle, Walton, Flemingsburg and Falmouth. In the fifteen last named municipalities, Kroger has only one store in each municipality. The Cincinnati branch also serves from the same warehouse, Kroger stores located in Cincinnati and adjoining territory in the State of Ohio. The Supervisor of the stores in Kentucky which are served from the Cincinnati branch is Albert B. Berger.

The Charleston, West Virginia, branch serves stores located in the following Kentucky municipalities: Pikesville, Prestonburg, Paintsville, Louisa, Russell, Greenup, Olive Hill, Grayson and Ashland. In all of the above municipalities, except Ashland, Kroger has only one store in each municipality. In Ashland, Kroger has five stores. The Manager of the Charleston, W. Va., branch is S. S. Rich.

The Charleston, W. Va., branch also serves Kroger stores located in Charleston and surrounding territory in the State of West Virginia.

The Herrin, Illinois, branch serves the Kroger stores located in the following Kentucky municipalities: Paducah, Mayfield and Murray. Kroger has only one store in Mayfield and one store in Murray. The same branch also serves Kroger stores located in Herrin and surrounding territory in the State of Illinois.

Each of the 263 Kroger stores is operated as a separate grocery store. Each store is managed by a local store manager who has charge of his own employees in his store. Separate accounts are kept for each store. The above list of stores indicates the wide separation in the localities in which our stores are located. The sales of one store are not affected by the sales of a store in a different location. It is not economical or practicable to move unsalable merchandise from one store to another because the cost of doing so is prohibitive. The amount of such merchandise in practice is so small that it does not warrant sending a truck to get it, to say nothing of the fact that when merchandise is delivered to a store the original packages are destroyed and the physical act of re-assembling same for transfer to [fol. 234] another place is impracticable. In addition, the bookkeeping and accounting problems at the central location involved in such a transaction make this practice uneconomical and unworkable. A large number of our stores sell meats, poultry, dairy products, fruit and vegetables in addition to groceries. Other stores carry a more restricted and limited line of merchandise. Many of these stores do not handle meats and poultry. The meat and poultry department is an entirely separate department or division of Kroger business. The employees in charge of this department are independent of the employees in the Grocery Department.

Kroger grocery stores are in direct competition with other grocery stores in each locality where Kroger conducts a store. The Kroger meat departments are in direct competition with meat stores in said localities, which are limited to the sale of meats or which are departments of other grocery stores. Kroger and all other grocery and meat stores handle the same or similar merchandise, and competition between said stores is based upon quality, price,

service, efficiency, sanitary conditions and attractiveness in store arrangement and display of merchandise.

The grocery and food field is a highly competitive one. Thousands of merchants are competing in this field. Kroger has at all times, and is at present, required to meet competition from individual merchants who own but one store, and also from individual merchants who own one store, but co-operate with wholesale grocers or with other individual merchants in large co-operative associations, and also from grocery stores the owner of which owns two or more stores. In many cases, the keenest and best competition in the matter of quality, price, service and general attractive and sanitary display of merchandise comes from individual merchants who own but one store. In a number of cases, the wide-awake individual merchant has been able to attract such a large proportion of the trade of his particular locality, that our Company has been unable to maintain a store in said locality in competition with such merchants, and said store has been closed. In Kentucky, as well as elsewhere, we have had to face keen competition from individual merchants who own one store, but who co-operate with hundreds of other store owners in co-operative associations. These co-operative associations fall into three [fol. 235] general classes. Some of them are sponsored and served by wholesale groceries, a second class are associations of retailers who own a wholesale distributing house, and a third group is a co-operative buying and merchandising association. All of these co-operative organizations combine a large number of retail grocery stores individually owned, but voluntarily co-operating for the purpose of obtaining the advantages of group or mass buying in carload lots, group or mass distribution of merchandise through co-operative facilities, and group or mass advertising of merchandise. The largest of these associations which operate extensively in Kentucky is the Independent Grocers Alliance, commonly known as the I. G. A. The I. G. A. has approximately 10,000 stores in the United States, chiefly in the middle west. It has about double the number of stores operated by Kroger. I am informed and believe that all of said I. G. A. stores are parties to a contract, of which a copy is hereto attached, and marked Exhibit A. Each of said I. G. A. stores is painted in the same distinctive style; each is arranged and decorated according to a

general and uniform plan; each of said stores advertises I. G. A. merchandise in a group with other stores. Each of said stores offers for sale a list of goods known as "highly competitive items," which are sold to member stores by the wholesaler at wholesaler's cost, plus not to exceed 3%. In addition to I. G. A., Kroger stores compete in Kentucky with the following co-operative organizations: Associated Community Stores, Ohio Valley Grocery Company, James Grocery Company, Merchants' Wholesale Grocery Co., and National Grocery Company. Membership in said co-operative organizations or so-called "voluntary chains" is open, upon the payment of a small fee, to all individual merchants who are thus in a position to avail themselves at their option, of whatever advantages there may be in group or mass buying, merchandising, advertising, and scientific store arrangement, window display, etc. We also have competition from merchants who own two or more stores. The result of the intense competition in the grocery and food field has been to lower food prices to the consumer throughout the United States, including the State of Kentucky, and to bring about more sanitary conditions, and a more attractive display of merchandise in grocery stores.

[fol. 236] Kroger has always built its business upon the policy of selling good food and merchandise to the consumer at the lowest possible prices. In order to accomplish this, it has been necessary to sell a large volume of merchandise at a small margin of profit on individual items. The profit which plaintiff is endeavoring to make in order to sell its merchandise at the lowest possible price has averaged from 2 to 2½% of its gross sales. However, competition, particularly in the matter of competitive prices, has been so keen during the past few years that although the gross sales of Kroger have steadily increased, the percentage of profit which said Company has been able to earn has steadily decreased. From 1926 to 1929, the sales increased from One Hundred Forty-six Million Nine Thousand Three Hundred Seventy-three ($146,009,373) Dollars to Two Hundred Eighty-four Million, Nine Hundred Fifty-three Thousand Four Hundred Forty-eight ($284,953,448) Dollars and the reported percentage of profit for all sales decreased from .0288 in 1926, to .0223 in 1929. The com-

bined sales of all Kroger stores and the average percentage of profit to said sales during said years was as follows:

	Sales	Average net profit
1926	$146,009,373	.0288
1927	161,299,604	.0271
1928	207,373,551	.0257
1929	284,953,448	.0223

The figures for 1930 are not yet available, but will be supplied as soon as the same have been compiled. My estimate of sales for 1930 is $267,086,028 and the percentage of profit on said sales will be under 2%.

Our Kentucky sales for 1929 were approximately $12,635,115. Owing to economic and competitive conditions prevailing in Kentucky, we sustained a loss on Kentucky business during the years 1929 and 1930. Our sales in Kentucky for the year 1930 were approximately $14,653,448.22, of which approximately $11,639.18 of sales were made between March 17, 1930, and December 31, 1930.

My experience is that earnings or net profits do not increase because of an increase in sales volume or in relation thereto.

There are many other factors which affect profits or earnings. Sound management, efficiency in operation, [fol. 237] rents, taxes, wages, spoilage, competitive prices, proper personnel, market conditions, transportation costs, commodity prices, interest rates, damage suits, claims, litigation and unforeseen contingencies which always arise and cannot reasonably be anticipated or named here, are all important factors upon which profits or earnings depend. An unexpected drop in commodity prices for coffee or sugar or other staple items of which we carry a large inventory, may frequently cause inventory losses which vitally affect profits.

As a further illustration of the fact that profits have no necessary relation to sales, we have a number of stores located in Kentucky and elsewhere in the United States which have gross sales of $35,000 or under which show a profit from the operation of said stores, whereas numerous other stores with gross sales from $50,000 to $90,000 are operated at a loss. A large sales volume may result from special advertising on a large scale but the advertising expense may

absorb any profit from such sales increase. Special or distress sales at low or competitive prices frequently move large quantities of merchandise and increase sales volume without profit to the distributor. The lack of relationship of mere sales volume to net earnings or profits, is further illustrated by the fact that a number of stores with which we are in competition and which have a smaller sales volume than our stores, make a larger percentage of net profit. This is frequently due to the fact that the individual store owner endeavors to build has business upon a service basis offering credit, delivery service, a wide selection of merchandise, including numerous luxury items, which are not handled by Kroger stores, and by reason of the foregoing obtains a higher price at a larger margin of profit than competitive stores which cater more particularly to the average consumer, who does not require special service or luxury items. I have observed that the same thing is true of other businesses with which I have had contact, and that large sales or small sales are not the measure of net profits. Frequently concerns with large gross incomes have net losses and other concerns with considerably smaller gross incomes have large net profits.

I have read the Kentucky Gross Sales Tax Law, and know that the law purports to tax the first $400,000 of gross sales at one-twentieth of one per cent, the next $100,000 at two-twentieths of one per cent, and then jumps three-twen- [fol. 238] tieths of a per cent for each additional $100,000 of gross sales until $1,000,000 is reached, after which the tax is one per cent. I know of nothing in the grocery, meat, poultry or vegetable business which would tend to make $400,000 a dividing line upon which to base anything with relation thereto. The tax jump based on each $100,000 increase in sales is not based upon any means or methods of classification or accounting known to the grocery business. Our average sales per store in Kentucky are about $50,000. An increase of $100,000 in our sales is approximately the sales of two stores, which would make the tax rate jump three-twentieths of a per cent for every two stores which we operate after the first ten, until we reach the twentieth store, when the tax becomes twenty times greater for our twenty-first store than for our first store.

In the operation of our business we make purchases in many different states of the United States in varying quantities, large and small, in order to supply our trade in Kentucky. This merchandise includes all varieties of food products, meats, fruits, vegetables, dairy and creamery supplies and garden and farm products of all kinds. Some of this merchandise is shipped from the states where the same is grown, produced or processed outside of Kentucky to our stores located in the State of Kentucky, where the same is sold at retail. Many of these items are sold in the original packages and containers in which the same are packed or contained for shipment. Many of the items sold in our stores in Kentucky, which are near the borders of the various states bordering Kentucky, are sold to non-residents of Kentucky, living across such state lines. Such goods are transported, carried or delivered to the purchasers thereof from said Kroger stores in Kentucky. For example, one of our stores is located at Middlesboro, Kentucky, which is near the juncture of the Tennessee, Virginia and Kentucky lines and many sales are made from this store to non-residents of Kentucky, living in Tennessee or Virginia. While we purchase in Kentucky for sale in Kentucky stores all available items, including more than three-fourths of our produce, more than sixty (60%) per cent of our meats and a large amount of other items, climatic and manufacturing conditions are such that we are required to purchase a large volume of grocery supplies in other states. For these reasons, we are extensively en- [fol. 239] gaged in interstate trade and commerce, and ship and transport between Kentucky and other states and sell to customers, both residents and non-residents of Kentucky, groceries, meats, dairy supplies, and garden and farm products. We sell in our Kentucky stores at retail a large volume of garden and farm products, most of which are produced and grown by Kentucky farmers, and also a large volume which is grown and produced on farms in other states of the United States by farmers residing in such other states.

Kroger also operates, manages and farms a large farm, consisting of 370 acres, located in the State of Ohio, near Cleves. This farm is named "Country Club Farm" after the "Country Club" brand, which is one of our best known and advertised brands. Kroger raises and produces on

this farm, cattle, sheep, hogs, poultry, milk and other garden and farm products. Some of the products from the Kroger farm are sold at retail in Kroger stores located across the river in Kentucky, at Covington, Newport and vicinity.

Kroger owns a packing plant, located in the City of Cincinnati, Ohio. Cattle, sheep and hogs raised on the Kroger farm are slaughtered and processed in this packing plant and the meat therefrom is transported to Kroger stores for sale at retail, including Kroger stores located in the State of Kentucky.

Kroger also owns a dairy plant, located in the City of Cincinnati, Ohio. Milk from the Kroger farm is sent to this plant, where the same is processed and transported to Kroger stores for sale at retail, including Kroger stores in Kentucky. I am informed and believe that other large dairies own farms in Ohio and Indiana and transport milk and dairy supplies to Kentucky for sale there at retail.

Kroger has consistently maintained a policy of having its stores bright, attractive in appearance and maintained in strict conformity with all of the sanitary and health regulations with respect to the sale of food, produce and milk. The sale of good foods under sanitary conditions, prepared, processed and kept in conformity with approved health regulations is beneficial to the public welfare and public health. There is nothing about the maintenance or operation of any Kroger store which is injurious to public health, public welfare, public morals or public safety.

The basis upon which Kroger has built its business by [fol. 240] selling at low prices and relying upon a large volume of sales for a profitable return upon the value of its business is of great benefit to the consuming public. It has enabled the public to obtain food at the lowest possible prices. It contributes to eliminate waste in distribution and Kroger in many instances distributes food in direct line from the producer to the consumer. This results in the most efficient and economical distribution of foods, meats, dairy and farm products, which economical and efficient distribution of food supplies is of great public benefit. Public patronage has given Kroger a large volume of sales and this enables Kroger to dispose of its merchandise more rapidly than if it were forced to obtain its profits from a higher price on a smaller volume. This rapid turn-

over assures the sale of fresh goods to the consuming public. In the food business this is particularly important and this method of conducting business has been of great value to the consuming public, because it prevents stale stock, stock wastage and stock spoilage.

I have calculated the tax which Kroger would be required to pay under the gross sales tax previously referred to. This tax will average approximately Four Hundred and Thirty ($430) Dollars per store. If we only operated one store in Kentucky and this store had average sales of about fifty Thousand ($50,000) Dollars, we would pay no tax because of the low rate of taxation and the credit granted for the payment of license fees. It is only because we own a number of stores and the requirement that each store should pay a tax return based not on the sales of that store but on the sales of all other stores aggregated that our tax amounts to $430 per store. In practical effect the law operates to prevent Kroger from operating a number of stores, solely because of their number. I say this because as a practical grocery man I know that it is impossible to successfully operate an average grocery store, if said store is required to pay a tax of $430 per store and all license fees and other taxes in addition thereto in competition with individual merchants and members of co-operative organizations, who do not pay any tax or only pay one-twentieth of the tax we are required to pay. A one (1%) per cent tax on gross sales will increase the operating expense of a Kroger store and of any well managed grocery store approximately five and one-half (5½%) per cent and no gro- [fol. 241] cery store can stand this increase in operating expense unless all competitors are subject to a substantially similar increase. It is impossible to shift this burden to the consumer by increasing the retail sale price of groceries, meats, milk, creamery and dairy supplies and garden and farm products for a number of reasons. Competitors who are not subject to a like tax would be able to undersell us and the resulting loss of trade would make it impossible to operate successfully. Many standard brands are nationally advertised at definite prices and consumer demand for these items at these prices prevents any retailer from selling these nationally advertised brands at higher prices. Prices for numerous other items are fixed in world and national markets and cannot be arbitrarily regulated or

controlled within state lines. In Kentucky there is considerable competition across state lines and higher prices cannot be obtained in Kentucky than competitive prices across the state line. For these reasons the tax cannot be shifted but would have to be absorbed by Kroger out of capital or earnings. At the present time, when a condition of economic depression exists, it would have to be paid largely out of capital, or we would be required to close or dispose of a sufficient number of stores to bring our tax within the minimum bracket. We are obligated to pay hundreds of thousands of dollars as rent under leases of stores having years to run and the enforcement of the gross sales tax against our company would inevitably result in an irreparable loss of hundreds of thousands of dollars arising from the inability of our company to continue its business in Kentucky except in a limited number of stores with sales aggregating not to exceed Four Hundred Thousand ($400,000) Dollars.

John B. Bonham.

[Duly verified.]

[fol. 242] EXHIBIT "A"—J. G. A. Contract

THIS AGREEMENT entered into by the Wholesaler and Retailer, both of whose signatures are affixed hereto

WITNESSETH, THAT

WHEREAS, there exists a great need for closer co-operation between Wholesalers and Independent Retailers throughout the United States in order that both Wholesaler and Retailer may, through close co-operation, secure the many benefits of mass buying, mass merchandising and mass advertising, and in order that many needed economies in the operation of both the Wholesalers and Retailers business may be brought about so that Consumers trading with such Retailers may also in turn receive benefits, thus furthering community prosperity and growth and perpetuating the individually owned retail business, and

WHEREAS, the undersigned Wholesaler has secured a charter from the INDEPENDENT GROCERS' ALLIANCE OF AMERICA (I. G. A.) organized to make co-operation between the Wholesaler and Retailer possible and practicable, and providing a National Headquarters through which plans can be organized and carried into effect for the mutual benefit of the Wholesaler, Retailer and Consumer, and

WHEREAS, the undersigned Wholesaler and Retailer are both desirous of co-operating each with the other for the mutual benefits of both,

NOW, THEREFORE,

THE WHOLESALER WILL

First—Furnish the Retailer with the following advertising matter or other printed material as Headquarters of the I. G. A. from time to time may determine:

(A) 3 window posters per week.
(B) 250 copies of "STORE NEWS" every other week. Six times per year a special, larger edition of "STORE NEWS" to replace the regular issue.
(C) One large window placard each week.
(D) One window display bulletin with cut of display instructions for installation weekly.
(E) One merchandising bulletin monthly (inserted in GROCERGRAM).
(F) One copy of "I. G. A." GROCERGRAM monthly.
(G) Special advertising for use in clearance sale—
3 large window streamers
2 14 x 21 posters
8 10½ x 14 posters
(H) Special merchandising broadsides and bulletins for sales campaigns, etc.

It is understood that the Wholesaler is to have the privilege from time to time of making changes in the above advertising matter as the progress of the movement may make desirable in their judgment.

Second—Furnish a list of goods to be known as "Highly Competitive Items" which will be sold to Retailer by Wholesaler at Wholesaler's cost plus not to exceed 3% without regard to cash discount Wholesaler receives. Provided, however, that the total purchases of such items shall not exceed 25% of Retailer's total purchases from Wholesaler; exclusive of Fruits, Vegetables and Produce.

Third—Wholesaler to co-operate with Retailer on special remodeling and clearance sales.

Fourth—Wholesaler will provide a special supervisor at Wholesaler's Headquarters to co-operate with Retailer.

Fifth—Wholesaler to provide newspaper advertising for "I. G. A." members, newspaper advertising to start when 100 Retailers have signed agreements.

Sixth—Wholesaler will provide "I. G. A." Window insignias for Retailer's use at cost of $1.25 for two.

Seventh—Procure for Retailer an official membership certificate in the INDEPENDENT GROCERS' ALLIANCE OF AMERICA.

THE RETAILER PROMISES AND AGREES

(A) To use in good faith to the best of his ability the service, insignias, emblems, etc., and expressly agrees not to use or permit to be used in or about his store other emblems, insignias or advertising furnished from any other source unless agreed to by Wholesaler.
(B) 1. Paint store front of his store in I. G. A. colors.
2. Erect a sign with Retailer's name and "I. G. A." insignias thereon and affix "I. G. A." emblem transfers to windows.
3. Re-arrange and redecorate the interior of his store using I. G. A. Colors.
All as per "I. G. A." general and uniform plans relating to colors and store arrangements submitted by the Wholesaler to the Retailer. Retailer agrees to do all of this at his own expense.
(C) To pay Wholesaler THREE DOLLLARS AND FIFTY CENTS ($3.50) weekly, in advance, during the life of this agreement for the privilege of participating in the benefits provided for under this agreement.
(D) To pay all invoices on a weekly basis. These settlements to be made by Wednesday covering all purchases for previous week. Payments to be made on net basis on Fruits, Vegetables and Produce and on the agreed list of highly competitive Grocery items and less 3% Discount on the other Grocery items that are bought by the Wholesaler on a discount basis.
(E) To purchase goods from the Wholesaler to the total amount of not less than Five Hundred Dollars ($500.00) per month on Grocery items and Three Hundred and Fifty Dollars ($350.00) per month on Fruits, Vegetables and Produce during the life of this agreement.
(F) To keep his store in a clean and orderly condition and to repaint store and redecorate inside of store from time to time as the need becomes apparent. The outside to be painted at least once each year.

The term of this agreement is for a period of three years from date signed and it is expressly understood and agreed that should at any time the Wholesaler's charter from National I. G. A. Headquarters be terminated this agreement will be automatically cancelled without any liability to either party.

The Retailer hereinabove mentioned shall have the right of three year renewal periods from time to time at the expiration of the preceding three year period providing he lives up to this agreement and co-operates fully with the Wholesaler and carries out the promises and agreements hereinabove recited. The failure of either party to notify the other in writing within thirty days (30) prior to date of expiration of his desire to cancel will constitute a renewal for a three year period.

Retailer further agrees that in the event of the cancellation of this agreement by lapse of time or for other reasons that he will immediately repaint the front of his store so as to eliminate the "I. G. A." colors in order that the store will not mislead the public into believing it is an "I. G. A." store.

In the event that the Retailer either transfers his business or becomes bankrupt or fails to perform his part of this agreement, then and in that case, this agreement shall be deemed cancelled without any liability whatsoever by the Wholesaler to the Retailer and the Retailer agrees to return to the Wholesaler all insignias, signs, emblems, names and membership certificates, etc., and failing to do so, the Wholesaler shall have the right to enter and take possession for itself and its own use as it deems fit all "I. G. A." signs, names, insignias, membership certificates, etc., and shall have the right to withdraw and cease furnishing directly or indirectly all advertising material and service provided for under this contract, and in the event that the Retailer has defaulted in paying the weekly charge hereinabove specified to be paid during the life of this agreement, that said unpaid indebtedness to the date of cancellation shall become immediately due and payable.

The Retailer agrees further that inasmuch as the advertising material has to be ordered thirty days in advance, the Retailer agrees to pay the weekly charge hereinabove mentioned for four weeks after notice of cancellation.

This Agreement entered into at _____ this _____ day of _____ A. D. 19___, between the Wholesaler and Retailer both of whose signatures are affixed to this agreement.

_____ (Wholesaler)

By _____

_____ (Retailer)

_____ Witness

Street Address _____ Town

_____ Witness

Phone _____ State

[fol. 243] AFFIDAVIT OF W. A. STEIDEN

Louisville, Kentucky, December 30, 1930.

STATE OF KENTUCKY,
County of Jefferson, ss:

Mr. W. A. Steiden being first duly sworn says as follows:

I am 43 years of age and live with my family at Louisville, Kentucky. Ever since I have been in business I have been engaged in the grocery business. I was with Piggly Wiggly Valley Company beginning with 1917 in the capacity of General Manager and for the past two years and at present I have been in the employ of the Kroger Grocery and Baking Company and have been acting as Branch Manager for the Louisville Branch. As Branch Manager my duties consist of the general management, supervision, and control of 222 stores, the greater part of which are in the state of Kentucky. Our branch is divided into 14 districts. Districts 1 to 5 comprise the city of Louisville and they are under my direct supervision. District 6 is out of Jefferson, Hardin, Larue, Warren, and Nelson Counties. I visit the stores in these districts periodically. I check the sales made at each store. I keep the company advised of the progress and special needs of our stores. I also keep in close touch with the competitive conditions in regard to each of our stores and it is a part of my duties to inform the company in case I think it advisable to expand or to take new locations. It is a part of my duties to know something about competing stores. I have listed the Kroger stores in columns 1 and 2 on exhibit A. In column 3 I have listed a competing store which is operated either by an individual or a corporation who does not own any other store. In column 5, I have listed the affiliation of such store as well as I know the affiliation.

Because I am experienced in the retail grocery business and because of my familiarity with the location of the stores listed on exhibit A as competitors of the Kroger stores, I have estimated the annual sales of these competitive stores and have listed them in column 6 on exhibit A.

The average sales of each Kroger store is about $50,000.00. Each Kroger store competes with the grocery [fol. 244] store located in its neighborhood and it is not affected by grocery stores in other cities. The sales of

many of the competitors exceed the sales of the Kroger store with which they compete. We have a Kroger store at 529 West Oak Street. John Hardy operates a grocery store in the same block. His store has sales which are estimated at $150,000.00 a year and this estimate is about three times as much as the sales of the Kroger store.

Grimms' Grocery located at 1482 South Seventh Street has gross sales which I estimate at $75,000.00. The Kroger store in the neighborhood is located at 1504 South Seventh. Its sales are around $35,000.00. I estimate that Ruffra Brothers at 1400 Hepburn Avenue does at least twice as much business as the Kroger store at 988 Barret which is only one block away. R. G. Eggen located at 1501 Winter Avenue is in the immediate vicinity and I estimate its sales as being larger than the sales of a competing Kroger store.

This situation is true in numerous cases in the districts over which I have supervision. In every case the Kroger Grocery and Baking Company and the stores operated by the competitors are similar. They sell the same general class of merchandise.

The grocery business in the city of Louisville and in the state of Kentucky is h-ghly competitive. There are a great number of stores, and no individual or no corporation controls either the power of purchasing or the ability to sell to the public. Almost every grocery in my district has to pay license and special privilege taxes. There is a state tax for selling soft drinks. Almost all the groceries in my district sell soft drinks. The same is true of cigarettes and oleomargarine. These special privilege taxes run between $50.00 and $75.00 a store, and these taxes are alike for the Kroger stores and for the persons and corporations who operate a single store. The Kroger store, situated at 2549 W. Market Street, handles soft drinks, cigarettes, and oleomargarine. It pays a $6.00 license fee for the right to sell soft drinks, $11.00 for the privilege of selling cigarettes and the same amount in order to enable it to sell oleomargarine. The total tax is $28.00. Under the Gross Sales Act, this amount will be deducted from the tax which would have to be paid for that particular store. Mrs. B. Shulman's store, which is located at 25th and Griffith Avenue, is in direct competition with this Kroger store. [fol. 245] I estimate its annual sales at $50,000 and since the owner of this store has no other store, the tax would be 1/20th of 1% or about $25.00. Mrs. Shulman's Grocery

store sells oleomargarine, cigarettes, and soft drinks. The deduction which it would be allowed to take would completely offset the tax which it would have to pay. This would not be so in the case of the Kroger store because the sales of the Kroger store are aggregated with the sales of all other Kroger stores in the state of Kentucky; thus placing Kroger in a higher bracket and subjecting it to a 1% tax. Inasmuch as Kroger has twelve million dollars' worth of sales in Kentucky, the tax on each store would be about $450.00, and when the deduction is taken off there would still remain a tax of about $425.00. The effect of allowing deductions creates a similar result in the case of almost every other competitor who operates only a single store. A 1% tax, therefore, is placed on Kroger while no tax is placed on the competitors.

I have listed on exhibit D, the Kroger stores in districts 1 to 7, together with special license taxes which each store has to pay. These taxes are the same for competitors who handle the same products. Almost all the stores operated by competitors, who do not operate any other stores, are in the lower brackets, and because of the credits allowed them, will have no taxes to pay.

The profits which we endeavor to make from store operation in the Branch over which I supervise, do not average over 1½ to 2% on gross sales, but we are not able to make this profit at all times and a number of stores in my district have been operated at a loss for the last two years. The tax, therefore, would take about one half our profit and would frequently turn our profit into a loss or else increase the loss sustained from store operations. A tax of $425.00 per store is oppressive and prohibitive. It is practically impossible to operate any store at a profit and pay a $400.00 tax per store. It would be impossible to increase business because the entire profit on the increase would be taken up by the 1% tax. It would be impossible to open any new stores because the 1% tax has wiped out any margin of profit which we might have. However, competitors who operate a single store could increase their business or open new stores without subjecting themselves to any tax, or [fol. 246] else they could undersell us without paying any tax on the business which they take away from us. Many of the stores which we operate are under long term leases, and the closing of these stores would involve heavy losses.

Many of the competitive stores, although individually

owned, are now members of a cooperative association. In my district the following cooperative associations are operating, to wit:

Ohio Valley Grocery Company.
James Grocery Company.
Merchants Wholesale Grocery Company.
National Grocery Company.

I have listed on exhibit A column 5, the groceries that I think belong to cooperative associations. There are many on the list that I have marked as independents when they are really associated with some cooperative society. I believe that the Ohio Valley Grocery Company does about a million dollars worth of business a year. If each member of the Ohio Valley Grocery Company would be required to pay the same tax as Kroger does, its tax would be much higher than it is under the Kentucky Gross Sales Tax as passed. However, the state does not aggregate the sales of the cooperative association and as a result the members pay nothing. On the other hand the sales in all the Kroger stores are aggregated and each store has to pay the amount levied in the highest bracket. The members of the cooperative association enjoy all the advantages enjoyed by the Kroger stores. There is group buying and mass merchandising. This situation is the same in the case of the other cooperatives.

In the Kroger organization each store is a separate unit under its own manager. Separate records are kept for each store. Each store is charged with taxes which are assessed and the rent which must be paid. Each store is charged for goods purchased by that store and credited with sales made.

W. A. Steiden.

Sworn to before me this 13th day of January 1931. Ernest J. Wiley, Notary Public of Jeff. County, Kentucky. My commission expires June 15, 1933. (Seal of Ernest J. Wiley, Notary Public, Jefferson Co., Ky.)

[fol. 247]

EXHIBIT "A"

Kroger Stores, District #1

Principal Independent Competitors

City	Street No.	Firm name	Address	Affiliation	Estimated annual sales
689	1280 Bardst'n Rd	Major Taylor	1304 Bardstown Rd	Ind	$250,000
1038	St. Matthews, Ky	Bauer Bros	St. Matthews	Ind	78,000
		Robbie & Clemens	" "	Ind	75,000
		Fisher Bros	" "	Ind	16,000
1638	603 E. Walnut	Jas. Hess. Groc	Clay & Chestnut	Ind	13,000
		Country Store	Clay & Walnut	Ind	10,000
		Berlins Grocery	623 E. Walnut	Ind	8,000
		Ackermans Grocery	Hancock & Fehr	Ind	26,000
		Wm. E. Mueller	Clay & Walnut	Ind	10,000
1669	1609 Eastern Pky	Crawford Groc	Newburg Road	Ind	13,000
1871	3300 Frankfort Ave	Aug Niehaus	Shelbyville Rd	Ind	21,000
		C. E. Fry	Cannons Lane Frankft. Ave	Ind	50,000
2116	2337 Frankfort Ave	H. Sohns	2218 Payne St	Ind	16,000
		Geo. Oeswien	2216 Frankfort Ave	Ind	30,000
		Ed. Eppinger	2257 Frankfort Ave	Ind	21,000
		Eiths Market	2269 Frankfort Ave	Ind	75,000
2533	2728 Frankfort Ave	Hudson Market	2720 Frankfort Ave	Ohio Valley	125,000
		F. C. Schuepbach	2708 Frankfort Ave	Ind	26,000
2896	2532 Frankfort Ave	F. C. Schuepbach	2708 Frankfort Ave	Merchant Gro. Co	26,000
3067	1758 Frankfort Ave	Greens Grocery	1813 Frankfort Ave	Ind	10,000
		V. Schmidt	Frankfort & Williams	Ind	26,000
3157	975 Baxter Ave	Otte Bros	630 Baxter Ave	Ind	21,000
		Urma Cash Store	Rubel & Breckeridge	Ind	13,000
		Schoffenberg Bros	916 Baxter Ave	Ind	57,000
		Herbergers Market	1085 Bardstown Rd	Ind	36,000
3165	1381 Bardstown Rd	Ralston Grocery	Bardstown Rd. & Edenside	Ohio Valley	250,000
		Cherokee Grocery	1379 Bardstown Rd	Ohio Valley	150,000
3215	744 E. Broadway	R. O. Broder	Clay & Gray	Ind	42,000
		Louis Haefflich	Clay & Gray	Ind	16,000

[fol. 248]

EXHIBIT "A"—Continued

City	Street No.	Firm name	Address	Affiliation	Estimated annual sales
		F. A. Curren	800 So. Shelby	Ind	13,000
		Wm. Kelkoff	Shelby & Roselane	Ind	36,000
		H. Dueselkamp	Shelby & Gray	Ind	13,000
		Rogues Market	715 E. Broadway	Ind	36,000
3489	1200 Bardstown Rd	Eggen Grocery	Winter & Edward	Ind	100,000
4399	1882 Frankfort	B. J. Blake	2004 Frankfort Ave	Ind	21,000
		East End Market	2025 " "	Ind	36,000
		P. Knoff & Sons	Frankfort & Vernon	Ind	75,000
4648	1603 Bardstown Rd	Deer Park Grocery	Deer Park & Bardstown Rd	Ind	50,000
5009	St. Matthews, Ky	Bauer Bros	St. Matthews, Ky	Ind	78,000
		Robbie & Clemens	" " "	Ind	75,000
		Fisher Bros	" " "	Ind	16,000
5137	2912 Frankfort	Herman Potts	Stiltz Lane	Ind	31,000
		Kroger Stores District #2			
691	1038 So. 32nd St	Walter Grant	3036 Grant Ave	Do Not Know	$13,000.00
698	306 Woodlawn	Ice & Violett	546 Woodlawn	Ind	50,000.00
		Fallon Mkt	216 Woodlawn	Ind	31,000.00
786	2757 Dumesnil St	J. Irvin	2222 Dumesnil	Ind	13,000.00
1777	2127 W. Kentucky St	Geo. Evers	20th & Maple Sts	Ind	39,000.00
		Andersons Market	23rd & Maple	Ind	26,000.00
		Leo Messmer	23rd & Ky. Sts	Ind	31,000.00
		J. M. Yewell	2317 Garland	Ind	31,000.00
		B. Markowitz	23rd & Ky. Sts	Ind	31,000.00
		W. P. Todd	2100 W. Date St	Ind	21,000.00
		Geo. Kuhn	2339 W. Date St	Ind	21,000.00
		A. A. Grant	1107 S. 22nd St	Ind	23,000.00
		Wm. Yutz	2200 W. Maple	Ind	26,000.00
		David Hoffman	2202 Garland Ave	Ind	21,000.00
2298	2200 W. Oak St	Geo. Scott	1219 So. 18th St	Ind	18,000.00
		Eckerles Grocery	2301 Wilson St	Ind	31,000.00

		Allen & Moore	2201 W. Oak St	Ind	75,000.00
		Grines Grocery	2184 Dumesnil	Ind	13,000.00
		S. W. Brock	2100 Wilson St	Ind	16,000.00
		Allen Grocery	1828 W. Ormsby	Ind	16,000.00
[fol. 249]					
		R. L. Crossier	2225 W. Ormsby	Ind	$16,000.00
		E. Scott	2100 St. Louis Ave	Ind	32,000.00
2930	4600 So. 6th St				
3154	3032 So. 4th St	H. J. Roberts	762 So. Central	Ind	13,000.00
		Wm. Schwacter	3000 So. 3rd St	Ind	42,000.00
		Harrisons Mkt	3028 So. 4th St	Ind	18,000.00
		South Lou. Mkt	3018 So. 4th St	Ind	39,000.00
		Sam. Krietmon	3115 So. 4th St	Ind	25,000.00
4292	4508 Park Blvd	H. Marcell	4532 Park Blvd	Ind	31,000.00
		Len Wilson	4621 Park Blvd	Ind	31,000.00
		C. Fisk	4412 Lou. Ave	Ind	18,000.00
		W. Lippold	4701 Lou. Ave	Ind	20,000.00
		Beisler Bros	4358 Park Blvd	Ind	31,500.00
		J. W. Thomas	4346 Park Blvd	Ind	15,000.00
4474	2533 Greenwood	V. L. Dunn	26th & Howard	Ind	13,000.00
		A. McDowell	1028 So. 26th St	Ind	21,000.00
		R. Grenwell	25th & Osage	Ind	23,000.00
		G. P. Stammell	1232 So. 26th St	Ind	48,000.00
4477	3102 Taylor Blvd	J. F. Jarosh	3331 Taylor Blvd	Ind	21,000.00
		Jetton & Son	Taylor & Central	Ind	31,000.00
		Frank Hartman	3296 Taylor Blvd	Ind	26,000.00
4484	3131 Virginia Ave				
4491	2830 So. 4th St	Chas. E. Toffe	521 Winkler	Ind	36,000.00
		A. J. Schmitt	2700 So. 4th St	Ind	36,000.00
		Ben Rosenblum	2732 So. 4th St	Ind	21,000.00
		Moorehead Grocery	2818 So. 4th St	Ind	15,000.00
		E. E. Linder	2901 So. 4th St	Ind	18,000.00
		E. P. Buchort	2932 So. 5th St	Ind	16,500.00
		S. O. Nichols	2723 So. 7th St	Ind	16,500.00
		E. E. Houseman	2918 So. 7th St	Ind	13,000.00
4493	3465 Taylor Blvd	Bessie Creason	4400 Taylor Blvd	Ind	26,000.00
		Geo. Slacter	3700 Taylor Blvd	Ind	26,000.00

[fol. 250] EXHIBIT "A"—Continued

City	Street No.	Firm name	Address	Affiliation	Estimated annual sales
		Wm. Betz	3469 Taylor Blvd	Ind	42,000.00
		T. Walker	423 Taylor Blvd	Ind	26,000.00
		J. C. Becker	1400 Berry Blvd	Ind	31,000.00
		C. E. Seifer	1416 Berry Blvd	Ind	28,000.00
		J. Ottersbach	4000 Taylor Blvd	Ind	5,000.00
		Greenerts Mkt	3800 Taylor Blvd	Ind	26,000.00
4639	1400 Hemlock	Millers Groc	3000 Southern Ave	Ind	28,000.00
		William Downs	3216 Kirkby	Ind	31,000.00
		A. V. Terrill	32nd & Woodland	Ind	31,000.00
4764	1101 So. 18th St	J. A. Olt	18th & Garland	Ind	21,000.00
		Bills Mkt	18th & Oak St	Ind	16,000.00
		R. A. Warren	18th & Maple	Ind	31,000.00
5151	1507 So. 18th St	H. Torstick	23 & Hill St	Ind	39,000.00
		Faust Grocery	1442 So. 18th St	"	52,000.00
		T. P. Kolbrier	1329 So. 18th St	"	78,000.00
		E. C. Schoff	1359 So. 18th St	"	21,000.00
		C. L. Misbach	18th & Hill	"	28,000.00
		Geo. Schneider	2339 Bolling Ave	"	15,000.00
		J. M. Rose	18th & Burnett	Ind	13,000.00
5159	3781 So. Parkway	Vaughns Mkt	3946 So. 3rd St	Ind	23,000.00
		J. G. Schuster	3758 So. 3rd St	"	26,000.00
		C. C. Cocke, Jr	3947 So. 4th St	"	18,000.00
		G. H. Buffett	4101 So. 3rd St	"	21,000.00
		Kroger Stores, District #3			
430	1606 Bardstown Rd	Deer Park Groc. Co	1759 Bardstown Rd	Ind	50,000.00
		J. John	1700 Bonnycastle	Ind	31,000.00
659	988 Barrett	Arch E. Eggen	1501 Winter Ave	Ind	75,000.00
		Ruffra Bros	1400 Hepburn Ave	Ind	100,000.00
1491	2042 Preston	Jno. Beckman	2039 So. Shelby	Ind	21,000.00
		Ising Bros	2205 So. Preston St	Ind	60,000.00
1648	2733 Bardstown Rd				
2430	2451 Bardstown Rd	Mike Schum	2301 Taylorsville Rd	Ind	46,000.00

		Herman Kerz	2307 Taylorsville Rd	Ind	46,000.00
2498	1101 Goss Ave	Chas. Deckel	2443 Bardstown Rd	Ind	300,000.00
		John Harstern	1357 So. Shelby	Ind	62,500.00
[fol. 251]		F. A. Greishaber	1148 So. Shelby	Ind	260,000.00
2785	2227 Bardstown Rd	Chas. Deckel	2443 Bardstown Rd	Ind	300,000.00
		Mike Schum	2301 Taylorsville Rd	Ind	46,500.00
		Herman Kerz	2307 Taylorsville Rd	Ind	46,500.00
2954	1613 Norris Place	J. John	1700 Bonnycastle	Ind	30,000.00
3102	3131 Preston St	Jno. T. Echsner	2511 Preston St	Ind	36,000.00
		A. Ohlman	2901 " "	Ind	21,000.00
3397	1236 So. Shelby	Joe Meinart	Clay & St. Cath St	Ind	46,000.00
		Herman Pool	Logan & St. Cath	Ind	21,000.00
		J. A. Horton	1234 So. Shelby	Ind	28,000.00
		Jno. Hartstern	1357 So. Shelby	Ind	62,000.00
		Chris. Hartstern	1345 So. Shelby	Ind	26,000.00
		F. A. Greishaber	1148 So. Shelby	Ind	26,000.00
		Wm. Dreslane	701 Camp St	Ind	32,000.00
		Edw. Hanks	640 Camp St	Ind	21,000.00
		J. Schook Groc	1100 Ramers	Ind	46,000.00
3594	1908 Bardstown Rd	Adolph Hobbick	1868 Bardstown Rd	Ind	40,000.00
		Deer Park Gro. Co	Bardstown & Deer Park	Ind	50,000.00
4411	1933 So. 3rd St	H. G. Brooks & Co	1800 3rd St	Ind	400,000.00
		H. W. Stein	324 West Brandies	Ind	60,000.00
4490	901 Barrett	Wm. Strohm	918 Barrett	Ind	200,000.00
4799	1038 E. Burnett St				
5146	1512 Bardstown Rd	Heckman Groc. Co	1514 Bardstown Rd	Do Not Know	62,000.00
5164	801 Eastern Pkwy	Ising Bros	2205 So. Preston St	Ind	60,000.00
5550	963 Chas. St	Jake Hillman	Chas. & Kriger	Ind	60,000.00
		Stoll Grocery Co	1100 Milton	Ind	21,000.00
		Kroger Stores, District #4			
384	528 So. 5th St	Snyders Grocery	562 So. 5th St	Ind	10,000.00
429	224 So. 4th St	Denunzios	345 W. Jefferson	Ind	52,000.00
452	1039 So. Brook	Scheffers Grocery	Brook & Caldwell	Ind	16,000.00
		Church's Grocery	Floyd & St. Catherine	Ind	16,000.00
		J. H. Kneady	Preston & St. Catherine	Ind	16,000.00
504	529 W. Oak St	Bass Market	7th & Oak St	Ind	21,000.00
		Shaikun's Grocery	7th & Zane St	Ind	18,000.00

EXHIBIT "A"—Continued

City	Street No.	Firm name	Address	Affiliation	Estimated annual sales
[fol. 352]		Moriarity Bros	6th & Ky. St	Ind	60,000.00
		I. Kreitman	6th & Zane	Ind	19,000.00
		Hardy Gro. Co	5th & Oak	Ohio Valley Gro	150,000.00
		W. O. Englander	7th & Ky. St	" " "	32,000.00
1241	1159 So. 4th St	H. Nuffer & Son	625 Magnolia	Ind	50,000.00
1418	1271 So. Floyd St	A. Hankie	Clay & Camp	Ind	21,000.00
		R. A. Drislane	Clay & Camp	"	40,000.00
		G. A. Schneider	429 W. Ormsby	"	21,000.00
		J. W. Watson	Hancock & Camp	"	17,500.00
2439	978 So. 2nd St	H. Franks	6th & Breck	Ind	20,000.00
2612	1504 So. 7th St	Danner Bros	1505 So. 7th St	Ind	50,000.00
		Wm. E. Chick	7th & Shipp	Ind	25,000.00
		S. Kellmann	1000 W. Hill	Ind	15,000.00
		J. Adams	1100 W. Hill	Ind	11,000.00
		M. D. Guelda	7th at 9th St	Ind	40,000.00
		M. Taylor	1116 W. Hill	"	10,500.00
		Louis Linker	1041 W. Hill	"	11,000.00
		Grimms Grocery	1462 So. 7th St	"	75,000.00
		N. Wolders	1480 So. 7th St	"	40,000.00
2787	1162 So. 3rd St	H. G. Brooks & Son	3rd & Bloom	Ohio Valley	400,000.00
2841	654 So. 4th St	Zapp's Groc. Co	640 So. 4th St	" "	100,000.00
2898	1527 So. 4th St	C. W. Hall	5th & Lee	Ind	20,000.00
		A. Hannish	5th & Lee	"	20,000.00
		W. Weinda	1454 So. 7th	"	15,000.00
3394	344 E. Oak St	I. Farb	Preston & Oak St	Ind	16,000.00
		French's Gro	Jackson & Oak St	Ind	25,000.00
		A. Schad	" "	Ind	27,500.00
		Shelby Parkway Gro	Preston & Shelby	Ind	20,000.00
3414	861 So. 3rd St	Wilkens Mkt	5th & Breck	Ind	24,000.00
		J. B. Strauss	4th & Broadway	Ohio Valley	350,000.00
3512	1501 So. 1st	F. C. Slange	114 W. Hill St	Ind	21,000.00
3512	1501 So. 1st	A. Anna Doll	238 E. Burnett	Ind	15,000.00
4351	1398 So. 2nd	C. A. Young	2nd & Magnolia	Ohio Valley	250,000.00
5144	900 So. 1st				
5166	1201 So. 1st	E. A. Altmans	2nd & Oak	Independent	15,000.00

235	3405 W. Bdwy	Geo. Numurer	35 & Michigan	Ind	13,000.00
		Abe Linker	31 & Bdwy	"	18,000.00
		Shawnee Gro. Co	34 & River Pk. Drive	"	47,000.00
		Hohman & Sons	34 & Bdwy	"	61,000.00
		Ruben Gro. Co.	35 & Vermont	"	39,000.00
		W. G. Goings	30th & Michigan	"	10,000.00
		Robert & Back	30th & River Pk. Dr	"	10,000.00
		N. J. Osborne	30th & Michigan	"	10,000.00
785	2525 Portland Ave	Thos. McShane	25th & Ryan	"	20,000.00
		M. A. Carbone	23rd & Lytle	"	13,000.00
		Geo. Meyer	26th & Slevin	"	17,000.00
		Buechler & Fehrebach	26th & Elliott	"	13,000.00
		J. J. Logan	28th & Montgomery	"	16,000.00
		C. A. Buttler	21 & Portland	"	26,000.00
		Abe Keller	21 & Portland	"	16,000.00
		Willard Feller	26 & Portland	"	13,000.00
		John Von Allmen	25 & Portland	"	16,000.00
		Schulman Grocery Co	25th & Griffith	"	51,000.00
1401	4615 W. Mkt	G. E. Becker	41 & Market	"	60,000.00
		Hofsteter & Gunthner	42 & Market St	"	75,000.00
1455	2733 W. Bdway	Harry Davis	22 & Walnut	"	16,000.00
		Lewis Lechner	22 & Chestnut	"	21,000.00
1557	3321 W. Market	R. E. Haynes & Son	30th & Market	"	36,000.00
		Wm. Coch	29th & Market	"	18,000.00
		Henry Schock	227 N. 34th St	"	12,000.00
		Paul Muething	33rd & Rudd	"	10,000.00
		John Pontrich	34 & Market	"	52,000.00
		Guy Thurman	29th & Slevin	"	18,000.00
1696	3919 River Pk. Dr	Chas. Army	38th & River Pk. Dr.	"	26,000.00
		Geo. Stevens Gro	37th & Vermont	"	10,000.00
1768	4034 W. Market	Frank Fust	41 & Cedar	"	17,000.00
		Hofsteter & Gunthner	43 & Market	"	75,000.00
		Chas. Regee	41 & Cedar	"	16,000.00

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EXHIBIT "A"—Continued

City	Street No.	Firm name	Address	Affiliation	Estimated annual sales
2363	2300 W. Market	Hohman & Son	24th & Jeff	Ind	52,000.00
		K. W. Spalding	22nd & Jeff	"	13,000.00
		J. Kopph, Jr	22nd & Market	"	10,000.00
		Joe Spelmiller	20th & Rowan St	"	13,000.00
		J. W. Oldeges	24th & Rowand St	"	13,000.00
2363	2300 W. Market St	Nicholas Wagner	23 & Duncan St	Ind	13,000.00
		Geo. Killerman	22 & Market St	"	23,000.00
		C. Rusch	21 & Market St	"	31,000.00
		Miller Bros	19 & Duncan	"	76,000.00
		Ollie Thorp	20th & Duncan	"	13,000.00
2917	3719 W. Bdwy	V. H. Durbin	Cecil & Chestnut	"	60,000.00
		Frank Fust	41 & Cedar	"	31,000.00
2921	3801 River Pk. Dr	Orthobee Gro. Co	34th & Cedar	"	30,000.00
		Ruben Gro. Co	35th & Vermont	"	39,000.00
		A. E. Boldsmith	38th & Vermont	"	21,000.00
		Chas. Army	38th & River Pk. Dr	"	26,000.00
		Geo. Stevens Co	37th & Vermont	"	10,000.00
3140	4321 Vermont	A. E. Goldsmith	38th & Vermont	"	21,000.00
		Chas. Regee	41 & Cedar St	"	16,000.00
		G. E. Beker	41*th* & Market St	Ohio Valley	44,000.00
		Hofstater & Gunthner	42nd & Market	Retail Merchants	75,000.00
		Frank Fust	41*th* & Cedar St	James Gro. Co	17,000.00
4090	4311 W. Market	G. E. Beker	44th & Market	Ohio Valley	60,000.00
		Frank Fust	41*th* & Cedar	James Gro. Co	17,000.00
		Hofsteter & Gunthner	42nd & Market	Retail Mrechants	75,000.00
4381	4001 W. Bdway	A. E. Goldsmith	38th & Vermont	Ind	21,000.00
		Chas. Army	38th & River Pk. Dr	"	26,000.00
		Geo. Stevens	37th & Vermont	"	10,000.00
		Ruben Gro. Co.	35th & Vermont	"	39,000.00
		V. H. Durbin	Cecil & Chestnut	"	60,000.00
4475	558 So. 20th St	Sam Miller	20th & Cedar	"	13,000.00
		Geo. Gazel	20th & Madison	"	13,000.00
		Fred Miller	22nd & Mag	"	18,000.00
		W. T. Vaughan	19th & Chestnut	"	16,000.00

		J. C. Tuk	23 & Cedar St	"		23,000.00
		B. R. Shera	22 & Magazine St	"		13,000.00
[fol. 255]						
		M. L. Cohn	19th & Madison St	"		13,000.00
		Sm. Selman	20th & Magazine St	"		10,000.00
		J. S. McCown	21 & Cedar St	"		10,000.00
		J. C. Schuchard	21 & Walnut St	"		10,000.00
		Charley's Market	20th & Walnut St	"		29,000.00
		Geo. Minrath	20th & Jeff St	"		17,000.00
		Fred J. Voll	22nd & Cedar	"		16,000.00
4479	2549 W. Market	M. H. Colman	27th & Market	Ind		21,000.00
		Mrs. B. Shulman	25th & Griffith	"		50,000.00
		Litchfield Gro. Co	26th & Main St	"		34,000.00
		Tony Litchfield	28th & Market	"		47,000.00
		Dan Weber	26th & St. Cecelia	"		18,000.00
		McDonald & Stevens	25th & St. Cecelia	"		23,000.00
		Fred Shanks	26th & Rowan	"		16,000.00
		G. H. Gunthner	26th & Jeff	"		23,000.00
		Marvin Shelburn	28th & Griffith	"		10,000.00
		J. W. Pruitt	26th & Jeff	"		10,000.00
		Jas. Schmidt	28th & Duncan	"		18,000.00
4620	2533 W. Walnut	M. Blier	24th & Walnut St	"		10,000.00
		Agnew Gro. Co	26th & Cedar	"		16,000.00
		Dan Hodge	26th & Madison	"		16,000.00
		Schnepp Gro. Co	28th & Madison	"		47,000.00
		Monarch Gro. Co	27th & Chestnut	"		42,000.00
		H. Waith	28th & Jeff	"		23,000.00
		D. H. Cater & Sons	24th & Chestnut	"		26,000.00
		Harry Davis	25th & Walnut St	"		16,000.00
		Jos. Murkel	28th & Chestnut St	"		13,000.00
		D. Perilles	26th & Walnut	"		13,000.00
		Geo. Dillman	26th & Mag	"		13,000.00
4622	2839 Portland	J. W. Smith	1801 W. Pkway	"		18,000.00
		Phillyss Gro. Co	30th & Portland	"		17,000.00
		Sam Plank	29th & Baks St	"		16,000.00

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EXHIBIT "A"—Continued

City	Street & No.	Firm name	Address	Affiliation	Estimated annual sales
		Geo. Beker	35th & Duncan	Ind	12,000.00
		Jos. C. Beker	34th & W. Pkway	"	60,000.00
		S. Davis	29th & Portland	"	60,000.00
		Jas. Zieser	37th & W. Pkway	"	40,000.00
		Mrs. B. Schulman	25th & Griffith	"	47,000.00
		Fred Davis	31 & Bank St	"	26,000.00
		Nick Weisenberg	34th & Bank St	"	13,000.00
			Kroger Stores, District #6		
1579	Elizabethtown, Ky	Walker & Miller	Elizabethtown, Ky	Independent	51,000.00
		Hawkins Grocery	"	"	52,000.00
		Clarks Home Grocery	"	"	52,000.00
		Adams Grocery	"	"	31,000.00
		Williams Grocery	"	"	23,000.00
		Joe Kirk	"	"	13,000.00
		L. H. Lee	"	"	13,000.00
2206	Bowling Green, Ky	J. C. Brownfield	1305 Center St. B. G. Ky	"	52,000.00
		H. Willoughby	729 College St. " " "	"	31,000.00
4796	Bardstown, Ky	J. S. Smith	3rd Street, Bardstown, Ky	"	47,000.00
		Bardstown Grocery	3rd Street, "	"	73,000.00
		Rapier Grocery	" "	"	42,000.00
		Ballard & Ballard	" "	"	31,000.00
		Stoker & Smith	" "	"	36,000.00
5248	415 Park Row B. G. Ky	S. Brown	12th & Adams St. B. G. Ky	Retail Merch. Asso	52,000.00
		A. Gunnels	702 College St. " " "	" " " "	42,000.00
		Chas. James	504 12th St. " " "	" " " "	62,000.00
		Thomas Bros	210 Main St. " " "	" " " "	78,000.00
		J. S. Cole	423 College St. " " "	Ind	31,000.00
		R. S. Cole	1246 Netwood St. " " "	Ind	21,000.00
		Beete Dobson	116 High St. " " "	Ind	16,000.00
		Hubert Ducket	1207 Broadway " " "	Ind	26,000.00
		Urey Dennis	Church St. " " "	Ind	21,000.00
		P. Holland	1238 Indianola	Ind	23,000.00

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		J. W. Hogan	625 Church St.	" " "	Ind	21,000.00
		Hudson Bros	401 W. Main St.	" " "	Ind	16,000.00
		F. L. Kister	875 Broadway St.	B. G. Ky	Ind	31,000.00
		E. McDonald	322 College St.	" " "	Ind	42,000.00
		McCormick	206 Main St.	" " "	Ind	52,000.00
		A. H. McFarland	3rd & College	" " "	Ind	42,000.00
		Park & McGoodwin	945 State St.	" " "	Ind	62,000.00
		Mrs. J. Moltenberry	Fairview Ave.	" " "	Ind	39,000.00
		Robald Bros	140 Main St.	" " "	Ind	57,000.00
		Jack Russell	928 State St.	" " "	Ind	42,000.00
		Siddens	1265 College St.	" " "	Ind	50,000.00
		Tabor Bros	724 Fairview	" " "	Ind	42,000.00
5248	415 Park Row B. G. Ky.	P. E. Tandy	115 13th St.	B. G. Ky	Independent	31,000.00
		H. H. Welch	418 13th St.,	" " "	"	39,000.00
L-2	Hodgenville, Ky	C. H. Duckworth	Hodgenville, Ky		Unknown	32,000.00
		M. C. Jolly	"	"	"	31,000.00

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EXHIBIT "B"

L-i-c-e-n-s-e-

District #1

Store No.	Address	City soft drinks	County soft drinks	City cigarettes	County cigarettes	County Oleo	City Meat	Egg dealers	City grocery
689	1280 Bardstown Rd	10.00	6.00	10.00	11.00	11.00	25.00	.....	.....
1038	St. Matthews, Ky	.....	6.00	.....	11.00	11.00	.....	.....	.....
1638	603 E. Walnut St	10.00	6.00	.....	.....	11.00	25.00	.....	.....
1669	1609 Eastern Pkway	10.00	6.00	.....	.....	11.00	.....	.....	.....
1871	3300 Frankfort Ave	10.00	6.00	10.00	11.00	11.00	.....	.....	.....
2116	2337 Frankfort Ave	10.00	6.00	10.00	11.00	11.00	25.00	.....	.....
2533	2728 Frankfort Ave	10.00	6.00	.....	.....	11.00	25.00	.....	.....
2896	2532 Frankfort Ave	10.00	6.00	10.00	11.00	11.00	25.00	.....	.....
3067	1758 Frankfort Ave	10.00	6.00	.....	.....	11.00	.....	.....	.....
3157	975 Baxter Ave	10.00	6.00	.....	.....	11.00	25.00	.....	.....

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[fol. 258]

EXHIBIT "B"—Continued

Store No.	Address	City soft drinks	County soft drinks	City cigarettes	County cigarettes	County Oleo	City Meat	Egg Dealers	City grocery
3165	1381 Bardstown Rd.	10.00	6.00	10.00	11.00	11.00	25.00	.....	.....
3215	744 E. Broadway	10.00	6.00	10.00	11.00	11.00	.....	.....	.....
3489	1200 Bardstown Rd.	10.00	6.00	10.00	11.00	11.00	.....	.....	.....
4399	1882 Frankfort Ave.	10.00	6.00	.....	.....	11.00	25.00	.....	.....
4648	1603 Bardstown Rd.	10.00	6.00	10.00	11.00	11.00	25.00	.....	.....
5009	St. Matthews, Ky.	.....	6.00	.....	11.00	11.00	.....	.....	.....
5137	2912 Frankfort Ave.	10.00	6.00	10.00	11.00	11.00	25.00	.....	.....
				District #2					
691	1038 So. 32nd St.	10.00	6.00	.....	.....	11.00	.....	.....	.....
698	306 Woodlawn Ave.	10.00	6.00	10.00	11.00	11.00	.....	.....	.....
786	2757 Dumesnil St.	10.00	6.00	10.00	11.00	11.00	25.00	.....	.....
1777	2127 W. Ky. St.	10.00	6.00	.....	.....	11.00	.....	.....	.....
2298	2200 W. Oak St.	10.00	6.00	10.00	11.00	11.00	.....	.....	.....
2930	4600 S. Sixth St.	10.00	6.00	.....	.....	11.00	.....	.....	.....
3154	3032 So. Fourth St.	10.00	6.00	.....	.....	11.00	25.00	.....	.....
4292	4508 Park Blvd.	10.00	6.00	10.00	11.00	11.00	25.00	.....	.....
4474	2533 Greenwood	10.00	6.00	10.00	11.00	11.00	25.00	.....	.....
4477	3102 Taylor Blvd.	10.00	6.00	10.00	11.00	11.00	25.00	.....	.....
4484	3131 Virginia	10.00	6.00	10.00	11.00	11.00	25.00	.....	.....
4491	2830 So. 4th St.	10.00	6.00	10.00	11.00	11.00	25.00	.....	.....
4493	3467 Taylor Blvd.	10.00	6.00	10.00	11.00	11.00	25.00	.....	.....
4639	1400 Hemlock St.	10.00	6.00	10.00	11.00	11.00	25.00	.....	.....
4764	1101 So. 18th St.	10.00	6.00	.....	.....	11.00	25.00	.....	.....
5151	1507 So. 18th St.	10.00	6.00	10.00	11.00	11.00	25.00	.....	.....
5159	3781 Sou. Pkwy.	10.00	6.00	.....	.....	11.00	25.00	.....	.....
				District #3					
430	1606 Bardstown	10.00	6.00	10.00	11.00	11.00	25.00	.....	.....
659	988 Barrett Ave.	10.00	6.00	.....	.....	11.00	.....	.....	.....
1491	2042 Preston St.	10.00	6.00	.....	.....	11.00	.....	.....	.....
1648	2733 Bardstown	.....	6.00	.....	11.00	11.00	.....	.....	.....

2430	2451 " Rd	10.00	6.00	.....	.....	11.00	25.00	.....	.....
2498	1101 Goss Ave	10.00	6.00	.....	.....	11.00	25.00	.....	.....
2785	2227 Bardstown Rd	10.00	6.00	10.00	11.00	11.00	25.00	.....	.....
[fol. 259]									
2954	1613 Norris Place	10.00	6.00	.....	.....	11.00	.....	.....	.....
3102	3131 Preston St	.....	6.00	.....	.....	11.00	.....	.....	.....
3397	1236 So. Shelby	10.00	6.00	.....	.....	11.00	25.00	.....	.....
3594	1908 Bardstown Rd	10.00	6.00	10.00	11.00	11.00	.....	.....	.....
4411	1933 So. Third St	10.00	6.00	.....	.....	11.00	.....	.....	.....
4490	901 Barrett Ave	10.00	6.00	10.00	11.00	11.00	25.00	.....	.....
4799	1038 E. Burnett	10.00	6.00	10.00	11.00	11.00	25.00	.....	.....
5146	1521 Bardstown Rd	10.00	6.00	10.00	11.00	11.00	.....	.....	.....
5164	801 Eastern Pkway	10.00	6.00	.....	.....	11.00	25.00	.....	.....
5550	963 Charles St	10.00	6.00	10.00	11.00	11.00	25.00	.....	.....
			District #4						
384	528 S. Fifth St	10.00	6.00	.....	.....	11.00	25.00	.....	.....
429	224 S. Fourth St	10.00	6.00	.....	.....	11.00	25.00	.....	.....
452	1039 S. Brook St	10.00	6.00	.....	.....	11.00	25.00	.....	.....
504	529 W. Oak St	10.00	6.00	.....	.....	11.00	.....	.....	.....
1241	1159 S. Fourth St	10.00	6.00	10.00	11.00	11.00	.....	.....	.....
1418	1271 S. Floyd St	10.00	6.00	.....	.....	11.00	25.00	.....	.....
2439	978 S. Second St	10.00	6.00	10.00	11.00	11.00	.....	.....	.....
2612	1504 S. Seventh St	10.00	6.00	10.00	11.00	11.00	.....	.....	.....
2787	1162 S. Third St	10.00	6.00	.....	.....	11.00	25.00	.....	.....
2841	654 S. Fourth St	10.00	6.00	.....	.....	11.00	25.00	.....	.....
2898	1527 S. Fourth St	10.00	6.00	10.00	11.00	11.00	.....	.....	.....
3394	344 E. Oak St	10.00	6.00	.....	.....	11.00	25.00	.....	.....
3414	861 S. Third St	10.00	6.00	.....	.....	11.00	.....	.....	.....
3512	1501 S. First St	10.00	6.00	.....	.....	11.00	.....	.....	.....
4351	1398 S. Second St	10.00	6.00	.....	.....	11.00	.....	.....	.....
5144	900 S. First St	10.00	6.00	.....	.....	11.00	.....	.....	.....
5166	1201 S. First St	10.00	6.00	.....	.....	11.00	.....	.....	.....

[fol. 260]

District #5

Store No.	Address	City soft drinks	County soft drinks	City cigarettes	County cigarettes	County Oleo	City Meat	Egg Dealers	City grocery
235	3403 W. Broadway	10.00	6.00	.....	.....	11.00	.....	.....	.....
785	2525 Portland Ave	10.00	6.00	.....	.....	11.00	25.00	.....	.....
1401	4615 W. Market St	10.00	6.00	10.00	11.00	11.00	25.00	.....	.....
1455	2133 W. Broadway	10.00	6.00	.....	.....	11.00	.....	.....	.....
1557	3321 W. Market St	10.00	6.00	10.00	11.00	11.00	25.00	.....	.....
1696	3919 River Park Dr	10.00	6.00	10.00	11.00	11.00	25.00	.....	.....
1768	4034 W. Market St	10.00	6.00	.....	.....	11.00	25.00	.....	.....
2363	2300 W. Market St	10.00	6.00	.....	.....	11.00	25.00	.....	.....
2917	3719 W. Broadway	10.00	6.00	.....	.....	11.00	25.00	.....	.....
2921	3801 W. Chestnut	10.00	6.00	.....	.....	11.00	.....	.....	.....
3140	4321 W. Madison	10.00	6.00	.....	.....	11.00	25.00	.....	.....
4090	4311 W. Market St	10.00	6.00	10.00	11.00	11.00	25.00	.....	.....
4381	4001 W. Broadway	10.00	6.00	.....	.....	11.00	.....	.....	.....
4475	588 S. 20th St	10.00	6.00	10.00	11.00	11.00	25.00	.....	.....
4479	2549 W. Market St	10.00	6.00	10.00	11.00	11.00	25.00	.....	.....
4620	2533 Walnut St	10.00	6.00	10.00	11.00	11.00	25.00	.....	.....
4622	2839 Portland Ave	10.00	6.00	10.00	11.00	11.00	25.00	.....	.....
			District #6						
1579	Public Square, Elizabethtown, Ky	.....	6.00	25.00	11.00	11.00	.....	2.00	.....
2206	935 College St., Bowling Green, Ky	.....	6.00	.....	11.00	11.00	15.25	.....	15.25
4796	Third St., Bardstown, Ky	25.00	6.00	25.00	11.00	11.00	.....	2.00	20.00
5248	415 Park Row, Bowling Green, Ky	.....	6.00	.....	.....	11.00	15.25	2.00	15.25

The above represents all Kentucky stores in Districts 6, 7 and 8.

[fol. 261] AFFIDAVIT OF GILBERT J. SCHNEIDER

Lexington, Kentucky, December 30, 1930.

STATE OF KENTUCKY,
County of Fayette, ss:

Mr. Gilbert J. Schneider being first duly sworn says as follows:

I am 32 years of age and live with my family at Lexington, Kentucky. I have been employed by The Kroger Grocery & Baking Company for the last 16 years. I started with the Kroger organization as a store boy. Later I became a clerk in the store and then Store Manager. I acted as supervisor for 2½ years over district 12 working out of the Louisville Branch of The Kroger Grocery & Baking Company and for the last 15 months I have been Superintendent, having charge of districts 9, 10, 11, and 12.

As supervisor over district 12, I was thoroughly acquainted with the Kroger stores in the district and with the stores competing with Kroger. My duties as Superintendent consist of looking after sales, see that stores are stocked with the proper merchandise and keep in touch with what competitors in my territory are doing. In order to keep in close touch with what competitors are doing, I often have occasion to shop in their stores in order to determine prices they are charging and to get an idea what stock they carry and what business they are doing. Because of my duties and because of my familiarity with the locations of the stores competing with Kroger's, I am familiar with the retailing of groceries and meats in the counties of—

Fayette,	Marion,	Washington,
Pulaski,	Belle,	Boyd,
Whitley,	Lincoln,	Rock Castle,
Harlan,	Laurel,	Owen,
Mercer,	Franklin,	Carroll,
Shelby,	Henry,	Jessamine,
Garret,	Oldham,	Scott,
Montgomery,	Estill,	Madison,
Clark,	Bourbon,	Woodford.

I am acquainted with the number of grocery stores in my territory, the affiliations of the groceries, the character of

the merchandise sold in the stores, the competitive condi-
[fol. 262] tions in the counties, and the taxes to which the stores are subject, and I am able to estimate the approximate gross sales of the various stores located in the districts.

The Kroger Grocery & Baking Company owns and operates 63 stores in districts 9, 10, 11, and 12 located as shown in column 1 and 2 on exhibit A which is attached hereto. These stores compete directly with other grocery stores located in the same cities and towns and which are in the immediate vicinity of the Kroger stores. On exhibit A there is listed in column 3 and 4 the principal competitor over each Kroger store over which I have supervision. In column 5, I have listed the affiliation of each store and in column 6 the estimated annual sales of each competitive store.

The average sales of each Kroger store in the territory over which I supervise, is approximately $50,000.00 a year or $1,000.00 a week.

The sales of the following stores owned by competitors who do not own or manage any other store exceed the gross sales of the Kroger store in that locality:

Kroger Store, Harlan, Ky., Gross sales approximately	60,000.00
Competing Store, W. H. Pennington, Gross sales approximately	100,000.00
Kroger Store, Middlesboro, Ky., Gross sales approximately	65,000.00
Competing Store, Shoffner Gro. Co., Gross sales approximately	100,000.00
Kroger Store, Danville, Ky., Gross sales approximately	55,000.00
Competing Store, W. B. Martin, Gross sales approximately	90,000.00
Kro. Store, 641 E. Main, Lexington, Ky., Gross sales approximately	58,000.00
Competing Store, Clay & W. Main, Lex., Gross sales approximately	100,000.00

In every case the stores operated by the Kroger Grocery & Baking Co. and the stores operated by its competitors handle a similar line of merchandise and deal with the same public. There is no monopoly in the grocery business in the state of Kentucky in the district under my supervision. There are a great number of stores in the field that is highly competitive. Each Kroger store over which I have charge is in direct competition with other stores in the immediate vicinity.

All of the stores under my supervision sell soft drinks, cigarettes, oleomargarine and some candle eggs. The license taxes which each Kroger Store pays are listed on exhibit B attached hereto. In each case the sum total of li-

cense taxes amounts to about $50.00. Almost all the stores competing with Kroger handle soft drinks, cigarettes, [fol. 263] oleomargarine, and a great many of them candle eggs. Their license taxes would be about the same as the taxes which Kroger has to pay.

The average sales of competitive stores owned by individuals or corporations which do not own more than one store does not exceed $50,000.00 and a good many of them have sales around $25,000.00.

In Campbellsville, Kentucky, W. R. Hoskins does about $75,000.00 worth of business a year. Under the Gross Sales Tax law his sales would be taxed at 1/20th of 1% and this tax would amount to about $37.50. Hoskins' Grocery sells oleomargarine, cigarettes, and soft drinks. His deductable tax therefore would be the same as the deductable tax of the Kroger store at Campbellsville and would be about $50.00. As a result, the grocery operated by W. R. Hoskins would pay no tax. We operate a grocery in Campbellsville which is competing with Hoskins' store. It does about $40,000.00 worth of business. Although we have a right to the same deduction as Hoskins, we would still have to pay a tax because our sales are added to the sales of all Kroger stores in the state of Kentucky in order to determine the rate of taxes. As a result our store is subject to a 1% tax on its sales which would amount to about $450.00 a year. After the deductions are made it still would have to pay $400.00 a year.

In Franklin County we operate a grocery store at 208 Main Street. We have another store at 211 St. Clair which is just around the corner. We operate a third store at 311 St. Clair which is within one and a half blocks of the other two stores. The Moore grocery is located in the same block. Each of our three stores does about $50,000.00. The Moore Grocery does the same amount of business a year. All four stores sell cigarettes, and oleomargarine. The tax on the Moore grocery would be $25.00 and it would be completely erased by the deductions which they are allowed to take. In regard to the three Kroger stores, however, the deduction would not relieve them from paying the tax but instead each store would be subject to the tax of about $400.00.

In the city of Lexington, Alex Hughes operates a grocery at the corner of Walnut and East Second Street. This

store is one block from the Kroger store which I supervise and it competes directly with the Kroger store. The gross [fol. 264] sales in Alex Hughes' store is estimated about $60,000.00 a year. He would not be subject to any tax because of the deductions which he is allowed to take. Our store at 3rd and Walnut has a gross sales of about $21,000.00 or less than half the sales of Alex Hughes. However, our store would have to pay a tax of $400.00. The same situation exists in regard to every store over which I have supervision and in each case competitors who own no other stores do not pay any tax but the Kroger store is subjected to a tax of $400.00.

A $400.00 tax on each store is oppressive and prohibitive. Each store operates on a basis of a small margin of profit which is not over 1½ to 2% on gross sales. It is therefore practically impossible to operate any store at a profit and pay $400.00 tax per store. It would be impossible to increase business because the small margin on which the increased business would be done would be all eaten up by the tax. Any new store opened up by Kroger in the territory under my supervision would be subject to the 1% tax on all of its sales. However, a competitor who operates only one store could increase his business or open up a new store without subjecting himself to any tax. Many stores are under long term leases and if they would be closed heavy losses would result. If this heavy tax is imposed, our competitors would be able to undersell us by approximately 1% but they would not have to pay any tax on the increased business which they would get as a result.

Many of the competitors of the Kroger stores under my supervision are now members of cooperative associations. I have listed the affiliation of these stores in column 5 of exhibit A.

Independent Grocers Alliance is an important voluntary cooperative association operating in the territory over which I have supervision. Independent Grocers Alliance has some stores outside of my district in the state of Kentucky. I believe that if the sales of each of the stores which are members of Independent Grocers Alliance would be aggregated the same as the sales of each Kroger store are aggregated with the sales of every store in the state, that those merchants would fall in the highest bracket and would have to pay a 1% tax. However, the members of cooperative associations pay nothing. In spite of this fact they

enjoy the advantages which the stores owned by Kroger [fol. 265] have as a result of being members of the Kroger organization. They secure the benefits of mass buying, mass merchandising, mass advertising, and other economies.

Each member is furnished with window posters and literature in regard to the proper conduct of grocery business the same as Kroger stores are furnished from central headquarters. Special merchandise broadsides and bulletins for sales campaigns are sent to members of Independent Grocers Alliance by the central headquarters. Each member of Independent Grocers Alliance has common newspaper advertising in the city of Lexington, that is, one advertising article is inserted for all Independent Grocers Alliance stores in the city of Lexington. There is attached, a marked exhibit C, copy of an advertisement that appeared in a Lexington newspaper by Independent Grocers Alliance. The store fronts of each member of Independent Grocers Alliance bear the insignia "I. G. A.". They have common store fronts and can be easily recognized as "I. G. A." stores. The central headquarters send special supervisors who cooperate with the retailer in assisting and developing of the business. These supervisors are experts who advise the retailers in regard to proper methods for increasing sales.

Under the Kentucky Sales Tax Statute, each member of the Independent Grocers Alliance is treated as a separate unit and is not forced to aggregate his sales with the other members of the association. As a result, his deductions relieve him from the payment of any tax. Every Kroger store is a separate unit under its own manager. Separate records are kept for each store. Each store is charged with taxes and rent, and with the goods which it purchases and credited with the sales it makes. However, the Kentucky Sales Tax Statute does not treat the Kroger stores as separate units but aggregate the sales of all the stores, thus subjecting each store to a 1% tax on its gross sales.

Gilbert J. Schneider.

Sworn to before me this 5th day of January, 1931. Roy Forman, Notary Public of Fayette County, Kentucky. Notary Public, Fayette Co., Ky. My Commission expires Aug. 20, 1931. (Seal Roy Forman, Notary Public, Fayette County, Ky.)

District No. 9

EXHIBIT "A"

KROGER STORES — PRINCIPAL INDEPENDENT COMPETITORS

Store No. CITY	STREET AND NO.	FIRM NAME	ADDRESS	AFFILIATION	ESTIMATED ANNUAL SALES
Lexington, Ky.	509 E. Maxwell	R. T. Cooms	High & Kentucky Sts.	Ind.	37,000.00
#2130		J. L. Rue & Sons,	Woodland & Euclid Aves.	Ind.	80,000.00
2184	216 E. 7th St.	T. J. Burks	7th & Maple Ave.	Ind.	26,000.00
		F. L. Totten	746 Maple Ave.	Ind.	21,000.00
2185	934 S. Limestone	H. B. Heathman	Lime & Virginia Aves.	Ind.	36,500.00
2245	383 S. Broadway	Kelly-Hunt	Mill & Maxwell Sts.	Ind.	42,000.00
		Andrew B. Sallee	Broadway & High Sts.	Ind.	45,000.00
2522	148 N. Broadway	Hart Brothers	316-18 W. Short St.	Ind.	95,000.00
		J. T. Mallory	474 N. Broadway	Ind.	50,000.00
2662	1190 N. Limestone	W. E. Allender	Bryan Station Pike	I.G.A.	30,000.00
2704	208 E. Third St.	J. A. Willis & Son	Third & Jefferson	Ind.	30,000.00
		C. L. Duvall	340 Race St.	Ind.	20,000.00
3060	500 E. Third St.	Holbrook Co.	501 E. Third St.	Ind.	25,000.00
		John McCarvey	561 W. Third St.	Ind.	25,000.00
3062	112 N. Hanover	Holman Gro. Co.	Cramer & Victory Ave.	I.G.A.	52,000.00
		J. T. Robertson	Cramer & Hanover Aves.	Ind.	30,000.00
		B. H. Gum	Walton & Cramer Ave.	Ind.	40,000.00
5226	Maxwell & Woodland	F. S. Johns	347 LaFayette Ave.	I.G.A	35,000.00
		Jack-Dodd	349 Clifton Ave.	Ind.	35,000.00
		Service Grocery Co.	Columbia & Rose Sts.	Ind.	30,000.00
5227	208 E. Main St.	None			
5228	145 N. Limestone	J. T. Looney	262 E. Short St.	Ind.	45,000.00
		Alex Hughes	Walnut & E. 2nd St.	Ind.	60,000.00
		Leslie Rue	5th & Walnut Sts.	Ind.	35,000.00
5232	852 E. High St.	Spicer Gro. Co.	High & Clay Sts.	I.G.A.	50,000.00
		Butler Gro. Co.	846 E. High St.	Ind.	30,000.00

[fol. 266]

Butler Bro. Co. 340 E. High St.

[fol. 267]

EXHIBIT "A"

District No. 9 cont.

KROGER STORES

PRINCIPAL INDEPENDENT COMPETITORS

Store No. City.	STREET & NO.	FIRM NAME	ADDRESS	AFFILIATION	ESTIMATED ANNUAL SALES
Lexington, Ky.					
5245	600 N. Limestone St.	S. Rosenberg	301 E. 5th St.	Ind.	35,000.00
		L. W. Rue	Fifth & Walnut Sts.	Ind.	30,000.00
5246	102 E. Maxwell	L. Woods	Limestone & Maxwell	I.G.A.	20,000.00
		Warren Brothers	201-203 S. Limestone	Ind.	80,000.00
		W. B. Griggs	563 S. Limestone	Ind.	50,000.00

District No. 10

EXHIBIT "A"

KROGER STORES

PRINCIPAL INDEPENDENT COMPETITORS

CITY Store No.	STREET & NO.	FIRM NAME	ADDRESS	AFFILIATION	ESTIMATED ANNUAL SALES
703	Owingsville, Ky.	Estill & Thomas	Owingsville, Ky.	Ind.	75,000.00
		Ray Spencer	Owingsville, Ky.	Ind.	35,000.00
861	Paris, Ky	Cook Gro. Co.	Paris, Ky.	Ind.	75,000.00
2537	Paris, Ky.	J. W. Brone	Paris, Ky.	I.G.A.	40,000.00
5206	Paris, Ky.	Chas. Green	Paris, Ky.	Ind	21,000.00
946	Winchester, Ky.	H. O. Ro Gro. Co.	Winchester, Ky.	Ind.	75,000.00
2086	Winchester, Ky.	Smith Gro. Co.	Winchester, Ky.	Ind.	30,000.00
5240	Winchester, Ky.	R. B. Brown	Winchester, Ky.	Ind.	35,000.00
1708	Mt. Sterling, Ky.	T. K. Barnes	Mt. Sterling, Ky.	I.G.A.	28,000.00
		H. B. Ringo	Mt. Sterling, Ky.	Ind.	28,000.00
		W. O. Mackie	Mt. Sterling, Ky.	Ind.	18,000.00
3254	Richmond, Ky.	Joe Groc. Co.	Richmond, Ky.	Ind.	50,000.00
		Ora Hackett	Richmond, Ky.	Ind.	45,000.00
		Home Groc. Co.	Richmond, Ky.	Home Gro.Co. Lexington,Ky.	45,000.00
		Kinkead Grocery	Richmond, Ky.	Ind.	21,000.00
3369	Irvine, Ky.	Broadway Gro. Co.	Irvine, Ky.	Ind.	50,000.00
		Wilson Grocery	Irvine, Ky.	Ind.	30,000.00
3417	Georgetown, Ky.	M. C. Cash Grocery	Georgetown, Ky.	Ind.	42,000.00
5222	Georgetown, Ky.	Morris & Crenshaw	Georgetown, Ky.	Ind.	50,000.00
		Floyed Robinson	Georgetown, Ky.	Ind.	40,000.00
5225	Short & B'way. Lexington, Ky.	H. B. Royse	586 W. Main, Lexington, Ky.	Ind.	55,000.00
		J. B. Wallace	592 W. Main, Lexington, Ky.	Ind.	45,000.00
		Sharkeys Groc.	752 W. Main, Lexington, Ky.	Ind.	30,000.00
5229	641 E. Main, Lexington, Ky.	L. F. Rue Groc.	Main & Clay Sts.,Lexington,Ky.	Ind.	100,000.00
5231	1035 S. Limestone,Lexington,Ky.	None			
2660	521 Georgetown St.Lexington, Ky.	B. N. Foley	535 Georgetown St.Lexington,Ky	Ind.	40,000.00
		Roy Gaines	4th & Georgetown, Lexington, Ky.	I.G.A.	75,000.00
		Robertson Gro.	383 Georgetown St.,Lexington, Ky.	Ind.	30,000.00

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[fol. 268]

District #11.

E-X-H-I-B-I-T "a"

KROGER STORES		PRINCIPAL INDEPENDENT COMPETITORS.			
CITY	STREET & NO.	FIRM	ADDRESS	AFFILIATION	ESTIMATED ANNUAL SALES
446	Owenton, Ky.	Owenton Grocery Co.	Owenston, Ky.	Ind.	62,000.00
		Balls Grocery	Owenton, Ky.	Ind.	20,000.00
721	Harrodsburg, Ky.	Van Arsdal Grocery	Harrodsburg, Ky.	Ind.	31,000.00
		Peoples Grocery	Harrodsburg, Ky.	Ind.	31,000.00
2093	Frankfort, Ky.	Moore Grocery	Frankfort, Ky.	Ind.	50,000.00
2299	Lawrenceburg, Ky.	Martins Grocery	Lawrenceburg	Ind.	30,000.00
		Smith Grocery	Lawrenceburg	Ind.	28,000.00
		Van Meter Grocery	Lawrenceburg	Ind.	21,000.00
2302	Versailles, Ky.	Howard Grocery Co	Versailles, Ky.	Ind.	40,000.00
		Blue Grass Groc.	Versailles, Ky.	Ind.	42,000.00
		Redman Groc. Co.	Versailles, Ky.	Ind.	30,000.00
2513	Carrollton, Ky.	Wood Grocery Co.	Carrollton, Ky.	Ind.	33,000.00
		Thomas Grocery	Carrollton, Ky.	Ind.	26,000.00
		Hill Grocery	"	Ind.	45,000.00
2544	Shelbyville, Ky.	Blakemore Groc.	Shelbyville, Ky.	Ind.	75,000.00
		Wilmoth Groc.	"	Ind.	30,000.00
		Finchs Groc.	"	Ind.	26,000.00
3061	Midway, Ky.	Noel Bros. Groc.	Midway, Ky.	Ind.	26,000.00
		W. A. Gatrell	Midway, Ky.	Ind.	30,000.00
3182	Eminence, Ky.	Fred Berry Groc.	Eminence, Ky.	Ind.	58,000.00
		Terrill Groc.	Eminence, Ky.	Ind.	30,000.00
3221	Nicholasville, Ky.	T.C.Willis Co.	Nicholasville, Ky.	Ind.	47,000.00
		Cobbs Groc.	Nicholasville, Ky.	Ind.	18,000.00
		Funk Groc.	Nicholasville, Ky.	Ind.	26,000.00
3421	Frankfort, Ky.	Home Groc. Co.	Frankfort, Ky.	Home Gro.Co.	30,000.00
3656	Lancaster, Ky.	Spencer Co.	Lancaster, Ky.	Ind.	33,000.00
		McRoberts Groc.	Lancaster, Ky.	Ind.	26,000.00
4021	Wilmore, Ky.	Kahn Groc.	Wilmore, Ky.	Ind.	30,000.00
		Deitz Groc.	"	Ind.	25,000.00
		Little Groc.	"	Ind.	20,000.00
4518	Frankfort, Ky.	Marshalls Groc.	Frankfort, Ky.	Ind.	36,000.00
5221	Frankfort, Ky.	Dewitt Grocery	Frankfort, Ky.	Ind.	25,000.00
5238	Shelbyville, Ky.	Wilmoth Groc.	Shelbyville, Ky.	Ind.	30,000.00
		Finchs Grocery	"	Ind.	26,000.00
5393	LaGrange, Ky.	Barr Groc.	LaGrange, Ky.	Ind.	26,000.00
		Ballard Groc.	"	Ind.	10,500.00
		Jennings Groc	"	Ind.	20,000.00

[fol. 269]

District #12

EXHIBIT "A"

KROGER STORES		PRINCIPAL INDEPENDENT COMPETITORS			
CITY	STREET & NO.	FIRM NAME	ADDRESS	AFFILIATION	ESTIMATED ANNUAL SALES
174	Campbellsville, Ky.	W. R. Hoskins	Campbellsville, Ky.	Ind.	75,000.00
		Callison Groc.	Campbellsville, Ky.	Ind.	70,000.00
1287	Somerset, Ky.	Fletcher Groc.	Somerset, Ky.	"	60,000.00
		W. Setton	Somerset, Ky.	I. G. A.	70,000.00
		G/ Mc Kinnery	"	Ind.	50,000.00
2208	Harlan, Ky.	Clarence Saunders	Harlan, Ky.	Ind.	65,000.00
		W. H. Pennington	"	"	100,000.00
		Smith Groc. Co.	"	"	60,000.00
		Nees. Groc. Co.	"	"	40,000.00
3364	Danville, Ky.	Shiars Cure	Danville	Ind.	45,000.00
		Jones, Bros.	"	I.G.A.	60,000.00
		R. Foley	"	Ind.	50,000.00
		W. D. Lunford	"	Ind.	40,000.00
3368	Mt. Vernon, Ky.	Dows Meat Market	Mt. Vernon, Ky.	"	26,000.00
		John Rowe	Mt. Vernon, Ky.	"	48,000.00
		George Parrett	"	"	25,000.00
3422	Stanford, Ky.	E. B. Campbell	Stanford, Ky.	"	55,000.00
		Goods Grocery	"	"	23,000.00
		John Warner	"	"	45,000.00
3603	Pineville, Ky.	City Market	Pineville, Ky.	I.G.A.	40,000.00
		Henry Slusher	"	Ind.	50,000.00
3665	Lebanon, Ky.	B. B. Grocery	Lebanon, Ky.	"	70,000.00
		Comstock Groc.	"	"	60,000.00
		Molon Groc.	"	"	90,000.00
3677	Springfield, Ky.	McElroy & Shoder	Springfield, Ky.	"	75,000.00
		Tatum & Robertson	"	"	73,000.00
		Barnett Grocery Co	"	"	50,000.00
3752	London, Ky.	Pennington Bros.	London, Ky.	Ind.	40,000.00
		Joe. Smith	"	"	35,000.00
		James Carrol	"	"	40,000.00
3881	Middlesboro, Ky.	Owsley & Son	Middlesboro, Ky.	"	100,000.00
		Schneider & Son	"	"	55,000.00
		S. Latliff	"	I.G.A.	40,000.00
		H. Latliff	"	I.G.A.	40,000.00
		W. Cunningham	"	I.G.A.	30,000.00
		S. Hoffners Gro.	"	I.G.A.	100,000.00
3906	Pineville, Ky.	Catliff Cash Store	"	Ind.	50,000.00

District #12
Continued.

E-X-H-I-B-I-T "A"

KROGER STORES		PRINCIPAL INDEPENDENT COMPETITORS			
CITY	STREET & NO.	FIRM NAME	ADDRESS	AFFILIATION	ESTIMATED ANNUAL SALES
4575	Somerset, Ky.	Boston Grocery	Somerset, Ky.	Ind.	78,000.00
5206	Corbin, Ky.	Gabbard & Pennington	Corbin, Ky.	Ind.	50,000.00
		Chapples Grocery	Corbin, Ky.	I.G.A.	40,000.00
		W. M. Stonley	Corbin, Ky.	Ind.	45,000.00
5208	Danville, Ky.	W. B. Martin	Canville, Ky.	Ind.	90,000.00

EXHIBIT "B"
Dist. #9

LICENSE

Store No.	Address	City Soft Drinks	County Soft Drinks	City Cigarettes	County Cigarettes	County Oleo	City Meat	Egg Dealers	City Grocery
2130	509 E. Maxwell St. Lexington, Ky.		6.00		11.00	11.00			30.00
2184	216 E. Seventh St.	•	6.00		11.00	11.00			30.00
2185	934 S. Limestone St.	•	6.00		11.00	11.00			30.00
2245	383 S. Broadway St.	•	6.00		11.00	11.00			30.00
2522	148 N. Broadway	•	6.00		11.00	11.00			30.00
2662	1190 N. Limestone	•	6.00		11.00	11.00		2.00	30.00
2704	208 E. Third St.	•	6.00		11.00	11.00			30.00
3060	500 E. Third St..	•	6.00		11.00	11.00			30.00
3062	112 N. Hanover St.	•	6.00		11.00	11.00			30.00
5226	Maxwell & Woodland	•	6.00		11.00	11.00			50.00
5227	208 E. Main St.	•	6.00		11.00	11.00			50.00
5228	145 N. Limestone	•	6.00			11.00			40.00
5232	852 E. High St.	•	6.00		11.00	11.00			40.00
5245	600 N. Limestone	•	6.00			11.00			40.00
5246	102 E. Maxwell St.	•	6.00			11.00			40.00

EXHIBIT "B"
Dist. 10

LICENSE

[fol. 273]

Store No.	Address	City Soft Drinks	County Soft Drinks	City Cigarette	County Cigarette	County Oleo	City Meat	Egg Dealers	City Grocery
703	Owingsville, Ky.		6.00		11.00	11.00		2.00	
861	800 Main St., Paris, Ky.	25.00	6.00	10.00	11.00	11.00		2.00	25.00
946	Main St. Winchester, Ky.		6.00	20.00	11.00	11.00		2.00	15.00
1708	Mt. Sterling, Ky.		6.00	25.00	11.00	11.00		2.00	
2086	Lex.Ave. Winchester, Ky.		6.00	20.00	11.00	11.00		2.00	15.00
2537	715 Main, Paris, Ky.	25.00	6.00	10.00	11.00	11.00	10.00	2.00	25.00
2660	521 Georgetown St.Lexington,Ky.		6.00		11.00	11.00			30.00
3254	Richmond, Ky.	10.00	6.00	15.00	11.00	11.00		2.00	10.00
3369	Irvine, Ky.	5.00	6.00	10.00	11.00	11.00		2.00	20.00
3417	Georgetown, Ky.		6.00	15.00	11.00	11.00	15.25		50.00
5222	146 Main St. Georgetown, Ky.		6.00			11.00		2.00	50.00
5231	1035 S.Lime, Lexington, Ky.		6.00		11.00	11.00			40.00
5225	Short & B'way.Lexington, Ky.		6.00		11.00	11.00			50.00
5229	641 E. Main, Lexington, Ky.		6.00		11.00	11.00			40.00
5236	707 Main St.,Paris, Ky.		6.00			11.00		2.00	25.00
5240	25 N. Main, Winchester, Ky.		6.00			11.00		2.00	15.00

District #11 EXHIBIT "B"

L-I-C-E-N-S-E

STORE NO.	ADDRESS	CITY SOFT DRINK	COUNTY SOFT DRINK	CITY CIGARETTES	COUNTY CIGARETTES	COUNTY OLEO	CITY MEAT	EGG DEALER	CITY GROCERY	MILL FEED
446	Owenton, Ky.	25.00	6.00	5.00	11.00	11.00		2.00	25.00	
721	Harrodsburg, Ky.		6.00	5.00	11.00	11.00		2.00		
2093	208 Main St., Frankfort, Ky.	5.00	6.00	20.00	11.00	11.00		2.00	20.00	
2299	Lawrenceburg, Ky.		6.00		11.00	11.00		2.00	10.00	
2302	Versailles, Ky.	25.25	6.00		11.00	11.00	50.25	2.00		
2513	Carrollton, Ky.	15.00	6.00		11.00	11.00	10.00	2.00		
2544	Shelbyville, Ky.	10.00	6.00		11.00	11.00		2.00	40.00	
3061	Midway, Ky.		6.00		11.00	11.00		2.00		
3182	Eminence, Ky.	15.00	6.00	15.00	11.00	11.00		2.00	20.00	
3221	Nicholasville, Ky.	10.00	6.00	25.00	11.00	11.00		2.00	20.00	
3421	212 Second St. Frankfort, Ky.	5.00	6.00	20.00	11.00	11.00		2.00	20.00	
3656	Lancaster, Ky.	5.00	6.00	15.25	11.00	11.00		2.00		
4021	Wilmore, Ky.	10.00	6.00	52.50	11.00	11.00		2.00	20.00	5.00
4518	311 St. Clair St, Frankfort, Ky.	5.00	6.00	20.00	11.00	11.00	25.00	2.00	20.00	
5221	Frankfort ,Ky.	5.00	6.00			11.00	25.00	2.00	20.00	
5238	Shelbyville, Ky.		6.00			11.00	25.00	2.00	50.00	
5398	Lawrence, Ky.	5.00	6.00		11.00	11.00		2.00	10.00	

District #12 EXHIBIT "B"

L-I-C-E-N-S-E

STORE NO.	ADDRESS	City SOFT DRINK	COUNTY SOFT DRINK	CITY CIGARETTES	COUNTY CIGARETTES	CO. OLEO	CITY MEAT	EGG DEALER	CITY GROCERY
174	Campbellsville, Ky.	20.00	6.00		11.00	11.00		2.00	
1287	Somerset, Ky.	10.00	6.00	15.00	11.00	11.00		2.00	35.00
2208	Harlan, Ky.	12.00	6.00	12.00	11.00	11.00	7.00		22.00
3364	Danville, Ky.	25.00	6.00	12.00	11.00	11.00		2.00	20.00
3368	Mt. Vernon, Ky.	10.00	6.00	15.00	11.00	11.00		2.00	10.00
3422	Stanford, Ky.		6.00		11.00	11.00		2.00	
3603	102 Virginia Pineville, Ky.	6.00	6.00	11.00	11.00	11.00	7.00		20.00
3665	Lebanon, Ky.	6.00	6.00	50.00	11.00	11.00		2.00	
3677	Springfield, Ky.	10.00	6.00		11.00	11.00			10.00
3752	London, Ky.		6.00			11.00		2.00	5.00
3881	Middlesboro, Ky.	10.00	6.00	15.00	11.00	11.00	15.00	2.00	20.00
3906	Pineville, Ky.	6.00	6.00	11.00	11.00	11.00		2.00	20.00
4573	Somerset, Ky.	10.00	6.00	15.00	11.00	11.00		2.00	35.00
5206	Corbin, Ky.	6.00	6.00		11.00	11.00			10.00
5208	Danville, Ky.	25.00	6.00			11.00		2.00	20.00

[fol. 276] EXHIBIT "C"

[fol. 277] AFFIDAVIT OF D. T. PETTY

Evansville, Indiana.

STATE OF INDIANA,
County of Vanderburg, ss:

Mr. D. T. PETTY being first duly sworn says as follows:

I am 31 years of age and live with my family in Evansville, Indiana. I have been engaged in the grocery business about 9 years and the last 6 years I have had charge of district 14 of the Louisville Branch of the Kroger Grocery & Baking Company. This particular district was part of the organization of Piggly Wiggly Valley Company and at that time I was supervisor for that concern.

There are 6 stores owned and operated by The Kroger Grocery and Baking Company in this territory which comprises the counties of Davies, Hopkins, Henderson, Christian. As Superintendent, I visit each of these stores at least once every two weeks. My duties consist of selecting managers, checking the stock in the stores, and the sales made by each particular store. I advise the managers in regard to merchandising problems and I keep in close touch with the business done by our competitors. I often have occasion to stop in their stores and in this way I have a general idea of the stock they carry, the number of clerks they employ, and the amount of business they do. By reason of my duties and because of my familiarity with the location of the stores operated by competitors of The Kroger Grocery and Baking Company in my territory, I can estimate the approximate yearly sales of these competitors and the affiliation of almost all of them. The average annual sales of each of the Kroger stores that I supervise is about $40,000.00.

The Kroger Grocery & Baking Company operates two stores in Owensboro, Kentucky which are under my supervision. One is located at 116 Second Street and the other store is at 312 Fredrica Street. The principal independent competitors who operate only a single store are as follows:

Frederica Market, Independent, located on Frederica Street whose sales I estimate at $60,000.00 a year.

Thomas Bader at West Fourth Street whose annual sales I estimate at $80,000.00.

[fol. 278] J. H. McLimore on West 9th Street has a store of which the sales are about 25,000 according to my estimate. J. H. McLimore is a member of the Independent Grocers Alliance. As a result he receives posters and advertising material from the central headquarters. He has the advantage of common purchasing power with a great number of other stores. His store front is similar to the store fronts of other individual merchants who operate a single store but are members of Independent Grocers Alliance. McLimore sells oleomargarine and cigarettes. As a result he pays a license tax to the state which is about $22.00. His tax on the sales which I estimate at $25,000.00 are at the rate of 1/20th of 1% and would amount to $12.50. Consequently, he would have no tax to pay because the Kentucky Gross Sales Statute allows him to deduct the special license taxes which he pays to the state. On the other hand, each of the Kroger Stores in the city of Owensboro, Kentucky, would have a tax of about $400.00. Each store would be taxed at the rate of 1% because the sales of each store would be aggregated with the sales of every other Kroger store in the state of Kentucky.

The Kroger Grocery and Baking Company operates a grocery in Madisonville, Kentucky. The principal competitors of this store are as follows:

W. H. Arnold whose annual sales I estimate at $25,000.00.
G. T. Beeney whose annual sales I estimate at $25,000.00.
George H. Fuchs, estimated annual sales $20,000.00.

I do not believe that there is any competing store in Madisonville, Kentucky, that is operated by an individual or a corporation who does not own or operate any other store that would have any tax to pay, because in each case the deductions permitted would completely offset the tax. On the other hand, the store operated by The Kroger Grocery & Baking Company would have a tax of about $400.00.

The Kroger Grocery & Baking Company operates two stores in the city of Henderson, Kentucky. These are located at 234 South Second Street and 102 N. Main Street. The principal competitors are:

Quinn Brothers whose annual sales I estimate at $35,000.00 are located on S. 2nd Street.

[fol. 279] J. E. Blanford, Grocery, estimated annual sales $25,000.00.

Willie Weiner, South Second Street whose sales I estimate at $20,000.00.

Louis Keifer whose estimated annual sales are about $25,000.00.

White Front Grocery whose estimated annual sales are about $40,000.00.

Four of these competing stores are owned and operated by persons who do not own or operate any other store in the state of Kentucky as far as I know. Each of these four, however, is or has been a member of Independent Grocers Alliance and as a result they receive the benefits derived from connection with that organization. The fifth is owned by an individual who does not operate any other store in the state of Kentucky as far as I know. The owner of this store is associated with Urma, a cooperative buying association, and as a result receives the benefit of quantity buying and mass merchandising. He receives the benefit of the cooperative advertising of the central Urma organization.

None of the stores in Henderson, Kentucky would, in my opinion, have any taxes to pay because each of them would be able to set off the taxes that they now pay the state for special license taxes. However, the Kroger stores would be subjected to a 1% tax and each of them would have to pay $400.00.

The Kroger Grocery and Baking Company operates a store in Hopkinsville, Kentucky, over which I have supervision. Some of our competitors of this store in Hopkinsville, Kentucky, who do not own or operate any other stores in the state of Kentucky are, to the best of my knowledge, as follows:

Curtis and Company, W. 7th Street, whose annual sales I estimate to be about $65,000.00.

Cox and Wilson, whose annual sales I estimate to be $50,000.00.

J. T. Walker, 602 S. Main Street, estimated annual sales $55,000.00

Heltsley Brothers, East 7th Street, estimated annual sales $30,000.00.

Clark Cliff, South Main, whose annual sales I estimate at $35,000.00.

[fol. 280] I do not believe that any of the stores competing with The Kroger Grocery and Baking Company in this

county that are owned by persons who do not own any other store would have any tax to pay under the Gross Sales Tax Law because of the setoffs which they are allowed.

The Gross Sales Tax of $400.00 on each of the Kroger stores is prohibitive and confiscatory. There are a great number of competing merchants and a 1% tax that is levied on some and not on all, would give those merchants not taxed an advantage over those who must pay. The profits which we endeavor to make are about 1½ to 2% on gross sales, but we are not able to make this profit at all times and some of our stores for the last two years have operated at a loss. The 1% tax would increase the loss as to these stores and take the major part of the profit where we are making it. As the result of the imposition of the Gross Sales tax, our competitors who operate their business efficiently would be able to undersell us by 1%, but they would not have to pay any tax on the increased business because of the setoffs which they are allowed to take.

It would be impossible for The Kroger Grocery and Baking Company to open new stores because the profits of the new stores would be wiped out by the tax. However, competitors of The Kroger Grocery and Baking Company who operate or own a single store could open new stores without subjecting themselves to the tax.

I believe that if the sales of each of the stores which are members of Independent Grocers Alliance would be aggregated the same as the sales of each Kroger store are aggregated with the sales of every other Kroger store in the state, that these merchants would fall in the highest bracket and would have to pay a 1% tax. However, the members of the cooperative associations pay nothing. In spite of this fact, they enjoy the advantages which the stores owned by Kroger have as a result of being members of the Kroger organization. The central headquarters of Independent Grocers Alliance send special supervisors to the member stores who cooperate with the retailer in assisting and developing of the business. These supervisors are experts in the grocery business and they assist the retailer much in the same manner as I assist the Kroger managers.

[fol. 281] Every Kroger store is a separate unit under its own manager. Separate records are kept for each store. Each store is charged with taxes and rent and with the

goods it purchases and each store is credited with the sales it makes. However, the Kentucky Gross Sales Statute does not treat the Kroger Stores as separate units but aggregate the sales of all its stores, thus subjecting each store to a 1% tax on its gross sales. In contrast to this, the Kentucky Sales Tax Statute disregards the ben-fits received by voluntary association of independent store owners and permits those owners to operate without paying any tax.

D. T. Petty.

Sworn to before me this 14th day of January, 1931. Jessie Rohrscheib, Notary Public of Vanderburg County, Indiana. My com. ex. Nov. 20, 1931. (Seal of Notary Public, Indiana.)

[fol. 282]

EXHIBIT "A"

License District #14.

Store No.	Address	City soft drinks	County soft drinks	City cigarettes	County cigarettes	County oleo	City meat	Egg dealer	City grocery	City oleo
693	Madisonville, Ky	8.25	6.00	15.75	11.00	11.00	.....	2.00	.....	8.25
2075	234 Second St. Henderson, Ky	10.00	6.00	10.00	11.00	11.00	25.00	....	20.00	....
4085	102 No. Main St. Henderson, Ky	10.00	6.00	.....	.....	11.00	25.00	2.00	20.00	....
5223	Hopkinsville, Ky	.....	6.00	.....	.....	11.00	.....	2.00	40.00	....
5234	116 So. Second St. Owensboro, Ky	.....	6.00	.....	.....	11.00	.....	2.00	15.00	....
5235	312 Frederica St. Owensboro, Ky	.....	6.00	.....	.....	11.00	.....	2.00	15.00	....

[fol. 283] STATE OF OHIO,
County of Hamilton, ss:

Albert B. Berger, being first duly sworn, deposes and says as follows:

My name is Albert B. Berger, I am 31 years of age, and I live with my family in Cincinnati, Ohio. I have been engaged in the grocery business for eighteen years, and during that time, I have been associated with Depenbrock Grocery located at 815 Monmouth Street, Newport, Kentucky, and with The Kroger Grocery & Baking Company. The owner of Depenbrock Grocery does not own or operate any other store in the State of Kentucky. This store is conducted in the same manner that the Kroger stores that I supervise. It sells the same kind of food to the same public. The only difference between Depenbrock and Kroger is that Depenbrock delivers and Kroger does not.

I was Assistant Manager for Depenbrock for about six years, and with the Kroger Grocery & Baking Company, I served as a clerk in the store, store manager, supervisor, assistant Branch Manager, Branch Manager and Superintendent.

At present and for the last year, I have been Superintendent, having charge of 125 stores, 82 of which are situated in Kentucky. Most of these stores are in Covington, Newport, Ft. Thomas, Bellevue, and Dayton, Kentucky, and the counties surrounding these cities. As Superintendent of the stores, I usually visit them at least once every three weeks. I keep check of the stock carried in the store, I check the sales made, I advise the managers as to the problems of merchandising, and it is part of my duty to be acquainted with competitive conditions in regard to each store.

I am acquainted with the location of the store operated by each merchant competing with the various Kroger stores under my supervision, and in a general way, I am acquainted with the stock carried by these competitors and the number of employees of each competitor. I am acquainted with the affiliations of these stores, and I can estimate the approximate gross annual sales of each of the stores competing with the Kroger stores under my supervision.

[fol. 284] On Exhibit A, attached hereto, and made a part hereof, I have listed the Kroger stores under my supervision, together with the location of each store. In Columns 3 and 4, I have listed merchants competing with each of the stores under my supervision, who do not operate more than one store. In Column 5, I have listed the approximate annual sales of each competitor.

On Exhibit B, attached hereto and made a part hereof, I have listed the taxes which each of the stores under my supervision has to pay. The taxes paid by our competitors under the same circumstances are equal to the taxes of each Kroger store.

The average sales of each of the Kroger stores under my supervision is about Forty Thousand ($40,000) Dollars per year. In my opinion, some of the independent merchants competing directly with neighboring Kroger stores have gross annual sales which exceed the annual sales of the nearby Kroger store.

A grocery store competes with the merchant selling similar articles whose store is in the vicinity and the store, and the sales thereof, is not affected by the fact that another merchant operates a store or a group of stores in another part of the state. The Kroger stores under my supervision compete directly with the independent merchants listed on Exhibit A. In each case the Kroger stores and the competitors are selling similar articles, viz: groceries, to the same public. There is no monopoly in the grocery business in the district under my supervision and the field is highly competitive.

The average sales of the independent competitors in the district under my supervision are about Thirty Thousand ($30,000) Dollars per year. Under the gross sales tax law of the State of Kentucky, the average merchant would have to pay one-twentieth of one per cent (1/20th of 1%), or Fifteen ($15) Dollars. Practically all grocers in this district sell Oleomargarine and pay the state license tax of Eleven ($11) Dollars. A majority of them sell cigarettes and pay an additional license fee of Eleven ($11) Dollars. These special license fees amounting to Twenty-two ($22) Dollars would completely offset the Fifteen ($15) Dollars tax required under the Gross Sales Tax law, and as a result the average merchant who operates only a single store [fol. 285] would have no tax to pay. On the other hand, in the case of the Kroger stores, each would be subjected to

a tax which would not be based on the sales in that particular store but which would be based on the aggregate sales of all the Kroger stores in the State of Kentucky, which I understand to be Twelve Million ($12,000,000) Dollars. As a result each store would be subjected to a One (1%) Per Cent tax, which would amount to about Four Hundred Sixty ($460) Dollars. The Kroger Grocery & Baking Company would be permitted to deduct the same license tax as the independent competitors, however, the tax levied on each of the Kroger stores would be so large that even after deduction, they would still have about $425.00 to pay on each store. As a result, the only competitors of The Kroger Grocery & Baking Company who would have a tax to pay would be those who operated a number of stores and whose aggregate sales in all of the stores was taken as a basis for the tax.

The profits from store operation in the district under my supervision which we endeavor to make, is about Two (2%) Per Cent on gross sales. Where we are able to make a profit of (2%) Per Cent on gross sales, a 1% tax would take about half of this profit, and if we failed to make the Two (2%) Per Cent profit, the One (1%) Per Cent tax would turn our profit into a loss, or in the event we were losing on a particular store, it would increase our loss. The taxes, therefore, are oppressive and prohibitive. It is practically impossible to operate a store and pay a tax of Four Hundred Fifty ($450) Dollars. It would be impossible to increase business because all of the increased business would be subjected to a One (1%) Per Cent tax. It would be impossible to open new stores because the sales of the new stores would be added to the sales of the old stores and as a result, subjected to the One (1%) Per Cent tax. On the other hand, competitors who at present operate only a single store, could increase business or open new stores without subjecting themselves to any tax.

As a result of the One (1%) Per Cent levy on the Kroger stores and the failure to assess any tax against competitors operating single stores these competitors would have an unfair advantage.

Many of the merchants who operate a single store which are competing with the Kroger stores under my super- [fol. 286] vision, are now members of cooperative associations and as a result, they receive the benefits of mass buying, mass purchasing and group advertising. I am att-ching

hereto and marking as Exhibit C, copies of advertising by A. C. S. stores and I. G. A. stores which are voluntary associations operating in my district.

Many of the competitors have joined the Cincinnati Wholesale Grocers Association which is also a voluntary cooperative society. I believe that if the members of the cooperative societies had their sales aggregated that they would be subjected to a One Per Cent (1%) tax the same as the Kroger stores. However, under the Kentucky Gross Sales Tax law, each of these stores is treated as a separate unit for the purpose of taxation. In the Kroger organization, each store is a separate unit and separate records are kept for each store. Each store is charged with its rent, its purchases and credited with its sales. This separation, however, is disregarded by the Kentucky Gross Sales Tax law which requires the aggregation of the sales of all Kentucky stores.

Albert B. Berger.

Sworn to before me and subscribed in my presence this 28 day of January, 1931. Harry Kasfir, Notary Public, Hamilton County, Ohio. (Notarial seal of Harry Kasfir, Hamilton County, Ohio.)

[fol. 287]

EXHIBIT "A"

Kroger Stores

Principal Independent Competitors

City	Street & No.	Firm name	Addresses	Estimated annual sales
Newport	648 Monmouth St	Raymond Lippert	621 Monmouth St	75,000.00
	101 W. Fifth St	Fred Hindmarch	Fourth & Columbia	50,000.00
	413 E. Third St	J. W. Wetzel	3rd & Park	75,000.00
	109 E. Third St	J. W. Wetzel	" "	75,000.00
	529 Overton St	Reis Bros	4th & Overton	50,000.00
	948 Monmouth St	Hilbert Bros	925 Monmouth	30,000.00
	945 Central Ave	Krebs & Suter	9th & Central	40,000.00
	402 E. Tenth St	C. J. Radley	11th & Central	30,000.00
	221 W. 11th St	H. A. Weber	11th & Patterson	30,000.00
	719 Patterson St	Phil. Haberbusch	7th & Patterson	35,000.00
	1118 Patterson St	L. Burkart	11th & Patterson	20,000.00
	2 E. 11th St	A. W. Stratman	33 E. 11th St	35,000.00
	838 Monmouth St	Hilbert Bros	925 Monmouth St	30,000.00
Dayton	639 Sixth St	Berenden	929 Fourth St	65,000.00
	206 Sixth St	A. Day	137 6th St	25,000.00
	301 Clay St	Berendsen	929 Fourth St	
	1101 Third St	Niemeyer, 1031 5th St	1031 5th St	40,000.00
	503 Sixth Ave	H. Miller	201 6th St	25,000.00
Bellevue	201 Fairfield Ave	Meifert's Groc	Berry & Fairfield	25,000.00
	336 Taylor Ave	N. Bihl	Center & Division	40,000.00
	366 Berry St	N. Bihl	Center & Division	40,000.00
	600 Center St	N. Bihl	Center & Division	40,000.00
	300 Walnut St	N. Bihl	Center & Division	40,000.00
	501 Fairfield Ave	L. Bischoff	705 Fairfield	25,000.00
Ft. Thomas	1041 S. Ft. Thomas	Highland Groc	1051 S. Ft. Thomas	65,000.00
	913 N. Ft. Thomas	C. F. Nagel	901 N. Ft. Thomas	90,000.00
	44 N. Ft. Thomas	Geo. P. Stegner & Sons	30 N. Ft. Thomas	75,000.00
Clifton	68 Park Ave	Mrs. Weber	Main & Park	20,000.00
Southgate	210 Evergreen	Schindler	Custis & Alexandria	20,000.00
Alexandria	Main St	Hess & Roche	Main St	15,000.00
Silver Grove	Lower Rive Rd	Glen Jolly	River & 4 Mile Rd	35,000.00

[fol. 288]

EXHIBIT "A"—Continued

Kroger Stores

Principal Independent Competitors

City	Street & No.	Firm name	Addresses	Estimated annual sales
Cynthiana	101 Pike St	Rees & Rees	103 Pike Street	30,000.00
	Main & Pleasant	Riester	Main & Pleasant	20,000.00
Covington	101 Madison	C. A. Brandenburg	1048 Madison	20,000.00
	1316 Greenup	Saurber Grocery	1502 Greenup	25,000.00
	631 Madison Ave	Geo. C. Goode	18 W. 7th St	90,000.00
	521 E. 20th St	N. Werning	600 Delmar	30,000.00
	2046 Madison	Kess Bros	2001 Scott St	50,000.00
	4001 De Coursey	John Gerwes	3935 De Coursey	30,000.00
	1601 Holman St	H. H. Hoefker	1634 Holman	50,000.00
	3622 De Coursey	Chas. Demmin	3606 De Coursey	35,000.00
	1604 Greenup St	John Schmitt	1731 Greenup	30,000.00
	1501 Maryland	J. J. Daily	1557 Maryland	30,000.00
	1902 Garrard	Hais (Chas.)	307 E. 19th St	20,000.00
	331 W. 19th St	Wm. Hempke	19th & Holman	60,000.00
	4 E. 31st St	John Glenn	30th & De Coursey	20,000.00
	1430 Russell St	Ray Crouch	1431 Russell	20,000.00
	1700 Eastern Ave	L. J. Schreck & Son	16th & Eastern	25,000.00
	2115 Howell St	Mrs. E. Brue	1922 Howell	12,000.00
	643 Bakewell St	John Riesenbeck	701 Bakewell	25,000.00
	401 Pike St	Irvin Darnell	4th & Pike	35,000.00
	801 Greenup St	Coyne Bros	8th & Greenup	40,000.00
	1140 Holman St	Martina Groc	12th & Banklick	15,000.00
	601 Main St	A. B. Dierckes	647 Main St	40,000.00
	1253 Highway Ave	Hampton	Altamont & Alberta	25,000.00
	101 W. Sixth St	Sommers	606 Washington	15,000.00
	226 W. Third St	G. B. Remley	320 Johnson	30,000.00
	1104 Greenup St	Gaupohl	11th & Greenup	25,000.00
	268 Pike St	Frank Hartman	269 Pike St	35,000.00
	318 Greenup St	J. Horowitz	317 Greenup	25,000.00
	664 Pike St	Phil, Mildenberg	713 Pike St	40,000.00

	393 Madison Ave	E. Dungan	402 Russell	40,000.00
	725 Madison Ave	Meyers & Hiltz	703 Madison	45,000.00
	3327 Latonia Ave	W. G. Perry	33d & Latonia	30,000.00
	4456 De Coursey	John Gerwes	3935 De Coursey	35,000.00
	337 W. Southern	G. W. Ellison	Grace & Southern	35,000.00

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Ludlow	306 Elm St	J. A. Lahman	327 Elm	50,000.00
	815 Oak St	J. Etler	821 Oak St	35,000.00
	460 Oak St	Walz Bros	Helen & Oaks Sts	35,000.00
Erlanger	30 Lexington Pk	Jos. Herrmann	29 Lexington Pk	25,000.00
		Kenney	Erlanger	30,000.00
Bromley	4 Shelby Ave	Eubanks	Main & Shelby	22,000.00
Florence	Dixie Highway	M. G. Martin	Florence	25,000.00
Ft. Mitchell	Dixie Highway	Kenney	Ft. Mitchell	25,000.00
Elsmere	409 Dixie Highway	(No Ind. competitor)		
Augusta	202 Upper St	R. P. Yates	31 Upper St	18,000.00
		Mains	235 Upper St	18,000.00
Maysville	1206 W. Second St	M. C. Hutchins	1201 W. 2nd	30,000.00
	111 W. 2nd St	Chas. Conrad	1115 W. 2nd St	25,000.00
	200 Market St	Coblitz & Snapp	235 Market	30,000.00
Williamstown	Paris St	A. N. Skinner	120 S. Main	22,000.00
Carlisle	112 S. Main St	Sexton	108 S. Main	30,000.00
Walton	22 N. Main St	F. B. Hammond	Walton	25,000.00
Flemingsburg	121 E. Water St	Doherty	115 E. Water	25,000.00
Falmouth	124 Shelby St	G. W. Colvin	Shelby St	25,000.00

[fol. 290]

EXHIBIT "B"

Taxes and Licenses Paid for Stores in the State of Kentucky
of the Kroger Grocery & Baking Company

City	Store address Street & No.	City soft drink license	County soft drink license	City cigarette license	County cigarette license	State oleo license	City grocery license	City meat license	State egg license	City & school taxes	County & state taxes
Newport	648 Monmouth St.		6.00	None	11.00	11.00	15.00	30.00	None	15.02	11.96
	101 W. Fifth St.		"	"	"	"	"	"	"	"	"
	413 E. Third St.		"	"	"	"	"	"	"	"	"
	109 E. Third St.		"	"	"	"	"	"	"	"	"
	529 Overton St.		"	"	"	"	"	"	"	"	"
	948 Monmouth St.		"	"	"	"	"	"	"	"	"
	945 Central Ave.		"	"	"	"	"	"	"	"	"
	402 Tenth St.		"	"	"	"	"	"	"	None	None
	221 W. Eleventh St.		"	"	"	"	"	"	"	15.02	11.96
	719 Patterson St.		"	"	"	"	"	"	"	"	"
	1118 Patterson St.		"	"	"	"	"	"	"	"	"
	2 E. Eleventh St.	No Tax Unless Served	"	"	"	"	"	"	"	"	"
	838 Monmouth St.		"	"	"	"	"	"	"	"	"
Dayton	639 Sixth St.	5.00	6.00	5.00	11.00	11.00	15.00	15.00	None	47.31	11.96
	206 Sixth St.	"	"	"	"	"	"	"	"	"	"
	301 Clay St.	"	"	"	"	"	"	"	"	"	"
	1101 Third St.	"	"	"	"	"	"	"	"	"	"
	503 Sixth Ave.	"	"	"	"	"	"	"	"	"	"
Bellevue	201 Fairfield Ave.	None	6.00	10.00	11.00	11.00	10.00	None	None	38.06	11.96
	356 Taylor Ave.	"	"	"	"	"	"	"	"	"	"
	366 Berry St.	"	"	"	"	"	"	"	"	"	"
	600 Center St.	"	"	"	"	"	"	"	"	"	"
	300 Walnut St.	"	"	"	"	"	"	"	"	"	"
	501 Fairfield	"	"	"	"	"	"	"	"	"	"
Ft. Thomas	1041 S. Ft. Thomas	10.00	6.00	None	11.00	11.00	None	None	None	53.33	11.96
	913 N. Ft. Thomas	"	"	"	"	"	"	"	"	"	"
	44 N. Ft. Thomas	"	"	"	"	"	"	"	"	"	"

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Clifton	68 Park Ave	5.00	6.00	None	11.00	11.00	10.00	5.00	None	32.51	11.96
Southgate	210 Evergreen Ave	None	6.00	None	"	"	5.00	5.00	None	22.61	11.96
Alexandria	Main St	None	6.00	None	11.00	11.00	50.00	None	.....	7.50	11.96
Silver Grove	Lower River Rd	None	6.00	None	11.00	11.00	None	None	None	None	11.96
Cynthiana	101 Pike St	25.00	6.00	10.00	11.00	11.00	None	None	2.00	57.00	25.79
	Main & Pleasant	"	"	"	"	"	"	"	"	"	"
Covington	1101 Madison	10.00	6.00	None	11.00	11.00	10.00	None	None	28.19	12.49
	1316 Greenup St	"	"	"	"	"	"	"	"	"	"
	631 Madison Ave	"	"	"	"	"	50.00	"	"	"	"
	521 E. 20th St	"	"	"	"	"	"	"	"	"	"
	2046 Madison	"	"	"	"	"	"	"	"	"	"
	4001 De Coursey	"	"	"	"	"	"	"	"	"	"
	1601 Holman St	"	"	"	"	"	"	"	"	"	"
	3622 DeCoursey	"	"	"	"	"	10.00	"	"	"	"
	1604 Greenup	"	"	"	"	"	"	"	"	"	"
	1501 Maryland	"	"	"	"	"	"	"	"	"	"
	1902 Garrard	"	"	"	"	"	50.00	"	"	"	"
	331 W. 19th St	"	"	"	"	"	"	"	"	None	None
	4 E. 31st St	"	"	"	"	"	"	"	"	28.19	12.49
	1430 Russell St	"	"	"	"	"	10.00	"	"	"	"
	1700 Eastern Ave	"	"	"	"	"	50.00	"	"	"	"
	2115 Howell St	"	"	"	"	"	10.00	"	"	"	"
	643 Bakewell St	"	"	"	"	"	"	"	"	"	"
	411 Pike St	"	"	"	"	"	50.00	"	"	"	"
	801 Greenup St	"	"	"	"	"	10.00	"	"	"	"
	1140 Holman St	"	"	"	"	"	"	"	"	"	"
	601 Main St	"	"	"	"	"	50.00	"	"	"	"

[fol. 292]

	1253 Highway Ave	"	"	"	"	"	"	"	"	"	"
	101 W. Sixth St	"	"	"	"	"	"	"	"	"	"
	226 W. Third St	"	"	"	"	"	10.00	"	"	"	"
	1104 Greenup St	"	"	"	"	"	"	"	"	None	None
	268 Pike St	"	"	"	"	"	"	"	"	28.19	12.49
	318 Greenup St	"	"	"	"	"	"	"	"	"	"
	664 Pike St	"	"	"	"	"	50.00	"	"	"	"

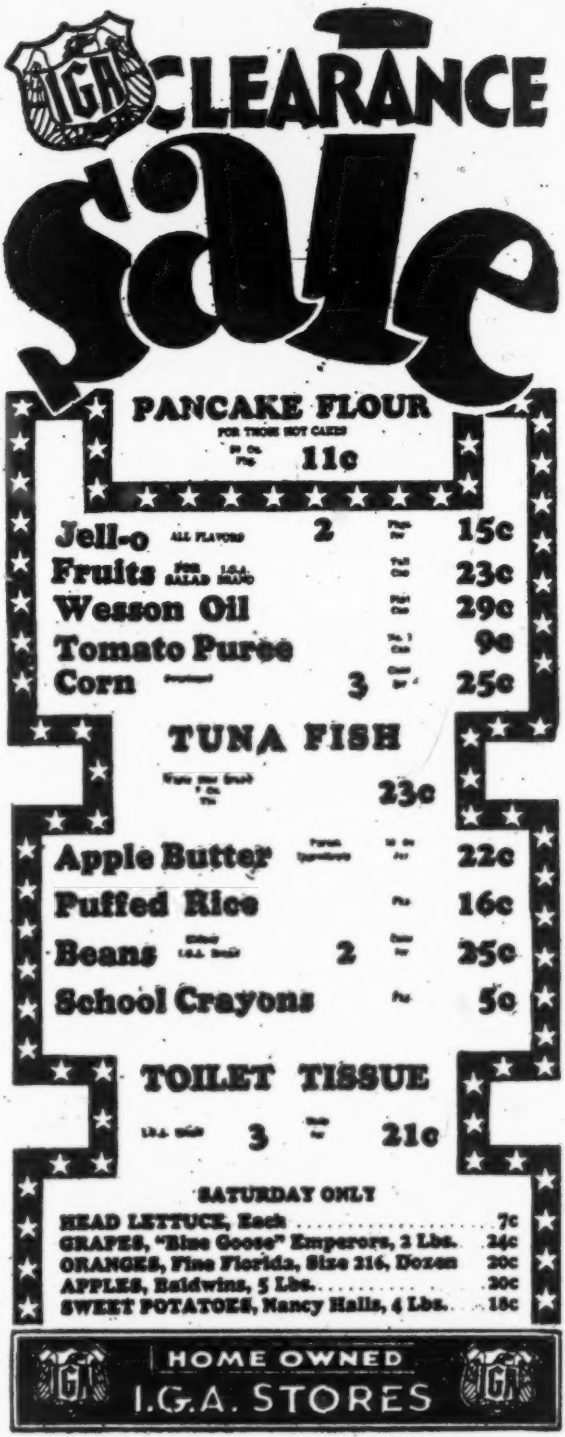
EXHIBIT "B"—Continued

Taxes and Licenses Paid for Stores in the State of Kentucky of the Kroger Grocery & Baking Company

City	Store address Street & No.	City soft drink license	County soft drink license	City cigarette license	County cigarette license	State oleo license	City grocery license	City meat license	State egg license	City & school taxes	County & state taxes
	393 Madison Ave	"	"	"	"	"	10.00	"	"	None	None
	725 Madison Ave	10.00	6.00	None	11.00	11.00	10.00	None	None	None	None
	3327 Latonia Ave	"	"	"	"	"	"	"	"	28.19	12.49
	4456 DeCoursey	"	"	"	"	"	"	"	"	"	"
	337 W. Southern	"	"	"	"	"	50.00	"	"	"	"
Ludlow	306 Elm St	None	6.00	None	11.00	11.00	15.00	None	None	25.96	12.49
	815 Oak St	"	"	"	"	"	"	"	"	"	"
	460 Oak St	"	"	"	"	"	"	"	"	"	"
Erlanger	30 Lexington Pk	"	6.00	None	11.00	11.00	None	None	None	21.77	12.49
Bromley	4 Shelby Ave	"	"	"	"	"	"	"	"	"	"
Florence	Dixie Highway	10.00	"	"	"	"	"	"	2.00	14.66	18.88
Ft. Mitchell	Dixie Highway	None	"	"	"	"	"	"	"	None	12.49
Elsmere	409 Dixie Highway	"	"	"	"	"	"	"	"	12.00	12.49
Augusta	202 Upper St	15.50	"	"	"	"	"	"	"	37.82	37.87
Maysville	1206 W. Second St	5.00	"	20.00	"	"	15.00	"	"	21.61	16.88*
	111 W. Second St	"	"	"	"	"	"	"	"	"	"
	220 Market St	"	"	"	"	"	"	"	"	"	"
Williamstown	Paris St	None	"	26.00	"	"	None	"	"	30.60	20.71
Carlisle	112 S. Main St	10.25	"	20.25	"	"	"	"	"	17.48	11.61
Walton	22 N. Main St	None	"	None	"	"	"	"	"	28.13	18.87
Flemingsburg	121 E. Water St	10.25	"	"	"	"	"	"	"	11.92	15.14
Falmouth	124 Shelby St	15.00	"	15.00	"	"	10.00	5.00	"	41.10	29.93
Total		516.00	498.00	226.25	913.00	913.00	1425.00	480.00	28.00	2181.57	1063.67

* Bakery Agency $20.00.

[fol. 293] EXHIBIT "C"



Affidavit of John E. Donahue

[fol. 294] State of Kentucky,
County of Jefferson, ss:

John E. Donahue, being first duly sworn, deposes and says as follows:

I am thirty years old and live with my family in Lexington, Kentucky. I have been in the grocery business for the last nine years; operated meat market for about two years and have been a clerk and manager of a store, stock auditor, assistant superintendent and superintendent for the Great Atlantic & Pacific Tea Co. For the last two years I acted as superintendent for that Company.

As superintendent I have charge of forty-nine stores in the Eastern part of Kentucky and in the Bluegrass district, which includes the cities of Lexington, Danville, Frankfort and the surrounding territory.

As supervisor of these stores it is my duty to visit them frequently, check up on stock carried, keep tab of the sales which they make and advise the managers in regard to merchandising problems. It is part of my duties to keep the Company informed of the possibility of expansion in any particular territory and it is also part of my duties to be acquainted with the general competitive conditions of the grocery business in the territory under my supervision.

By reason of my duties and because of my acquaintance with the various locations occupied by competitive stores and because of my familiarity with the number of employees and general conditions, I am familiar with the retailing of groceries in the territory under my supervision. I am familiar with the affiliation of competitive stores and with the character of merchandise sold therein. I am acquainted with the tax which the various stores must pay and I am able to estimate the approximate gross sales of the various stores located in the district.

Exhibit "A" attached hereto and made a part hereof lists in Columns 1 and 2 the Atlantic & Pacific stores under my supervision. I have also listed the individuals and corporations who operate a single store opposite the name of the Atlantic & Pacific store with which that particular individual or corporation competes. Estimated gross sales of these individuals or corporations are listed in Column 5. [fol. 295] The average gross sales of each Atlantic & Pacific

store in my territory is about Fifty Thousand ($50,000) Dollars.

There is no monopoly in the grocery business in Kentucky and the field is highly competitive. The Atlantic & Pacific stores under my supervision are subject to the same license tax that is imposed on the individual owners. Under the Gross Sales Tax these licenses are deductable, but the sales tax in the case of the Atlantic & Pacific stores is so high that they still have to pay an exorbitant sum after the deduction. The competitors of these stores, however, who do not own or operate any other store, do not have any tax to pay because their gross sales tax is completely offset by deductions which they are allowed. For example, Atlantic & Pacific have a store in Corbin, Kentucky, which does about Fifty Thousand ($50,000) Dollars of business a year. Pennington & Gabber operate a store in that city which sells the same class of merchandise to the same public. Both of these stores sell oleomargarine, cigarettes and candled eggs. The tax on the independent store would be 1/20 of 1%, or about $17.50. The cigarette tax, license fee and the oleomargarine license would completely offset this tax. The Great Atlantic & Pacific Tea Co., has sales approximating Thirteen Million ($13,000,000) Dollars, in the State of Kentucky. Under the gross sales tax law the tax on each store amounts to Five Hundred Sixty ($560) Dollars. After the deduction is made each store in the Atlantic & Pacific System would still have a Five Hundred ($500) Dollar tax to pay. This is true in the case of the Corbin store which competes with the store operated by Pennington & Gabber.

In Cumberland they operate a store on Main Street which does about Fifty-Five Thousand ($55,000) Dollars business a year. This store would have a Five Hundred ($500) Dollar tax to pay. The Independent Grocers who are members of Independent Grocers Alliance—an organization which gives to the retailer practically every advantage which members of the Atlantic & Pacific organization have—have no tax to pay.

The same is true in the case of the store at Evart, Kentucky. The competing store owner is a member of the Independent Grocers Alliance and as a result he has advantage of common advertising, mass merchandising, quan-
[fol. 296] tity buying and supervision by a trained expert; however, the owner of this store sells Oleomargarine and

Cigarettes, and consequently has deductions which relieve him from the payment of any tax. The Atlantic & Pacific, in that city, however, has to pay One (1%) Per Cent on its sales.

Exhibit "B" attached hereto and made a part hereof, lists the stores under my supervision and the tax which each store is to pay. The tax would be the same for each of the competitors of the Atlantic & Pacific Stores which I supervise and the result is the same as shown in the two examples which I have listed. In every case the Atlantic & Pacific store would be subject to a One (1%) Per Cent tax on all of its gross sales due to the fact that its sales are added to the sales of all other Atlantic & Pacific stores in the State of Kentucky, whereas, the competing store which was owned or operated by either an individual or a corporation which did not own any other store, has no tax to pay.

The profits from store operations in the district under my supervision are not over 1½ to 2 per cent on the gross sales. A Five Hundred ($500) Dollar tax on each store is oppressive and prohibitive. It is practically impossible to operate any store at a profit and pay a Five Hundred ($500) Dollar tax per store. Any increase in business would be taxed at One (1%) Per Cent, which would take almost all of the profit received as a result of the increase in business. The tax is so much that no new stores could be opened which would be profitable. Competitors could undersell us without subjecting themselves to any tax, because their aggregate sales would not exceed Four Hundred Thousand ($400,000) Dollars and they would remain at all times in the last bracket. Some of the stores which I supervise are held under long term leases and the closing of the same would involve heavy losses.

The Independent Grocers Alliance is very active in the district over which I have supervision. This organization gives its members following service: Window posters and instructions in regard to window display. Each member of the association has prominent store fronts and no one member is distinguishable from any other. The central organization sends supervisors to the retailer, who advises them in regard to the merchandising of goods, the installa-
[fol. 297] tion of stock and advertising in much the same way as I advise the managers of the stores under my supervision.

In the City of Lexington the Independent Grocers Alliance has common advertising for all of its members. Exhibit "C" is a copy of the newspaper advertising of the United Grocers Alliance in the City of Lexington, Ky.

I am informed and believe that if the gross sales of all the members of the Independent Grocers Alliance were added together that the tax on each member would be One (1%) per cent on sales; that is, if they were taxed in the same manner as the Atlantic & Pacific stores the sales of all members would be added together in order to determine the rate of taxation. In effect, however, the members of the cooperative association, although enjoying all the benefits enjoyed by the Atlantic & Pacific stores under my supervision, pay no tax at all.

I am attaching hereto and marking as Exhibit "D," a picture of our store and the store operated by the M. & C. Cash Grocery, 118 Main Street, Georgetown, Kentucky. These two stores are adjoining. The M. & C. Cash Grocery is a member of the I. G. A. It has a front which is common to all I. G. A. stores, just as the neighboring store which we operate has a front which is common to all stores that we operate. The I. G. A. store sells for cash and makes no deliveries. Its groceries are the same type as handled in our store. Its arrangement is practically the same as ours. Its sales are about as large as the sales in our store. However, its special license taxes would relieve it from the payment of any tax, on the other hand, our store would be subjected to a Five Hundred ($500) Dollar burden under the Gross Sales Tax Law of Kentucky. This situation is an example of the condition that prevails in many neighborhoods. Groceries which are in the immediate vicinity of the Atlantic & Pacific Store which we operate, have no taxes to pay, while our stores have a heavy burden to meet, altho these stores are direct competitors.

I am attaching hereto and marking as Exhibits "E," "F" and "G," wrappers taken from articles purchased at this I. G. A. store in Georgetown. Similar products are sold under the same kind of wrappings in all I. G. A. stores.

Each store in the Atlantic & Pacific system is a separate unit, separate books are kept, and taxes and expenses are charged against each particular store. Each store is charged with goods purchased by it, and credited with the [fol. 298] goods it sells. The aggregation of sales of all the Atlantic & Pacific stores under the Gross Sales Tax

statute disregards this separation, but at the same time that statute disregards the common advantages of the members of the Independent Grocers Alliance.

John E. Donahue.

Subscribed and sworn to before me this 4th day of February, 1931. Nadine McCreary, Notary Public, Jefferson County, Ky. (Seal of Nadine McCreary, Notary Public, Jefferson Co., Ky.) Notary Public, Jefferson County, Ky. My commission expires Aug. 11, 1931.

EXHIBIT "A"

THE GREAT ATLANTIC & PACIFIC TEA COMPANY

SUP'T. JOHN E. DONAHUE'S TESTIMONY

PRINCIPAL INDEPENDENT COMPETITORS

CITY	ADDRESS	FIRM NAME	ADDRESS	ESTIMATED ANNUAL SALES
Barbourville	Main & Pub. Sq.	Pennington Bros.	Barbourville	$50,000
Corbin	222 Center	Pennington & Gabber	Corbin	35,000
Corbin	215 Main	None	None	———
Cumberland	Main St.	I.G.A.	Cumberland	45,000
Danville	229 W. Main St.	Jones Bros.	Danville.	68,000
Evarts	Yocum St.	I.G.A.	Evarts	41,600
Frankfort	111 Bridge St.	Wooman Brothers	Frankfort	52,000
Frankfort	313 St. Clair	Home Owned	Do	31,200
Frankfort	601 High St.	W. Markhall	Do	47,000
Georgetown	118 Main St.	M.& C. Cash Gro.	Georgetown	31,200
Harlan	103 S. Main St.	W. H. Pennington	Harlan	75,000
Harlan	Tener Bld.Main St.	Smith Groc.	Do	50,000
Harrodsburg	516 Main St.	A. Patterson	Harrodsburg	62,400
Hazard	216 Main St.	Service Gro. Co.	Hazard	40,000
Hazard	113 Main St. E/S	Parkins Gro.	Do	50,000
Irvine	209 Main St.	F.M. Welch	Irvine	55,000
Jackson	Main Nr. Bdway	Daniels Market	Jackson	45,000
Lancaster	126 Main St.	M. H. Forbes	Lancaster	31,200
Lawrenceburg	133 S. Main St.	Turner & Brown	Lawrenceburg	31,200
Lexington	185 N. Limestone	Alex Hughes	Lexington	52,000
Lexington	401 S. Broadway	Kelly Hunt	Do	52,000
Lexington	125 N. Broadway	Packing House Mkt.	Do	104,000
Lexington	496 E. High St.	J. L. Rue & Son	Do	41,600
Lexington	Elm Tree Lane	None	None	———
Lexington	933 S. Limestone	None	None	———
Lexington	133 Third St.	None	None	———
Lexington	801 S. Bdway	Coldglaser & Hafely	Lexington	41,600
Lexington	404 Georgetown	B.N. Foley	Lexington	85,000
Lexington	646 E. Main St.	Rue Grocery	Lexington	78,000
Lexington	568 W. Main St.	Thurston Market	Lexington	62,400
Lexington	432 E. 3rd St.	Powell Gro.	Lexington	31,200
Lexington	1203 Limestone	Yeager's Gro.	Do	83,400
Middlesboro	2028 Cumb St.	S. Cowley & Son	Middlesboro	125,000
Mt. Sterling	42 Main St.	C. Childres	Mt. Sterling	50,000
Neon	Main St.	Chas. Taylor	Neon	75,000
Nicholasville	113 S. Main St.	T. C. Willis	Nicholasville	55,000
Paris	629 Main St.	Chas. Cook	Paris	62,400
Pineville	Pine St.	Gabliff Cash Store	Pineville	60,000
Ravenna	706 Main St.	J. M. Hamilton	Ravenna	45,000
Richmond	112 E. Main St.	G. Ringo	Richmond	40,000
Somerset	107 Mt. Vernon	I.G.A.	Somerset	46,800
Stanford	Main St.	P. Campbell	Stanford	51,000
Versailles	138 Main St.	Howard Bros.	Versailles	36,400
Vicco	Main St.	Don Watts	Vicco	65,000
Wallins Creek	Howard St.	I.G.A.	Wallins	30,000
Whitesburg	Main & Court	I.C. Richey	Whitesburg	45,000
Williamsburg	400 Main St.	Pennington & Gabber	Williamsburg	62,400
Winchester	20 N. Main St.	Boro Groc.	Winchester	80,000

[fol. 299]

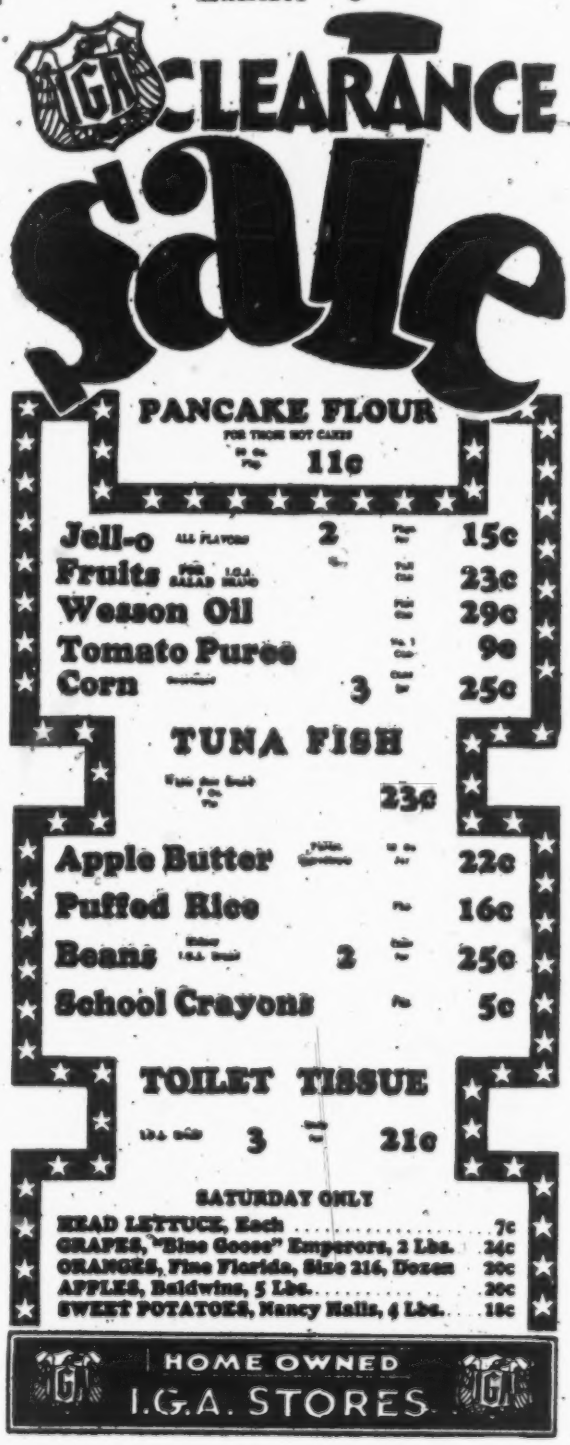
EXHIBIT "B"

THE GREAT ATLANTIC & PACIFIC TEA COMPANY

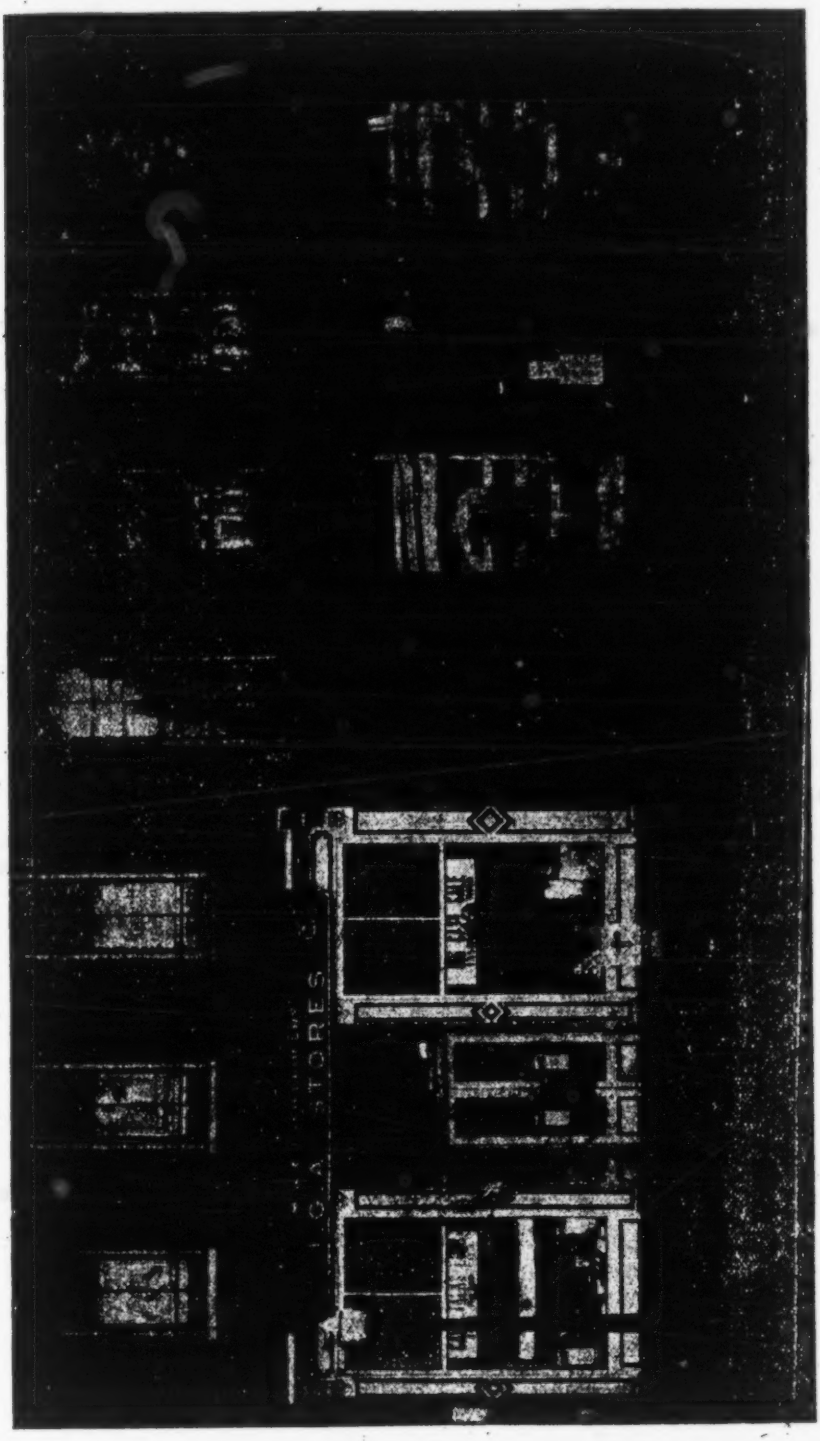
SUP'T. JOHN E. DONAHUE'S TERRITORY

City	Street Address	Soft Drink	Oleo	State and County	Cigarettes	City Grocery	City Meat	Egg Dealers	City and School	Miscellaneous	Total
Barbourville	Main & Pub.Sq.	6.00	11.00	26.00	11.00	-	-	2.00	25.00		81
Corbin	222 Center	11.00	11.00	22.00	18.00	10.00	-	2.00	26.00		100
Corbin	215 Main	11.00	11.00	42.00	18.00	10.00	-	2.00	26.00		120
Cumberland	Main St.	6.00	11.00	65.00	22.00	26.00	-	-	15.00		145
Danville	229 W. Main	31.00	11.00	14.00	21.00	25.00	-	2.00	35.00		139
Evarts	Yocum St.	12.00	11.00	46.00	17.00	10.00	21.00	-	50.00	5.00 C. Feed	172
Frankfort	111 Bridge	11.00	11.00	21.00	21.00	20.00	25.00	2.00	27.00		138
Frankfort	313 St.Clair	11.00	11.00	37.00	21.00	20.00	25.00	2.00	27.00		154
Frankfort	601 High	11.00	11.00	23.00	21.00	20.00	25.00	2.00	41.00		154
Georgetown	118 Main St.	6.00	11.00	16.00	26.00	50.00	15.00	2.00	66.00		192
Harlan	103 S. Main	17.00	11.00	72.00	22.00	21.00	6.00	2.00	85.00		236
Harlan	Tom Bl, Main	17.00	11.00	63.00	22.00	21.00	6.00	-	61.00		201
Harrodsburg	516 Main St.	6.00	11.00	37.00	16.00	-	-	2.00	38.00		110
Hazard	216 Main St.	6.00	11.00	41.00	12.00	80.00	-	2.00	146.00		298
Hazard	113 Main, R/S	12.00	22.00	23.00	11.00	61.00	-	-	115.00		244
Irvine	200 Main	11.00	11.00	42.00	21.00	10.00	10.00	2.00	49.00		156
Jackson	Main nr Bdway	16.00	11.00	73.00	21.00	25.00	-	2.00	56.00		204
Lancaster	126 Main St.	11.00	11.00	26.00	26.00	-	-	2.00	21.00		97
Lawrenceburg	133 S. Main	26.00	11.00	22.00	11.00	10.00	5.00	2.00	29.00		116
Lexington	185 N. Limestone	6.00	11.00	19.00	46.00	30.00	-	-	41.00		153
Lexington	401 S. Bdway	6.00	11.00	21.00	46.00	20.00	-	-	41.00		145
Lexington	125 N. Bdway	6.00	11.00	21.00	46.00	20.00	-	-	41.00		145
Lexington	496 E. High	6.00	11.00	20.00	46.00	20.00	-	-	41.00		144
Lexington	Elm Tree Lane	6.00	11.00	20.00	46.00	20.00	-	-	41.00		144
Lexington	933 Limestone	6.00	11.00	20.00	46.00	20.00	-	-	-		103
Lexington	133 - 3rdSt.,	6.00	11.00	20.00	46.00	20.00	-	-	41.00		144
Lexington	801 S. Bdway.	6.00	11.00	20.00	46.00	20.00	-	-	41.00		144
Lexington	461 Georgetown	6.00	11.00	14.00	46.00	20.00	-	-	41.00		138
Lexington	646 E. Main St	6.00	11.00	10.00	11.00	20.00	-	-	-		58
Lexington	583 W. Main	6.00	11.00	14.00	46.00	30.00	-	-	41.00		148
Lexington	432 E. 3rd St	6.00	11.00	21.00	46.00	20.00	-	-	41.00		145
Lexington	1203 Limestone	6.00	11.00	21.00	46.00	20.00	-	-	41.00		145
Middlesboro	2028 Cumb.	16.00	11.00	67.00	26.00	25.00	15.00	2.00	65.00		227
Mt. Sterling	42 Main St.	-	11.00	55.00	37.00	-	-	2.00	41.00		146
Neon	Main St.	6.00	11.00	15.00	11.00	21.00	-	-	39.00		103
Nicholasville	113 S. Main	6.00	11.00	31.00	36.00	-	35.00	2.00	50.00	5.00 Fish	176
Paris	629 Main St.	6.00	11.00	57.00	18.00	10.00	10.00	2.00	61.00		175
Pineville	Pine St.	6.00	11.00	52.00	22.00	20.00	7.00	2.00	88.00		208
Ravenna	705 Main St.	11.00	11.00	66.00	21.00	20.00	-	2.00	84.00		195
Richmond	112 N. Main	16.00	11.00	40.00	26.00	10.00	15.00	2.00	66.00		186
Somerset	107 Mt.Vernon	21.00	11.00	25.00	26.00	30.00	-	2.00	46.00		161
Stanford	Main St.	6.00	11.00	31.00	11.00	-	-	2.00	43.00		107
Versailles	135 Main St.	31.00	11.00	9.00	11.00	-	25.00	2.00	22.00		111
Vicco	Main St.	6.00	11.00	33.00	11.00	52.00	-	-	25.00		138
Wallins Creek	Howard St.	16.00	11.00	67.00	22.00	25.00	-	-	47.00		188
Whitesburg	Main & Court	6.00	11.00	82.00	11.00	15.00	-	-	70.00		195
Williamsburg	400 Main St.	6.00	11.00	48.00	11.00	5.00	-	2.00	38.00		121
Winchester	20 N. Main	6.00	11.00	60.00	62.00	-	-	2.00	35.00		176

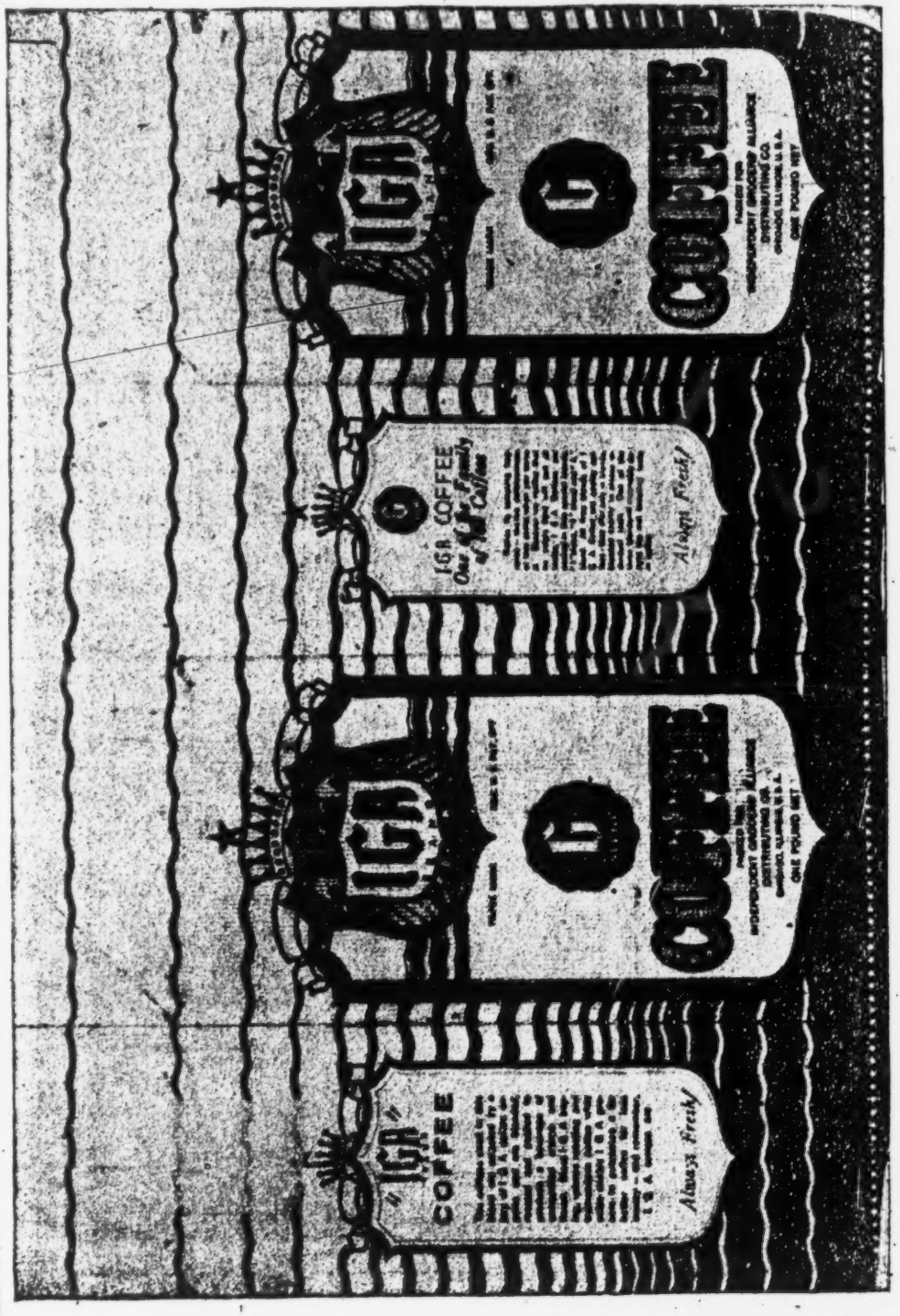
[fol. 300] EXHIBIT "C"



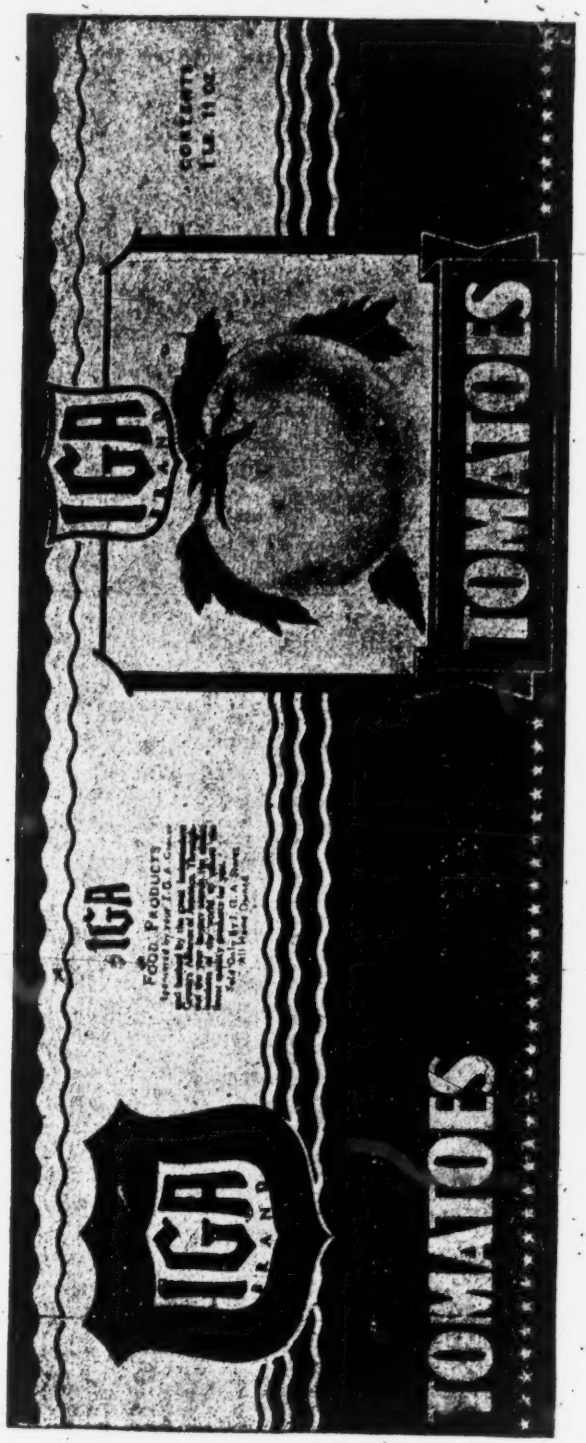
[fol. 301] EXHIBIT "D"



[fol. 302] EXHIBIT "E"



[fol. 303] EXHIBIT "F"



[fol. 304] EXHIBIT "G"

[fol. 305] AFFIDAVIT OF JOHN SCANLAN

STATE OF KENTUCKY,
County of Jefferson, ss:

John Scanlan, being first duly sworn deposes and says as follows:

I am forty years old and live with my family in Louisvlle, Kentucky, and for the last four years I have been in the meat business. I am associated with The Great Atlantic & Pacific Tea Company in the capacity of Meat Superintendent. I have charge of fifty-three meat markets of which forty are located in the State of Kentucky.

The meat markets operated by The Great Atlantic & Pacific Tea Company are housed in the same quarters as the grocery department; however, the meat department is entirely distinct from the grocery department. The supervisor of the grocery department has nothing to do with the men selling meats or of the purchase or distribution of the meat.

The A. & P. stores which operate meat markets in the State of Kentucky are listed in Exhibit "A". The firm name, address and estimated sales of competitors who operate only one store are listed on the same sheet.

Under the Gross Sales Tax, the meat sales would be added to the grocery sales in order to determine the total sales subject to the tax. The A. & P. meat markets compete with stores which do nothing but sell meat; these stores are taxed on their meat sales alone. It is incorrect, therefore, to add in the sales of groceries in the case of A. & P. when this is not done in the case of competitors. Because of this and because of the fact that all of the sales of A. & P. in the State of Kentucky are aggregated for the purpose of determining the tax, each of the A. & P. meat markets under my supervision would have to pay a tax which would be about one per cent on its gross sales. Each competitor would only have to pay about one-twentieth of one per cent and this one-twentieth would be completely deductible because of license taxes paid to the State.

As a result of the years I have spent in the grocery and meat business, and because of my familiarity with the loca-

tion and number of employees of my competitors, I can estimate the gross sales and none of them have sufficient sales to place them in the higher brackets.

[fol. 306] The margin of profit in meat which A. & P. receives from each dollar of sale is very low—we have a large turnover, but the profit per dollar of sale does not exceed, at the most, one per cent. If the one per cent tax was imposed under the Gross Sales Tax Law, the amount which A. & P. would have to pay would exceed the profits it would make from the sale of meats. This would mean that A. & P. would have to go out of the meat business; it would have to abandon stores to which it has leases for the sale of meat and it would involve heavy losses to the company.

John Scanlon.

Subscribed and sworn to before me this 6th day of January, 1931. Nadine McCreary, Notary Public. Notary Public, Jefferson County, Ky. My commission expires Aug. 11, 1931. (Seal of Nadine McCreary, Notary Public, Jefferson Co., Ky.)

[fol. 307]

EXHIBIT "A"

The Great Atlantic & Pacific Tea Company

Sup't John Scanlan's Territory

City	Address	Principal independent competitors		
		Firm name	Address	Estimated annual sales
Central City	109 Broad Street	NONE		
Evarts	Yocum St	NONE		
Frankfort	313 St. Clair	Fensel Bros	Frankfort	60,000
Georgetown	118 Main St	NONE		
Harlan	103 S. Main St	NONE		
Harlan	Tamer Bl. Main St	NONE		
Hazard	216 Main St	NONE		
Hazard	113 Main, E/S	NONE		
Hopkinsville	123 Ninth St	NONE		
Lebanon	119 Main St	NONE		
Lexington	401 S. Bdway	Lee Bromley	Upper & Maxw. Lex	20,000
"	496 E. High	LaRue & Son	Wdlawn & Euclid, Lex	35,000
"	933 S. Limestone	L. B. Heathman	Virgn. & Ninth, Lex	15,000
"	133 Third St	NONE		
"	646 E. Main	L. F. Rue	Clay & Main, Lexington	55,000
Louisville	1800 Frankfort Ave	Schoeffie M. Mkt	1810 Frankfort	26,000
"	1902 S. Third St	H. G. Brooks	1800 S. 3rd	78,000
"	3030 S. Fourth	South Lou. M. M	4th & Central	20,800
"	1215 S. 28th St	Bloemers M. Mkt	1302 28th St	18,150
"	2533 Portland	Schiffer M. Mkt	2618 Portland	15,600
"	4130 W. Broadway	NONE		
"	1237 S. Shelby	Shelby Meat Mkt	1234 S. Shelby St	10,400
"	801 E. Broadway	NONE		
"	844 E. Market	F. Hegan	901 E. Market	26,000

[fol. 308]

EXHIBIT "A"

The Great Atlantic & Pacific Tea Company

Sup't John Scanlan's Territory

City	Address	Principal independent competitors		
		Firm name	Address	Estimated annual sales
Louisville	Bdstn. & Dundee	Kurz M. Mkt	Dundee Road	36,400
"	501 N. 17th St	NONE		
"	852 S. 3rd St	NONE		
"	4518 Park Blvd	NONE		
"	306 W. Jefferson	NONE		
"	1501 Story Ave	NONE		
"	314 Woodlawn	Keller Market	310 Woodlawn	20,800
"	1501 S. 18th St	NONE		
"	3471 Taylor Blvd	W. Betz	3467 Taylor Blvd	20,800
"	3401 W. Market	J. Gold	3406 W. Market	15,600
"	2632 S. 4th St	NONE		
"	2046 S. Preston	NONE		
"	1614 Bdstn. Rd	A. Katzman	Bonnycastle Ave	18,200
"	605 W. Oak St	NONE		
St. Matthews		Roby & Clemens	St. Matthews	25,000
Louisville	4301 W. Market	NONE		
"	201 N. 26th St	T. McShane	2501 Rowan	7,800
Shively	18th St. Road	NONE		
Madisonville	132 S. Main	NONE		
Middlesboro	2028 Cumberland	NONE		
Mt. Sterling	#2 Main St	White House M. M.	Mt. Sterling	30,000
Neon	Main St	NONE		
Owensboro	120 E. 2nd St	NONE		
Paris	629 Main St	W. P. Phillips	Paris	40,000
Pineville	Pine St	NONE		
Ravenna	706 Main St	J. Hackworth	Ravenna	15,000
Richmond	112 E. Main	J. M. Culton	Richmond	40,000
Whitesburg	Main & Court	NONE		
Winchester	20 N. Main St	B. Martin	Winchester	40,000

[fol. 309] AFFIDAVIT OF CHRIS SCHUMANN

STATE OF KENTUCKY,
County of Jefferson, ss:

Chris Schumann, being first duly sworn says as follows:

I am forty years old and live with my family in Louisville, Kentucky. I have been engaged in the grocery business fifteen years; I started with The Quaker Maid Company at the age of twenty-four years in the capacity as manager of an individual store for four years, and six years as supervisor with The Quaker Maid, becoming affiliated with the A. & P. Company, as assistant superintendent for three years and superintendent for three years.

As superintendent of the A. & P., I have charge of sixty-two stores in the western section of Louisville and towns surrounding Louisville. As superintendent of these sixty-two stores, I am responsible for the business done in each of them; I organize the sales force; I have charge of the installation of stock and it is part of my duties to see that the moneys received for the sale of stock is paid over to the company. I visit each store at least once in every three weeks and at that time I go over with the manager the business done during the preceding period and I check up sales and receipts for the three weeks preceding my visit.

I keep in close touch with competitive conditions and it is part of my duties to advise the company in the case I believe it would be for the best welfare of the company to expand in certain territories; for this reason I keep check on all competing stores in the neighborhood of the A. & P. stores which I supervise. Because of my familiarity with the stores I supervise, and because of my experience in the grocery business, I can estimate the sales of the competitors of A. & P. from their location; from the number of employees and from the general conditions of the store. A grocery store competes with other grocery stores in the neighborhood. The fact that an organization operates a store or a group of stores in another city has no effect on the stores which I supervise in Louisville. The competition for these stores is offered by the groceries which are within one block or on the opposite corner. Every one of the stores under my supervision is in direct competition with other stores which are carrying on the same kind of business as

[fol. 310] that conducted in any one of the A. & P. stores. The competitors sell the same merchandise and they have the same method of business—the only difference is that in my case I supervise a group of stores, whereas the majority of competitors, whether they are operated by an individual or a corporation, only own a single store.

Groceries having sales of $75,000.00 a year are doing a fairly large business. There are not more than two groceries which are competing with the stores which I supervise that are doing more than $100,000.00 worth of business a year.

The stores which I supervise are listed in Exhibit "A" attached hereto in columns one and two. The principal competitors of each of these stores which are owned by either an individual or a corporation which owns only one store, are listed in column three and the estimated sales of each of the competing stores is listed in column five.

Almost every grocery store in my district has to pay license and special privilege taxes to the State of Kentucky, which taxes run between fifty and seventy-five dollars. On Exhibit "B", I have listed the taxes which each of the stores that I supervise has to pay. Competitors of the stores under my control are selling the same goods as the A. & P. stores and, consequently, they have to pay the same taxes. For example, in the city of Campbellsville, I supervise a store situated at 112 Main Street. This store sells soft drinks and pays a State Tax of $16.00; it pays a special privilege tax of $11.00 for the right to sell oleomargarine; a cigarette tax of $11.00 is paid and there is a $2.00 tax which must be met before the store can handle the sale of eggs. The principal competitor of the Campbellsville store is Hoskins Grocery. This store sells soft drinks, oleomargarine, cigarettes and eggs and its taxes for these special privileges would be similar to the tax imposed on the A. & P. store. The sales of Hoskins Grocery are about $52,000.00 a year. The license taxes which Hoskins would have to pay are deductible from the tax he has to pay under the Sales Tax Statute; the result would be that Hoskins Grocery would not have to pay any tax under the Gross Sales Law. The A. & P. exemption would be just as large but the A. & P. store would be subjected to a much higher tax since its sales would be lumped with the sales of all other A. & P. stores.

[fol. 311] The same result would occur in the case of every A. & P. store under my supervision, i. e., each store would be subjected to a heavy tax because its competitor doing the same kind of business would not have to pay, merely because its owner did not own any other store.

In Eminence, Kentucky, the A. & P. operates a store at #4 Kings Block; this store is under my direct supervision. Its chief competitor is Friend-Berry. Both of these stores sell soft drinks, oleomargarine, cigarettes and eggs. The total special license tax which the store I supervise has to pay is $55.00, and the tax which the Friend-Berry store pays is about the same. The Friend-Berry is one-half block away from the store which I supervise; the business conducted by it is exactly the same as the business conducted in the A. & P. store; however, the tax on its sales would not be more than $25.00 and the exemption would be greater than the tax. As a result, the tax would only fall on the store which I supervise and not on the competitor of that store.

In Louisville, I supervise the store located at 3133 Portland Avenue. Mr. Fischer operates a store at 33rd & Portland Avenue. Mr. Fischer has no other store and the store operated by him is one of the chief competitors of the one which I supervise. Both stores have the same license tax, but the sales tax of the A. & P. store would be much larger, and, as a result, Fischer's sales tax would be entirely wiped out, whereas the A. & P. tax would be very large.

The stores which I have listed above are fair examples of the situation in regard to each one of the sixty-two stores which I supervise. In each case, the special license taxes are the same as the taxes of the competing stores. In each case, the competing stores have a volume of sales which is the same as the stores which I supervise. In some cases the competing stores have a larger volume of sales than the stores under my control, but, in each case, the competing stores are owned by either a corporation or an individual that owns no other store, and pays no tax, whereas each and every one under my supervision pays a large tax under the Gross Sales Statute. This is caused by the fact that the sales in every one of the A. & P. stores are added together in order to put A. & P. into higher bracket, and the only persons in the grocery business who would have to pay under the Gross Sales Statute would be those who

[fol. 312] operate enough stores so as to make their aggregate sales over $400,000.00.

The tax on each A. & P. store would be about $566.00 and the deductions would amount to about $60.00. The effect of the tax is to impose a $500.00 burden which is not imposed on the competitors of the stores under my supervision. Such a tax would force the company to close almost all, if not all, its stores which I control; at least, I am practically certain that it would be impossible to operate these stores at a profit, if a tax is paid, at a fair rate for the capital invested.

Profits in my territory range from 1½% to 2½% on gross sales, and the 1% tax would take almost all of this profit. If the stores which I supervise were to be closed, the competitors would secure this business without being forced to pay this exorbitant tax, because each competitor would merely get the sales of a nearby A. & P. store and it would not be thrown into a higher bracket.

It would be impossible for these stores which I supervise to increase business and thereby increase profits, because an increase in business and in profits would be totally eaten up by the tax; besides this, it would be possible for our competitors to undersell us, thereby adding to their sales but not subjecting themselves to the tax.

For example, there is an A. & P. store in Elizabethtown, Kentucky. It does an annual business of about $60,000.00. The Hawkins Grocery, which competes with this store, does an annual business of about $40,000.00; it pays special privilege taxes of about $60.00, the same as the A. & P. store. By underselling A. & P. and accepting a smaller net profit of 1%, which Hawkins could do because of the heavy tax imposed on A. & P., he would be table to get the entire A. & P. business in Elizabethtown; he would then have sales of $100,000.00, but he would have no tax to pay because his license tax would still offset the entire tax imposed under the Gross Sales Tax Law.

There is no monopoly in the grocery business. Every store we operate has one or more nearby competitors who would be glad to secure the business done by our stores. The stores which I supervise attempt to meet competition by accepting a small margin of profit and by efficient methods of merchandising. Many of our competitors have copied our attempt to supply the customer on the basis of

[fol. 313] a small margin of profit although they own only one store. Many of the competitors of the stores which I supervise are members of co-perative buying associations. These organizations purchase goods for all members of the cooperative association; they have common advertising; they employ people who visit the stores and recommend changes in much the same way as I supervise the stores under my control. These men advise them in regard to proper window displays and methods of selling, and they have uniform advertising prices. If the sales in all these stores which are members of the cooperative association would be aggregated and the tax imposed on this basis, each store would have a much higher tax to pay because the aggregate sales would place the store in the highest bracket; however, under the Kentucky Sales Tax Law, the members of the cooperatives, although using the same methods as many stores and selling goods in the same manner as goods are sold in my stores, do not have to pay any tax.

The method of adding together all of the sales in the case of the A. & P. stores has no connection with the manner in which the A. & P. organization operates the stores. Each store in the system is a separate unit; separate books are kept for each store; each store is charged with the goods it buys and each store is credited with the goods it sells. If the taxes which have to be paid are charged against each particular store and if the present tax is allowed, a $500.00 charge would be made against each store.

Chris Schumann.

Subscribed and sworn to before me this 5th day of January, 1931. Nadine McCreary, Notary Public. Notary Public, Jefferson County, Ky. My commission expires Aug. 11, 1931. (Seal of Nadine McCreary, Notary Public, Jefferson Co., Ky.)

[fol. 314]

EXHIBIT "A"

The Great Atlantic & Pacific Tea Company

Sup't Chris Schumann's Territory

City	Address	Principal independent competitors		Estimated annual sales
		Firm name	Address	
Bardstown	Main Street	Stoker & Smith	Bardstown	60,000
Campbellsville	112 Main St	Hoskins Groc	Campbellsville	52,000
Carrollton	424 Main St	G. G. Woods	Carrollton	75,000
Elizabethtown	Irwin Block	Hawkins Groc	Elizabethtown	40,000
Eminence	#4 Kings Block	Friend & Berry	Eminence	50,000
LaGrange	121 Main St	W. T. Barr	LaGrange	35,000
Lebanon	119 Main St	B. & B. Service Store	Lebanon	78,000
Louisville	1215 S. 28th	Bloeman Grocery	28th & Dumesnil	52,000
"	2533 Portland	Fisher Bros	25th & High	52,000
"	1255 S. 18th	Kallbrier Groc	18th & Dumesnil	78,000
"	633 S. 26th	Dillman	26th & Magazine	36,400
"	2500 W. Market	Holman	24th & Jefferson	52,000
"	4130 W. Bdway	C. Durbin	41st & Chestnut	65,000
"	2100 W. Walnut	Charley's Market	22nd & Walnut	50,000
"	501 N. 17th St	Goffman	18th & Bank	52,000
"	3729 W. Broadway	A. Armig	38th & Chestnut	41,600
"	1801 W. Market	Wineberg	18th & Market	36,400
"	3133 Portland	Fischer	33rd & Portland	31,200
"	2146 Duncan	Fred Davis	22nd & Duncan	30,000
"	2239 W. Oak	Allen & Moore	22nd & Oak	62,500
"	2301 W. Broadway	Yutz Grocery	22nd & Maple	35,000
"	1501 S. 18th	Faust Groc	18th & Bolling	42,000
"	358 N. 26th St	Morris	20th & Slevin	33,800
"	1030 S. 28th	Gotton Groc	1015 S. 28th	40,000
"	3322 W. Broadway	F. Hohmann & Son	3401 W. Broadway	45,000
"	2901 Bank St	Davis Market	29th & Portland	60,000

[fol. 315] EXHIBIT "A"—Continued

Louisville	1901 W. Broadway	Madison Market	19th & Madison	50,000
"	2000 Bank St	Miller Bros	19th & Duncan	96,000
"	3401 W. Market	J. W. Pontrich	34th & Market	65,000
"	926 S. 18th St	NONE		
"	2600 S. Walnut	Prellis	27th & Walnut	25,000
"	1128 S. 32nd St	NONE		
"	2133 W. Market	Happell	22nd & Market	25,000
"	4301 W. Market	J. Becker	44th & Market	78,000
"	3402 W. Madison	Stietzletg Groc	34th & Chestnut	50,000
"	1031 Cecil Ave	F. Vertrees	40th & Greenwood	36,000
"	201 N. 26th	T. McShane	25th & Rowan	22,000
"	2201 W. Garland	Hoffman Groc	22nd & Garland	26,000
"	4103 W. Walnut	Riggies	41st & Cedar	35,000
"	1155 S. 18th St	NONE		
Shelbyville	540 Main St	B. B. Blakmore	Shelbyville	60,000
"	400 E. Main St	Hardesty Groc	Shelbyville	52,000
Springfield	Main St	McElroy & Sleader	Springfield	42,000

[fol. 316]

EXHIBIT "B"

The Great Atlantic & Pacific Tea Company

Sup't Chris Schumann's Territory

City	Address	Soft drinks	Oleo	State and county	Cigarettes	City grocery	City meat	Egg dealers	City and school	Miscellaneous	Total
Bardstown	Main Street	31.00	11.00	28.00	36.00	10.00	10.00	2.00	18.00	10.00 F.&V.	156
Campbellsville	112 Main St	16.00	11.00	19.00	11.00	.....	.....	2.00	24.00	.....	83
Carrollton	424 Main St	21.00	11.00	18.00	11.00	10.00	.....	2.00	24.00	.....	97
Elizabethtown	Irwin Block	6.00	11.00	26.00	36.00	.....	.....	2.00	48.00	.....	129
Eminence	#4 Kings Block	16.00	11.00	25.00	26.00	25.00	.....	2.00	12.00	.....	117
LaGrange	121 Main St	11.00	11.00	39.00	11.00	10.00	.....	2.00	.....	.....	84
Lebanon	119 Main St	12.00	11.00	64.00	62.00	.....	.....	2.00	77.00	.....	228
Louisville	1215 S. 28th	16.00	11.00	13.00	21.00	.....	25.00	.....	32.00	.....	118
"	2533 Portland	16.00	11.00	13.00	21.00	.....	25.00	.....	32.00	.....	118
"	1255 S. 18th St	16.00	11.00	13.00	21.00	.....	25.00	.....	32.00	.....	118
"	633 S. 26th St	16.00	11.00	13.00	21.00	.....	25.00	.....	32.00	.....	118
"	2500 W. Market	16.00	11.00	13.00	21.00	.....	25.00	.....	32.00	.....	118
"	4130 W. Bdway	16.00	11.00	10.00	21.00	.....	25.00	.....	32.00	.....	115
"	2100 W. Walnut	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	501 N. 17th	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	3729 W. Bdway	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	1801 W. Market	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	3133 Portland	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	2146 Duncan	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	2239 W. Oak St	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	2301 W. Bdway	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	1501 S. 18th St	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	358 N. 26th St	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	1030 S. 28th	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	3322 W. Broadway	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	2901 Bank St	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	1901 W. Bdway	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	2000 Bank St	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117

[fol. 317] EXHIBIT "B"—Continued

Louisville	3401 W. Market	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	926 S. 18th	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
"	2600 W. Walnut	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
"	1128 S. 32nd St	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
"	2133 W. Market	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
"	4301 W. Market	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
"	3402 W. Madison	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
"	1031 Cecil Ave	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
"	201 N. 26th St	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
"	2201 W. Garland	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
"	4103 W. Walnut	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
"	1155 S. 18th St	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
Shelbyville	540 Main	16.00	11.00	34.00	11.00	50.00	25.00	2.00	35.00	20.00 Fish	204
"	400 E. Main	16.00	11.00	26.00	11.00	40.00	25.00	2.00	35.00	.....	166
Springfield	Main St	16.00	11.00	26.00	11.00	10.00	.....	2.00	26.00	.....	102

[fol. 318] AFFIDAVIT OF LOUIE J. JONES

STATE OF KENTUCKY,
County of Jefferson, ss:

Louie J. Jones, being first duly sworn deposes and says as follows:

I am thirty-one years old and live with my family in Louisville, Kentucky. Ever since I was eighteen years old, I have engaged in the grocery business, having served in the following capacities with the following companies; two years as clerk in a Quaker Maid store; as a manager two years in a Quaker Maid store; as a manager four years in an A. & P. store, and as an assistant superintendent four years with the A. & P. and one year as superintendent with the A. & P., totalling thirteen years.

As superintendent for the A. & P. stores, my duties consist of the following: I have charge of sixty-five stores situated in the extreme east end of the city of Louisville. I am responsible for the business done in each of them; I organize the sales force; I have charge of the installation of stock and it is part of my duties to see that the moneys received for the sale of stock is paid over to the company. I visit each store at least once in every three weeks and at that time I go over with the manager the business done during the preceding period and I check up sales and receipts for the three weeks preceding my visit.

I keep in close touch with competitive conditions and it is part of my duties to advise the company in the case I believe it would be for the best welfare of the company to expand in certain territories; for this reason I keep check on all competing stores in the neighborhood of the A. & P. stores which I supervise. Because of my familiarity with the stores I supervise, and because of my experience in the grocery business, I can estimate the sales of the competitors of A. & P., from their location; from the number of employees and from the general conditions of the store. A grocery store competes with other grocery stores in the neighborhood. The fact that an organization operates a store or a group of stores in another city has no effect on the stores which I supervise in Louisville. The competi-

tion for these stores is offered by the groceries which are within one block or on the opposite corner. Every one of [fol. 319] the stores under my supervision is in direct competition with other stores which are carrying on the same kind of business as that conducted in any one of the A. & P. stores. The competitors sell the same merchandise and they have the same method of business—the only difference is that in my case I supervise a group of stores, whereas the majority of competitors, whether they are operated by an individual or a corporation, only own a single store.

These stores are located as shown in column one and two of the attached Exhibit which is labeled "Exhibit 'A' ". The principal independent competitors who own and operate a single store are listed in columns three and four and the estimated sales of these independent competitors are listed in column five of Exhibit "A".

The sales of each of the Atlantic & Pacific stores which I supervise range between $40,000.00 and $70,000.00.

The sales of the following stores owned by competitors who do not own or manage any other store exceed the gross retail sales of the A. & P. store in the immediate vicinity. For example: Charles Deckel doing business at 2443 Bardstown Road has an annual business which I estimate at $182,000.00. The A. & P. store which I supervise located at Bardstown & Dundee is in direct competition with this particular store; its gross sales are at least $80,000.00 less than the gross sales of Mr. Deckel's store.

Julius Strauss doing business at 716 South 3rd has sales which exceed the sales of the neighboring A. & P. store which I supervise by about $200,000.00.

The Mammoth Grocery located at 2nd & Jefferson has double the amount of sales of the A. & P. store situated at 306 W. Jefferson.

K. Young, doing business at 2nd & Magnolia, has sales of about $350,000.00. This is approximately $300,000.00 more than the sales of the store I supervise at 1411 South 2nd Street which is in direct competition with Mr. Young's store.

The same is true of Grimm's Grocery located at 1482 South 7th Street which store competes with the A. & P.

store located at 1508 South 7th Street, and this is also true in the case of store run by Ice & Violette which competes with the A. & P. store at 314 Woodlawn Avenue.

Each of the above listed stores is owned by either a corporation or an individual who does not own or operate any other grocery store. Each of the above stores is selling goods which are similar to the goods sold in the competing [fol. 320] A. & P. Stores. The manner of doing business is the same except that our business is cash and carry while the competing stores do a credit and delivery business. Each of the stores competing with the A. & P. Stores pay the same license taxes to the State, because they all sell the same goods sold in the A. & P. stores. In each case, the total license taxes, when added up and deducted from the tax which is charged to the stores competing with A. & P., under the Gross Sales Tax, practically wipes out this tax.

In the case of the A. & P. stores which I supervise, the deductions would not wipe out the tax imposed under the Gross Sales Tax Statute, because the sales of every A. & P. store in the State of Kentucky are aggregated and the taxes imposed on this basis.

The grocery business is highly competitive and the imposition of a large tax on the A. & P. stores I supervise, without a similar tax on the competing stores would enable those stores to undersell A. & P. and thereby take away the business from the stores which I supervise; however, by taking away this business and adding to their sales, these stores would not increase the tax which they would have to pay because each store would merely be taking the business of a particular A. & P. store which is in the same locality and the total gross sales would still be below $400,000.00, and the tax on this sum would be erased by the deductions allowed.

On Exhibit "B", I have listed the A. & P. stores which I supervise and I have also listed the taxes which these stores have to pay. The average sales of the competitive stores which are owned by an individual or a corporation which do not own more than one store, is about $50,000.00, the same as the average for the A. & P. stores.

Almost every grocery in Louisville handles soft drinks, oleomargarine, cigarettes and eggs. They would all be entitled, therefore, to the same deductions. A store doing $35,000.00 worth of business such as Yeader's Grocery, Highland Park, would have a tax to pay of $17.50; under the Gross Sales Tax Law his deductible tax would be at least $30.00, because he sells cigarettes, oleomargarine, soft drinks and eggs. As a result, Yeader would have no sales tax to pay. I supervise a store which is about a block away from Yeader's Grocery; its sales are around $50,000.00 but it would have a tax to pay because its sales would be aggregated with the sales of all the other A. & P. stores.

[fol. 321] Mr. Goemer operates a store at the corner of Baxter & Hamilton; his sales are below $50,000.00 and are almost the same as the sales of the A. & P. store which I supervise located at 426 Baxter Avenue. These two stores are direct competitors. Under the Gross Sales Tax Law, Mr. Goemer would have no tax to pay but the tax on the competitive store which I supervise would be about $500.00.

I supervise a store at 1496 South Shelby; it has grocery sales of around $50,000.00 which is about the same as the sales of Ziegler's Grocery located at Shelby & Burnett. Ziegler's tax would be about $25.00. Both of these stores sell cigarettes, oleomargarine, eggs and soft drinks. As a result, the license tax Ziegler pays would allow him to deduct his entire tax. The tax on the store which I supervise, which is in direct competition with Ziegler's store, would be about $566.00; the deduction would amount to about $60.00 and, as a result, my store would have a $500.00 tax to pay.

The same is true in the case of all the stores which I supervise; in every case, the competitive store which is operated by an individual or a corporation having no other stores, would be excused from paying anything under the Gross Sales Tax, but the stores which I supervise would have to pay $500.00.

The reason for this is that The Great Atlantic & Pacific Tea Company has about thirteen million dollars ($13,000,000.00) worth of sales in the State of Kentucky. It operates 217 stores; every store in the State of Kentucky will pay nearly one per cent on its sales, making an average tax of

about $566.00 as against nothing for competitors, except a limited and relatively few who own a large number of stores and have aggregate sales of over $400,000.

Profits from the store operations in my district average between 1½% to 2% on gross sales. A $500 tax per store is oppressive and prohibitive. It is practically impossible to operate any store and secure a reasonable return for money invested and at the same time pay a $500 tax per store. It would be impossible to increase business and make a profit because the increased business would be subject to a one per cent tax which would eat up the entire profit. It would be impossible to open any new stores in my territory without paying one percent on all of the sales in the new store; however, any one of the persons operating a [fol. 322] single store which competes with the stores which I supervise could open new stores without paying any tax.

Many of the stores which I supervise are under long term leases. If the gross sales tax law is imposed, they could not be operated at a profit, and, if they would be closed, heavy losses would be involved. The stores which are competing with the stores that I supervise are not subject to any tax and, as a result, they can undersell A. & P. by accepting a profit which is one per cent lower than the profit we would have to accept because of the Gross Sales Tax Law. The increased business which these stores would get, as a result, would not be taxable.

Many of the stores competing with the stores that I supervise are now members of co-operative associations. As a result, purchases are made by central headquarters; they can buy in quantity; they have common prices; men visit these stores much in the same manner as I visit the stores under my control and make recommendations in regard to show windows, selling points, and prices, therefore, these competitive stores have every advantage which the A. & P. stores have. There are a great many stores affiliated with cooperative associations in my district and I understand that if the gross sales of all these stores were aggregated, the tax which would be imposed would be about one per cent; however, as the act works out, there is no tax imposed on the competitors of A. & P.

Each store under my supervision is a separate unit in the A. & P. organization—separate books are kept. Each ex-

pense which a store incurs is allocated and charged against that store. Taxes and licenses are charged against the store. The same is true of purchases made by the store and money received is credited to each store.

Louie J. Jones.

Subscribed and sworn to before me this 6th day of January, 1931. Nadine McCreary, Notary Public. Notary Public, Jefferson County, Ky. My commission expires Aug. 11, 1931. (Seal of Nadine McCreary, Notary Public, Jefferson Co., Ky.)

[fol. 223]

EXHIBIT "A"

The Great Atlantic & Pacific Tea Company

Sup't Louie J. Jones' Territory

		Principal Independent Competitors		
City	Address	Firm name	Address	Estimated annual sales
Louisville	1301 Bdstn. Rd.	Major Taylor	1305 Bdstn. Rd.	$260,000
"	1800 Frankfort	V. A. Schmitt	1577 Frankfort	39,000
"	2700 Frankfort	Hudsons Market	2720 Frankfort	83,200
"	1902 S. 3rd St.	H. G. Brooks	1800 S. 3rd St.	300,000
"	401 E. Broadway	Hornick	656 S. Preston	78,000
"	701 W. Broadway	Abraham	717 W. Broadway	31,200
"	1272 S. Preston	Snyders Grocery	Preston & Ormsby	36,400
"	3030 S. 4th St.	Mettars Grocery	4th & Central	62,400
"	904 S. Shelby	Wigginton Grocery	Shelby & Breck	52,000
"	1237 S. Shelby	Harsteins	Shelby & Shelby Pkway	52,000
"	801 E. Broadway	Raque	709 E. Broadway	78,000
"	844 E. Market	F. Hegan	901 E. Market	57,200
"	1552 Garland Ave.	Schuckman	16th & Kentucky	78,000
"	Bdstn. & Dundee	Chas. Deckel	2443 Bdstn. Rd.	182,000
"	1536 S. Fourth	NONE		
"	842 S. 1st St	W. M. Dresel	712 S. 2nd St	31,200
"	994 Barret Ave	Ruffra Bros	1400 Hepburn	57,200
"	2831 Taylor Blvd.	Young Groc	2717 Montana	46,800
"	852 S. 3rd St.	Julius Strauss	716 S. 3rd St.	260,000
"	4518 Park Blvd.	Yadens Grocery	Highland Park	31,200
"	306 W. Jefferson	Mammoth Grocery	2nd & Jefferson	104,000
"	1411 S. 2nd St	K. Young Groc.	2nd & Magnolia	364,000
"	2255 Frankfort	Ed. L. Elinger	2257 Frankfort	44,200
"	1501 Story Ave.	Stacy	Story & Adams	52,000
"	426 Baxter Ave.	Goemer	Baxter & Hamilton	36,400
"	983 Goss Ave.	J. Hellman	Goss & Krieger	62,400
"	1508 S. 7th St.	Grimms Groc	1482 S. 7th St.	104,000
"	314 Woodlawn	Ice & Violette	524 Woodlawn	104,000
"	701 Fehr Ave	J. L. Moses	640 Fehr Ave	26,000

[fol. 324]

Louisville	3471 Taylor Blvd	G. W. Baker, Jr	3450 Taylor Blvd	78,000
"	1501 W. Broadway	Newman	15th & Magazine	39,000
"	1496 S. Shelby	Zieglers	Shelby & Burnett	52,000
"	3764 S. Third St	Sam Krietman	3115 S. 4th St.	62,400
"	2632 S. 4th St	A. J. Schmitt	2700 S. 4th St.	93,600
"	201 W. Broadway	Groden	643 S. 2nd St	36,400
"	2046 S. Preston St	Goldstein	Preston & Barbee	41,600
"	1001 S. 5th St.	I. Krietman	1026 S. 5th St	31,200
"	901 S. Preston	Jacobsons Grocery	Preston & Breck	46,800
"	1150 S. 1st St	Altmans	First & Oak	31,200
"	613 W. Walnut St	Eichel	511 S. 7th St.	36,400
"	1134 E. Breck	Schultz	Vine & Breck	31,200
"	2868 Frankfort	Roy H. Potts	329 Stilz Ave.	62,400
"	1449 S. Brook	NONE		
"	248 E. Market	Klein	Preston & Jefferson	312,000
"	944 E. Walnut	Geo. Scheibert	1001 E. Walnut	41,600
"	1912 Bdstn. Rd	Habig	Richmond Dr. & Bdstn	52,000
"	1614 Bdstn Rd	Heckman's Groc	1514 Bdstn Rd	57,200
"	625 Baxter Ave.	Joseph	Baxter & Rogers	46,800
"	971½ Baxter Ave	Scheifers	Baxter & Highland	52,000
"	4101 S. Preston	Bergenroths	Camp Taylor	26,000
"	1032 W. Market	Sam Baron	1002 W. Market	26,000
"	1232 W. Walnut St	P. Rheinhard	1234 W. Walnut	36,400
"	1429 W. Market	Simpson	15th & Jefferson	20,800
"	605 W. Oak Street	Ben Bass	1158 S. 7th St.	78,000
"	801 S. 6th St.	H. S. Cohen	800 S. 6th St.	31,200
St. Matthews		Roby & Clemens	St. Matthews	93,600
Louisville	1001 E. Oak St.	Baynes Groc	Swan & Oak Sts	52,000
"	1101 E. Burnett	Zieglers	Hickory & Burnett	52,000
"	1600 W. Oak St	Hoffman	1514 W. Oak St	18,200
"	733 S. Brook St	Wm. Mehl	Brook & Jacob	15,600
"	438 E. Atwood	Barnes	Jackson & Atwood	44,200
"	203 W. Walnut St	Schindler	2nd & Walnut	15,600
"	4401 Park Blvd	Beisler	Highland Park	41,600
"	4204 Taylor Blvd	G. Walker & Son	4231 Taylor Blvd	78,000
Shively	18th St. Road	E. W. Kiroy	St. Helens	52,000

EXHIBIT "B"

The Great Atlantic & Pacific Tea Company

Sup't Louie J. Jones' Territory

City	Street address	Soft drinks	Oleo	State and county	Cigarettes	City grocery	City meat	Egg dealers	City and school	Miscellaneous	Total
Louisville	1301 Bardstown	16.00	11.00	13.00	21.00	.....	25.00	.....	32.00	.....	118
"	1800 Frankfort	16.00	11.00	13.00	21.00	.....	25.00	.....	32.00	.....	118
"	2700 Frankfort	16.00	11.00	13.00	21.00	.....	25.00	.....	32.00	.....	118
"	1902 S. 3rd	16.00	11.00	13.00	21.00	.....	25.00	.....	32.00	.....	118
"	401 E. Bdway	16.00	11.00	13.00	21.00	.....	25.00	.....	32.00	.....	118
"	701 W. Bdway	16.00	11.00	13.00	21.00	.....	25.00	.....	32.00	.....	118
"	1272 S. Preston	16.00	11.00	13.00	21.00	.....	25.00	.....	32.00	.....	118
"	3030 S. Fourth	16.00	11.00	13.00	21.00	.....	25.00	.....	32.00	.....	118
"	904 S. Shelby	16.00	11.00	13.00	21.00	.....	25.00	.....	32.00	.....	118
"	1237 S. Shelby	16.00	11.00	13.00	21.00	.....	25.00	.....	32.00	.....	118
"	801 E. Bdway	16.00	11.00	11.00	21.00	.....	25.00	.....	31.00	.....	115
"	844 E. Market	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	1552 Garland	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	Bdstn. & Dundee	16.00	11.00	10.00	21.00	.....	25.00	.....	31.00	.....	114
"	1536 S. Fourth	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	842 S. First	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	994 Barret	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	2831 Taylor Bl	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....	116
"	852 S. 3rd St	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	4518 Park Blv	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	306 W. Jeff	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	1411 S. 2nd	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	2255 Frankfort	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	1501 Story	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	426 Baxter	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	983 Goss Ave	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	1508 S. 7th St	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	314 Woodlawn	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117
"	701 Fehr Ave	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....	117

[fol. 326]

Louisville	3471 Taylor Bl	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....		117
"	1501 W. Bdway	16.00	11.00	13.00	21.00	.....	25.00	.....	31.00	.....		117
"	1496 S. Shelby	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....		116
"	3764 S. 3rd St.	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....		116
"	2632 S. 4th	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....		116
"	201 W. Bdway	16.00	11.00	12.00	11.00	.....	35.00	.....	31.00	.....		116
"	2046 S. Preston	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....		116
"	1001 S. 5th	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....		116
"	901 S. Preston	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....		116
"	1160 S. 1st	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....		116
"	613 W. Walnut	16.00	11.00	12.00	21.00	.....	.....	.....	31.00	.....		91
"	1134 E. Breck	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....		116
"	2868 Frankfort	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....		116
"	1449 S. Brook	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....		116
"	248 E. Market	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....		116
"	944 E. Walnut	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....		116
"	1912 Bardstown	16.00	11.00	12.00	21.00	.....	25.99	.....	31.00	.....		116
"	1614 Bardstown	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....		116
"	625 Baxter	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....		116
"	971½ Baxter	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....		116
"	4101 S. Preston	10.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....		110
"	1032 W. Market	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....		116
"	1232 W. Walnut	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....		116
"	1429 W. Market	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....		116
"	605 W. Oak	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....		116
"	801 S. 6th	16.00	11.00	12.00	21.00	.....	25.90	.....	31.00	.....		116
"	St. Matthews	16.00	11.00	12.00	11.00	.....	.....	.....	31.00	.....		71
"	1001 E. Oak	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....		116
"	1101 E. Burnett	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....		116
"	1600 W. Oak	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....		116
"	733 S. Brook	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....		116
"	438 E. Atwood	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....		116
"	203 W. Walnut	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....		116
"	4401 Park Blvd	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....		116
"	4204 Taylor "	16.00	11.00	12.00	21.00	.....	25.00	.....	31.00	.....		116
"	Shively	6.00	11.00	12.00	11.00	.....	.....	.....	31.00	.....		71

[fol. 327] AFFIDAVIT OF BRACK M. FERRILL

STATE OF KENTUCKY,
County of Jefferson, ss:

Brack M. Ferrill being first duly sworn deposes and says as follows:

I am thirty-six years of age and live in Evansville, Indiana. I have been in the grocery business for eleven years and during that period I was associated with Quaker Maid, Inc., and The Great Atlantic & Pacific Tea Company. I started in as a store manager, then I was assistant superintendent of several stores, and for the last three years I have been superintendent of a district comprising certain Kentucky stores. There are sixty-six stores under my control and supervision in this district of which eighteen stores are situated in Kentucky.

My duties as superintendent require that I visit each of the stores under my supervision approximately once a month. I am familiar with the retailing of groceries in the territory under my supervision; with the affiliation of the grocery stores which are competing with the stores operated by The Great Atlantic & Pacific Tea Co.; with the character of the merchandise carried by competing merchants; with the number of clerks employed and its competing merchants and the general competitive conditions in the whole territory.

It is part of my duties to recommend to the central office any need for expansion in the territory and I inform the Company of the advisability of opening up new stores. I am familiar with the taxes which are assessed against each store and which are paid by both the Atlantic & Pacific Stores and by the stores operated by competitors.

There is listed on Exhibit "A" attached hereto and made a part hereof in columns 1 and 2 the stores operated by The Great Atlantic & Pacific Tea Co., which are under my supervision. On the same line as each store there is listed in column (3) the independent store or stores which competes with the Atlantic & Pacific Store. These stores are owned by individuals or corporations, who to my knowledge do not own or operate other stores. The addresses of these competing stores are listed in column (4) [fol. 328] of Exhibit "A", and the estimated annual sales of each competitive store is listed in column (5).

The average annual sales of each of the Atlantic & Pacific Stores under my supervision is approximately $50,000.00.

The sales of the following stores owned by competitors who do not own or manage any other store to the best of my belief exceed the gross retail sales of the Atlantic & Pacific store in same locality:

Central City

Firm	Street	Approx. gross sales
Atlantic & Pacific Store	109 Broad St.	$80,000
Ruby's	Same block	130,000

Glasgow

Atlantic & Pac. Store	Green & Main Sts.	70,000
H. Cherry	Same block	100,000

Owensboro

Atlantic & Pac. Store	120 E. 2nd St.	60,000
Thomas Bader	434 W. 4th St.	150,000

Princeton

Atlantic & Pac. Store	123 W. Main St.	50,000
A. Kalinsky	Half block away	80,000

In every case the Atlantic & Pacific Stores and competitors are similar; they are selling the same class of goods to the same public.

There is no monopoly in grocery business in the district over which I have supervision. There are a great number of stores and the field is highly competitive. The Atlantic & Pacific stores are subject to the same taxes as the stores of those competitors similarly situated. On Exhibit "B" there is listed the taxes which each Atlantic & Pacific store under my supervision pays.

The average sales of the competitive stores owned by individuals or corporations which do not own more than one store do not average in excess of about $50,000.00.

Fifty per cent of all the competitors who operate only a single store in my opinion do not average more than [fol. 329] $25,000.00 gross sales per year. At present the tax paid by these grocery stores exceeds sales tax and as a

result the reductions which they are allowed to take would entirely offset the sales tax.

The Atlantic & Pacific Stores under my supervision sell Oleomargarine, Cigarettes, Soft Drinks and Candled Eggs. They pay $11.00 for the right to sell Oleomargarine; $11.00 for the right to sell Cigarettes and $2.00 as a license for candling eggs. Most of the stores competing with the Atlantic & Pacific stores under my supervision sell Oleomargarine, Soft Drinks and Cigarettes and many of them candle Eggs.

The deductable tax, therefore, in each case is the same; however, the tax levied on the Atlantic & Pacific stores is much higher because the sales of all Atlantic & Pacific stores in the State of Kentucky are added together, thus putting each store in a higher bracket and making them subject to a one per cent tax. Each Competitor, however, who operates only a single store is taxed on the sales in that store and as a result he only pays 1/20 of 1%. This tax is completely offset by the deductions he is allowed to take. For example, the White Front Grocery Co., operates a grocery store in Henderson, Ky., and no other stores, as far as I know, are owned or operated by this same person who runs this particular store. The gross sales in the case of the White Front Grocery Co., are about $50,000.00 a year. Figuring this tax on 1/20 of 1%, the operator of this store has a tax of $25.00; however if he sells Oleomargarine, cigarettes and candles eggs on which he pays a license tax of $24.00 he has no tax to pay. On the other hand, Atlantic & Pacific operates a store at 312 First St., in Henderson, Ky., which competes directly with the White Front Grocery Co. This store has the same special license fees, but the deduction would not affect the tax because the tax on the A. & P. store would be about $560.00 and after the deduction we would still have to pay about $500.00. This is caused by the fact that the sales on this particular store are added to the sales of all other Atlantic & Pacific Stores in the State of Kentucky. As a result we would have to pay 1% on our sales, whereas the White Front Grocery Co., only pays 1/20 of 1% on its sales. The method of conducting business in the case of the White Front Grocery [fol. 330] Co., is practically identical to the method which is used in the Atlantic & Pacific Store; public served by each of them is the same. Gross sales in each store is about

the same, but in the one case we pay a $500.00 tax, whereas they pay nothing.

Profits from store operations in the district over which I have supervision average about 1½ to 2½%. A 1% tax on gross sales would take between ⅔ to ½ of this profit. A $500.00 tax on each store is prohibitive and confiscatory. It would be impossible to increase business and make additional profit because practically all of the increased profit would be taken by the tax. It would be impossible to open new stores in my district in the cities in which stores are located at the present time because the profits from each store would be swallowed up by the tax. However, competitors who are taxed on 1/20 of 1% could open new stores without paying any tax. Competitors not subject to the tax would be able to undersell the Atlantic & Pacific by accepting a smaller profit but they would not have to pay 1% tax on this increased business. Some of the stores under my supervision are leased from the owners under long term leases and to abandon these stores would involve considerable loss.

Many of the individuals operating stores which compete with Atlantic & Pacific, who do not own any other store are members of co-operative associations. In that portion of Kentucky in which I have supervision United Merchants Association known as the Urma Stores and Independent Grocers Alliance known as I. G. A. are the leading co-operative associations. Members of these co-operative associations receive the benefits of mass buying, mass merchandising and common advertising. The salesmen sent out by Independent Grocers Alliance and by United Retail Grocers Association advise the members in regard to uniform store windows, advertising displays and other questions arising in regard to the retailing of merchandise. This is similar to the service rendered by supervisors of stores in the Atlantic & Pacific organization. I believe that if the sales of all the members of each separate co-operative were aggregated each member of the association would have to pay the higher tax; however, under the Kentucky Sales Tax Law each member of the cooperative comes in [fol. 331] the bracket; as a result he has a low rate of taxation. On the other hand, the Atlantic & Pacific Stores are taxed 1%.

Each Atlantic & Pacific store under my supervision is a separate unit, under a manager whose salary is based on

the amount of sales of his particular store. Separate records are kept for each store. The taxes levied each store are charged against that store. Each store is charged with goods purchased by it and credited with the sales which it makes.

Brack M. Ferrill.

Subscribed and sworn to before me this 6th day of January, 1931. Nadine McCreary, Notary Public. Notary Public, Jefferson County, Ky. My commission expires Aug. 11, 1931. (Seal of Nadine McCreary, Notary Public, Jefferson Co., Ky.)

[fol. 332]

EXHIBIT "A"

The Great Atlantic & Pacific Tea Company

Sup't Brack M. Ferrill's Territory

City	Address	Principal Independent Competitors		Estimated annual sales
		Firm name	Address	
Bowling Green	939 State St	None	None	.....
Bowlling Green	216 Main St	Thomas Bros	Bowling Green	$104,000
Central City	109 Broad St	Ruby's	Central City	130,000
Franklin	406 Depot St	F. M. Ruder	Franklin	78,000
Glasgow	Green & Main St	H. Cherry	Glasgow	104,000
Greenville	109 W. Main	Star Market	Greenville	62,400
Henderson	312 First St	White Front Gro. Co.	Henderson	45,000
Hopkinsville	123 Ninth St	Walker	Hopkinsville	62,400
Horse Cave	S. S. Main St	Stuart	Horse Cave	41,600
Madisonville	132 S. Main St	McGary & Butler	Madisonville	41,600
Morganfield	Court St	Waggener Grocery Co.	Morganfield	52,000
Owensboro	120 E. 2nd St	Thomas Bader	Owensboro	100,000
Owensboro	1006 E. 4th St	R. Bratcher	Owensboro	52,000
Owensboro	225 W. 2nd St	Frederica Market	Owensboro	80,000
Princeton	123 W. Main St	A. Kolinsky	Princeton	78,000
Providence	109 Broadway	A. Niswoner	Providence	104,000
Russellville	123 N. Main St	Cooksey	Russellville	62,400

[fol. 333]

EXHIBIT "B"

The Great Atlantic & Pacific Tea Company

Sup't Brack M. Ferrill's Territory

City	Street address	Soft drinks	Oleo	State and county	Cigarettes	City grocery	City meat	Egg dealers	City and school	Miscellaneous	Total
Bowling Green	939 State	12.00	11.00	7.00	22.00	14.00	.....	2.00	31.00	.....	99
Bowling Green	216 Main	12.00	11.00	9.00	22.00	14.00	.....	2.00	31.00	.....	101
Central City	109 Broad	6.00	11.00	35.00	11.00	15.00	.....	2.00	102.00	.....	182
Franklin	406 Depot	6.00	11.00	19.00	11.00	.....	.....	2.00	39.00	.....	88
Glasgow	Green & Main	12.00	11.00	.....	26.00	10.00	.....	2.00	25.00	.....	86
Greenville	109 N. Main	6.00	11.00	63.00	36.00	5.00	5.00	2.00	45.00	.....	173
Henderson	312 First	16.00	11.00	13.00	21.00	20.00	.....	2.00	45.00	.....	128
Hopkinsville	123 Ninth	12.00	11.00	22.00	22.00	24.00	35.00	2.00	36.00	.....	164
Horse Cave	S. S. Main	6.00	11.00	17.00	11.00	17.00	.....	2.00	.....	.....	64
Madisonville	132 S. Main	12.00	11.00	21.00	22.00	.....	.....	2.00	23.00	15.00 Butter	106
Morganfield	Court St.	6.00	11.00	39.00	11.00	.....	.....	2.00	48.00	.....	117
Owensboro	120 E. 2nd	11.00	11.00	.....	11.00	10.00	.....	2.00	.....	.....	45
Owensboro	1006 E. 4th	11.00	11.00	13.00	11.00	10.00	.....	2.00	35.00	.....	93
Owensboro	225 W. 2nd	11.00	11.00	25.00	11.00	10.00	.....	2.00	35.00	.....	105
Princeton	123 W. Main	11.00	11.00	42.00	11.00	.....	10.00	2.00	.....	.....	87
Providence	109 Broadway	6.00	11.00	30.00	11.00	.....	.....	2.00	37.00	.....	97
Russellville	123 N. Main	6.00	11.00	.....	11.00	.....	.....	2.00	.....	.....	30

[fol. 334] AFFIDAVIT OF ALBERT C. HUNEKE

STATE OF OHIO,
County of Hamilton, ss:

Albert C. Huneke, being first duly sworn, deposes and says:

My name is Albert C. Huneke. I am 57 years of age and I live in Cincinnati, Ohio. I am Manager of the Cincinnati Packing House, owned and operated by The Kroger Grocery & Baking Company. This packing house is situated on the northeast corner of Bank & Winchell Streets. I have charge of all operations conducted at this plant, and all work is done under my direct supervision.

I am acquainted with the receiving, slaughtering, preparation and shipping of all products handled at this plant.

Shipments to this packing plant from various vendors are segregated upon delivery and they are kept apart at all times. We receive cattle, poultry, hogs and sheep from the Kroger Farm, which is located on the Louisville Pike near Cleves, Ohio, in the State of Ohio. As soon as any animal received from Kroger is killed, it is marked with a stamp, of which the following is a facsimile:

THE KROGER GROCERY

FARM PRODUCT

AND BAKING CO.

Poultry is marked on the leg with the following stamp:

[fol. 335] Upon being slaughtered, all products are kept in the chill room. They are then shipped to Kroger stores

where they are sold at retail. Beef is delivered in trucks without being wrapped, and it is sold in exactly the same condition that it is shipped, except that the clerk or manager of the store cuts it into smaller portions. This is true of beef which is shipped from Ohio to our Kentucky stores, that is, the beef is sold in the same condition it is in when being transported across the state line.

Some of the products derived from animals received from the Kroger Farm are sent to the Kentucky stores operated by The Kroger Grocery & Baking Company, where they are sold at retail.

Albert C. Huneke.

Sworn to before me and subscribed in my presence this 27 day of January, 1931. Harry Kasfir, Notary Public, Hamilton County, Ohio. (Notarial seal of Harry Kasfir, Hamilton County, Ohio.)

AFFIDAVIT OF WALTER WENDEROTH

STATE OF OHIO,
Hamilton County, ss:

Walter Wenderoth, being first duly sworn, deposes and says as follows:

My name is Walter Wenderoth. I am 44 years old, and I live with my family in Bellevue, Kentucky. I am associated with The Kroger Grocery & Baking Company, in the capacity of Meat Superintendent for its stores located in Campbell and Kenton Counties and the neighboring vicinity.

As Meat Superintendent, I have charge of the Meat Departments in each of the Kroger stores, and I am familiar with the stock carried and the sales made.

The Kroger stores under my supervision are supplied with meats and poultry by the Cincinnati Packing House of The Kroger Grocery & Baking Company. They are also supplied with products which we purchase from C. Rice and Joe Rice, who operate packing plants in Kentucky. We also purchase meats from Armour & Co. and Swift & Co., which is sold in the Kentucky stores.

[fol. 336] Among the products received from the Cincin-

nati Packing House of the Kroger Grocery & Baking Company are some which are derived from animals raised at the Kroger Farm, and these products are sold at retail in the Kentucky stores under my supervision.

The Meat Departments in each of the Kroger stores are entirely distinct from the Grocery branch of the business. Each meat store competes with the neighboring meat stores and it is not affected by neighboring groceries who do not sell meat. Many of the neighboring meat stores compete directly with the Kroger meat stores, which are owned and operated by individuals, partnerships or corporations, who do not own or operate any other store in the state of Kentucky, and many of these singly owned stores are larger and have greater sales than the competing Kroger stores. For example: Frank Trik on Monmouth Street in Newport, has greater sales in meat than the Kroger store across the street. Trik also handles oleomarg-ine and the State License which he pays would relieve him from the obligation of paying any tax under the Gross Sales Tax Law of Kentucky. The Meat Department in the Kroger store which is across the street would have a One (1%) per cent tax to pay.

Beckers Brothers Company, operating a meat store on Monmouth Street in Newport, also outsell the Kroger store which is in the neighborhood. Although this Kroger store is only a square away and the meat it sells does not differ from the meat sold in Becker Brothers Company store, its sales would be subject to a One (1%) per cent tax. The Becker store on the other hand, would only have to pay One-twentieth (1/20th) of One (1%) per cent, because their sales do not exceed $400,000, and in fact they are much lower. The sales in the competing Kroger store are very much below $400,000, but the sales are combined with the sales in all other Kroger stores, whether they are sales of meats or groceries, and the aggregate sales are taxed One (1%) per cent.

We endeavor as a general rule, to make about Two (2%) per cent profit per dollar of sale, and the assessment of a One (1%) per cent tax would deprive us of about Fifty (50%) per cent of this profit. Such a tax is exorbitant and confiscatory, and would make it unprofitable to operate

the Meat Departments under my supervision. In the event [fol. 337] we would increase our sales or in the event we opened new Meat Departments in Kroger Stores, we would be subjected to a One (1%) per cent tax. Our competitors, however, could increase their sales or open new meat stores in the neighborhood of Kroger stores without subjecting themselves to more than a tax of One Twentieth (1/20th) of One (1%) per cent.

Walter Wenderoth.

Sworn to before me and subscribed in my presence this 28th day of January, 1931. Harry Kasfir, Notary Public, Hamilton County, Ohio. (Notarial seal of Harry Kasfir, Hamilton County, Ohio.)

AFFIDAVIT OF FRANCIS BALLARD

STATE OF KENTUCKY,
County of Kenton, ss:

Francis Ballard, being first duly sworn, deposes and says as follows:

My name is Francis Ballard, and I live at 2316 Greenup St., Cov., Ky.

I am the Manager of the Meat Department in Store #658, operated by The Kroger Grocery & Baking Company, at 1253 Highway, Covington, Kentucky, and my duties consist of the management of my department and the selling of meats to the public at retail.

We receive meat which we sell at this store from Armour and Swift in Chicago, and from The Cincinnati Packing House, Bank & Winchell Streets, Cincinnati, Ohio, which is owned by The Kroger Grocery & Baking Company. We have received meat and poultry from the Cincinnati Packing House which was derived from animals raised on the Kroger Farm. All of these products have a special stamp which reads: "The Kroger Grocery & Baking Company—Farm Product."

These products have been sold at retail to the general public in my store by myself and by my clerks.

Francis Ballard.

[fol. 338] Sworn to before me and subscribed in my presence this 27 day of January, 1931. John Weisenberger, Notary Public, Kenton County, Ky. My commission expires April 18th, 1932. (Seal of J. Weisenberger, Notary Public, Kenton County, Kentucky.)

AFFIDAVIT OF RUFUS BLUME

STATE OF OHIO,
County of Hamilton, ss:

Rufus Blume, being first duly sworn, makes the following statement under oath:

My name is Rufus Blume, I am 54 years of age and live in Cincinnati, Ohio.

I am employed by the Kroger Grocery & Baking Company in the capacity of Superintendent of the Dairy plant operated by Kroger on Florence Avenue, Cincinnati, Ohio. All the work done at this plant in regard to the receiving, treating and shipment of milk and creamery products is under my direct supervision.

The Kroger Grocery & Baking Company purchases milk from farmers in the vicinity of the City of Cincinnati, and this milk is collected by milk route operators who bring it to the dairy plant on Florence Avenue in Cincinnati, Ohio. The containers of each farmer bear special identification marks in order that each vendor may be properly charged with the credits due him after the milk received is weighed.

In addition to receiving milk from farmers who sell to The Kroger Grocery & Baking Company, we also receive milk at the dairy plant from the farm which is conducted by The Kroger Grocery & Baking Company on the Louisville Pike, near Cleves, Ohio. This milk is brought in by O. W. Vaughn, who operates Route #800.

After the milk is received, it goes through the process of Pasteurization, and this is done in the most hygienic and approved fashion. Once the milk is poured into the

vats, it goes through the whole process of Pasteurization automatically, and it is even bottle mechanically. The bottled milk is delivered in Kroger trucks to the various stores [fol. 339] which the company operates in this vicinity, where it is sold at retail. We make deliveries from this plant to the stores operated by Kroger in the cities of Covington, Newport and Bellevue, Ky., and the stores in the neighboring territory. Our milk is sold in the same bottles that leaves the Kroger plant, and milk sold at retail in the Kentucky stores is in the same bottle that was used to transfer it from Ohio to Kentucky.

The milk which we receive from the farm conducted by The Kroger Grocery & Baking Company is poured into a special vat and it is bottled separately. Some of this milk is shipped to Kroger stores in the State of Kentucky, and it is there sold at retail.

R. B. Blume.

Sworn to before me and subscribed in my presence this 23 day of January, 1931. Harry Kasfir. (Notarial seal of Harry Kasfir, Hamilton County, Ohio.

AFFIDAVIT OF O. W. VAUGHN

STATE OF OHIO,
County of Hamilton, ss:

O. W. Vaughn, being first duly sworn, deposes and says as follows:

My name is O. W. Vaughn, and I live at Guilford, Indiana. I conduct what is called a "milk route" and my work consists of the collecting of milk from the various farmers in territory which I cover, and the delivery of that milk at the dairy plant of The Kroger Grocery & Baking Company on Florence Avenue, Cincinnati, Ohio.

My route takes in a radius of about twenty miles around Guilford, Indiana. This includes the territory surrounding Cleves, Ohio.

I collect milk from the farm conducted by The Kroger Grocery & Baking Company on the Louisville Pike near

Cleves, Ohio, and I deliver that milk at the dairy plant conducted by The Kroger Grocery & Baking Company, Florence Avenue, Cincinnati, Ohio.

[fol. 340] The cans of different farmers bear special identification marks, and each farmer is credited with the milk that I deliver at the Kroger plant after the same is weighed.

O. W. Vaughn.

Sworn to before me and subscribed in my presence this 23 day of January, 1931. Harry Kasfir. (Notarial Seal of Harry Kasfir, Hamilton County, Ohio.)

AFFIDAVIT OF JOHN C. SCHWARZ

STATE OF KENTUCKY,
County of Jefferson, ss:

John C. Schwarz, being first duly sworn, makes the following statement under oath:

My name is John C. Schwarz and I live in Louisville, Ky. I am Treasurer of Gray-Von Allmen Sanitary Milk Co., a corporation organized under the law- of Delaware.

The Gray-Von Allmen Sanitary Milk Co. produces milk and sells it at retail in the City of Louisville and in the surrounding territory. The Gray-Von Allmen Sanitary Milk Co. maintains an establishment at the corner Oak St. and Garvin Place, Louisville, Ky. at which establishment milk is sold at retail to the general public.

The Gray-Von Allmen Sanitary Milk Co. owns and operates a dairy farm at LaGrange Kentucky and it produces milk at this farm which is sold at retail. A portion of the milk produced on this farm is sold at retail at the establishment maintained by the company for the retail sale of milk at the corner Oak and Garvin Place, Louisville, Kentucky.

The Gray-Von Allmen Sanitary Milk Co. is, therefore, actually engaged in farming and selling farm products raised by them in this State and by reason thereof it comes within the exception provided for in Clause One of the

Kentucky Gross Sales Tax Law and is exempted under the terms of the Act.

(Signed) John C. Schwarz.

Sworn to before me this 19 day of January, 1931. Adeline L. Lauer, Notary Public. My commission expires Dec. 30, 1931. (Seal of Adeline L. Lauer, Notary Public, Louisville, Ky.)

[fol. 341] AFFIDAVIT OF ERNEST THOMPSON

STATE OF KENTUCKY,
County of Fayette, ss:

Ernest Thompson, being first duly sworn, deposes and says that he is Chief of Police, of the City of Lexington, State of Kentucky, and that in his opinion, the operation of a group of stores by a retail merchant does not increase the fire or police hazards, except in an arithmetical ratio.

Further affiant sayeth not.

Ernest Thompson.

[Duly verified.]

AFFIDAVIT OF M. R. ANDERSON

STATE OF KENTUCKY,
County of Fayette, ss:

M. R. Anderson, being first duly sworn, deposes and says that he is Safety Director, of the City of Lexington, State of Kentucky, and that in his opinion, the operation of a group of stores by a retail merchant does not increase the fire or police hazards, except in an arithmetical ratio.

Further affiant sayeth not.

M. R. Anderson.

[Duly verified.]

AFFIDAVIT OF C. J. HENRY

STATE OF KENTUCKY,
County of Fayette, ss:

C. J. Henry, being first duly sworn, deposes and says that he is Chief of the Fire Department, of the City of

Lexington, State of Kentucky, and that in his opinion, the operation of a group of stores by a retail merchant does not increase the fire or police hazards except in an arithmetical ratio.

Further affiant sayeth not.

C. J. Henry.

[fol. 342] AFFIDAVIT OF HARMON NOE

STATE OF KENTUCKY,
County of Harlan, ss:

I, Harmon Noe, being first duly sworn, deposes and says that he is Chief of Police, of the City of Harlan, State of Kentucky, and that in his opinion, the operation of a group of stores by a retail merchant does not increase the fire or police hazards, except in an arithmetical ratio.

Further affiant sayeth not.

Harmon Noe,
Chief of Police.

[Duly verified.]

AFFIDAVIT OF R. W. OWENS

STATE OF KENTUCKY,
County of Perry, ss:

R. W. Owens, being first duly sworn, deposes and says that he is Chief of Hazard Fire Department, of the City of Hazard, State of Kentucky, and that in his opinion, the operation of a group of stores by a retail merchant does not increase the fire or police hazards, except in an arithmetical ratio.

Further affiant sayeth not.

R. W. Owens.

[Duly verified.]

AFFIDAVIT OF CRAWFORD LEE

STATE OF KENTUCKY,
County of Franklin, ss:

Crawford Lee, being first duly sworn, deposes and says that he is Chief of Police, of the City of Frankfort, State of Kentucky, and that in his opinion, the operation of a

group of stores by a retail merchant does not increase the fire or police hazards, except in an arithmetical ratio.

Further affiant sayeth not.

Crawford Lee.

[Duly verified.]

[fol. 343] AFFIDAVIT OF G. H. PARKER, MANAGER, KENTUCKY ACTUARIAL BUREAU

JEFFERSON COUNTY,
State of Kentucky, ss:

Affiant, G. H. Parker, states that he is the manager and officer actively in charge of the business of the Kentucky Actuarial Bureau; that one of the functions of said Bureau is the determination of fire insurance rates on property insured against fire in the State of Kentucky; that said Bureau fixes or approves fire insurance premium rates throughout the entire State of Kentucky, and that affiant is familiar with the factors entering into the determination of the various rates fixed.

Affiant states that under the Kentucky Insurance Laws no rating bureau shall fix any fire insurance rate which discriminates unfairly between the risks of essentially the same hazard and having substantially the same degree of protection against fire. The rates as fixed by the Kentucky Actuarial Bureau are based upon the potential fire hazard in each individual risk in accordance with the requirements of the Kentucky Statutes and the fact that a particular store is owned by or leased to a corporation, partnership or individual owning or operating more than one store has no bearing on the premium rate for fire insurance on such building, or in any way affects the fire hazard.

Affiant states that, in his opinion, the fact that one owner owns or operates more than one store or more than one department in a single store does not affect the fire hazard in any way, as to any particular store.

G. H. Parker.

Subscribed and sworn to before me by G. H. Parker this 13 day of January, 1931. My commission expires this 21 day of January, 1931. William E. Clark, Notary Public, Jefferson County, Kentucky. (Seal.)

[fol. 344] Louisville

AFFIDAVIT OF ROBERT J. MCKIM

STATE OF KENTUCKY,
County of Jefferson, ss:

Robert J. McKim, being first duly sworn, states:

1. I am thirty-five years of age and I am the President and chief officer of the Stewart Dry Goods Company (hereinafter called Stewarts), a corporation organized under the laws of the State of Kentucky with its principal office and place of business in Louisville, Kentucky. I have been President of Stewarts since March 10, 1930, and prior to assuming that position I have been in the retail dry goods and department store business for sixteen years. Before entering this business I was a student at Tulane University. By virtue of my position and experience in the dry goods and department store business I am familiar with the methods customarily employed in conducting said business and with the general retail situation in the City of Louisville. By virtue of said fact and by making comparison with the sales of our own store, of which I have personal knowledge, I am qualified to estimate the approximate gross annual sales of other stores in the City of Louisville. I am familiar with the location and type of all of the larger retail stores in Louisville, and I have had an opportunity to and I have observed the nature, extent and character of their business. I am likewise acquainted with many of the smaller establishments, and I have made a survey of the City and consulted with various department managers, buyers and executive officers of Stewarts with a view to fortifying my information in regard to the stores hereinafter referred to.

2. There are seventy separate departments in Stewarts, each of which is charged in bookkeeping with its own floor space, advertising, payroll, taxes and other items of overhead as though they were so many separate and distinct stores. Each department is in practice, and in fact, a separate unit, distinct from the other departments in Stewarts. The figures for the various departments are continually examined and analyzed with a view to improving our business methods and our service to our customers, as well as [fol. 345] to determine whether or not a particular depart-

ment is, or is not, profitable. The continuance, enlargement or contraction of a department is determined by its showing, as indicated. For example, for many years Stewarts handled linoleum in a distinct department. After several years of unprofitable business in that department it was entirely discontinued in December, 1928, and has not since that time been handled.

The annual sales do not exceed $400,000.00 in any single department; the maximum sales of any one department in Stewarts is approximately $250,000.00.

3. In many instances the sales of particular departments in Stewarts are approximately the same as the sales of one or more specialized stores selling the same line of goods, and in many instances the sales of a particular department in Stewarts will be considerably less than the sales of specialized stores competing with Stewarts in the particular line of goods handled.

As a basis for the survey which I have made, as mentioned above, I have made use of the classified section of the 1930 City Directory of the City of Louisville, supplemented by the last classified Telephone Directory, together with my personal knowledge and the knowledge of the various department managers with whom I have consulted with a view to presenting wherever possible the entire field of competition with the specific departments mentioned, showing the discrimination against Stewarts, and other stores similarly situated, and in favor of specialized stores competing with only one or more departments in Stewarts which results from the threatened tax levied under the 1930 Kentucky Sales Tax Law. It is not practicable to list all of the stores competing with each individual department in Stewarts for the reason that the directories, naturally, do not have the same classification in each instance which we make of our departments. Therefore, I have carefully examined the classifications made by the City Directory and in every instance reasonably possible I have listed all of the stores competing with us. This results in a classification of about ten different kinds of competition, thereby furnishing as accurate an analysis of the general retail situation as I know how to make.

[fol. 346] In the list following I have in general omitted other department stores unless for particular illustration where I have noted their situation:

A. Books and Stationery

The following stores are all of the specialized book and stationery stores in the City of Louisville that I know of:

Baptist Book Store	323 Guthrie Street
Ida M. Lang	912 E. Market Street
John P. Morton & Co.	420 W Main Street
Southern Book Company	718 E. Market Street
W. K. Stewart Company	550 So. Fourth Street
Wilderness Road Bookshop	665 So. Fourth Street
Ye Booke Stalle	552 So. Third Street
The Raven Shop	921 Baxter Avenue

Of the above stores that of W. K. Stewart Company has undoubtedly the largest volume of sales of books and stationery in the City. The annual gross sales of no one of said stores, including its sales of stationery, etc., are in excess of $300,000.00.

The tax based upon this estimated figure would be $150.00, less the amount of its corporation license tax and any other license taxes, such as playing cards, etc., which said companies may have to pay. As compared with this tax the share of the threatened tax which would have to be borne by the stationery and book departments of Stewarts would be $465.70 on sales made in those departments approximately only one-fourth in amount of those of the largest store in this class.

The largest store, as well as most of the others named above, is located in the downtown shopping district in Louisville, and is in active, continuous competition with the book and stationery departments of Stewarts for the business of the public. Furthermore, the sale of books, particularly, is usually upon a fixed basis as to price, and it would be impossible for Stewarts to pass on to the consumer the amount of tax based on its sale of books, and successfully to continue to compete with specialized book stores.

[fol. 347] B. Clothing Dealers—Men's and Boys'—Retail

Under this heading the Directory lists the following fifty-two specialized stores:

Louis Appel Co.	425 So. Fourth Street
Myer Berman & Sons	220 W. Market Street

Blach's Inc.	205 So. Fourth Street
Crutcher & Starks	656 So. Fourth Street
Cunning & Brotzge	301 W. Jefferson Street
Double Worth Clothes Shop	317 So. Fourth Street
Ellenstein Bros.	216 So. First Street
Family Credit Clothing Co.	212 West Market Street
Federal Clothing Stores	313 So. Fourth Street
Fischer Clothing Co.	1030 W. Market Street
Getzel and Sons	612 W. Market Street
M. Goldberg & Sons	204 So. Fourth Street
Max Goldsmith	354 E. Liberty Street
Goldstein Bros.	217 W. Market Street
Morris Goldstein	428 So. Preston Street
Goldstein & Moseson	1100 W. Market Street
H. C. Graham	620 E. Market Street
B. W. Graves Co.	326 W. Market Street
Hauger Clothes, Inc.	322 W. Market Street
Hauger's	126 W. Market Street
Hurwitz Co.	436 So. 9th Street
J. R. Hyman	132 E. Market Street
Interstate Stores Co.	602 W. Market Street
Klothes Shoppe	316 W. Market Street
L. & N. Clothing Co.	124 W. Market Street
Lehmann Bros.	977 So. Shelby Street
Levy Bros.	Market—Cor. Third Street
Liberty Clothing Co.	310 West Jefferson Street
Lovenhart & Co.	Cor. 3d and Market Street
The Men's Shop	136 W. Market Street
Menter Clothing Co.	333 W. Market Street
Hyman Meyers & Bros.	335 W. Market Street
Modern Clothing Co.	310 W. Market Street
Morris Clothing Co.	314 W. Market Street
Moseson and King	433 W. Walnut Street
New York Clo. Co.	543 W. Market Street
The Olshine Co.	231 So. Fourth Street
[fol. 348] Rodes Rapier Co.	Fourth & Walnut Streets
Royal Clothes Shop	606 W. Market Street
Bawer Schuster	238 E. Market Street
Schuster Brothers	108 E. Market Street
Jacob Seligman	352 E. Market Street
S. L. Seligman	642 So. First Street
Shelbyville Overall Co.	117 W. Market Street
F. L. Simons	833 W. Market Street

Standard Outfitting Co.	404½ W. Jefferson Street
Chester Stern	1701 West Market Street
Stewart Clothing Shop	321 W. Market Street
J. B. Strauss & Co.	234 So. Fourth Street
Town Talk Clothes	206 West Market Street
Wearbest Cloth. Co.	302 West Market Street
Winner Clothiers	318 West Market Street
Roche & Roche	523 South Fourth Street
Wilson Bros.	629 South Fourth Street

In my opinion the following are the only stores in the above list having annual sales in excess of $400,000.00:

Louis Appel Company	425 South Fourth Street
Levy Brothers	Market—Cor. Third Street
Lovenhart & Co.	Cor. Third and Market
Rodes Rapier Co.	Fourth and Walnut Streets

None of the others will pay a tax under the 1930 Sales Tax Law at a rate higher than 1/20th of 1%. An accurate comparison of the estimated sales and tax of these stores with the men's furnishings, men's hosiery and underwear, boy's clothing and boy's furnishings departments of Stewarts, is not possible because of the fact that Stewarts has no men's clothing department, and this item represents a large part of the sales of the stores listed. However, the tax per dollar of sales in Stewarts amounts to approximately .00743% after all deductions. While the tax upon the dollar of sales of each of the above fifty-two stores, with the exception of four of them, will be only .0005% without considering the deductions permitted by the law. In other words, there is a discrimination against Stewarts and in favor of the great majority of specialized stores of at least 14.86 times. In all essential respects these specialized stores use the same methods of operating as do the corresponding departments at Stewarts.

[fol. 349] C. Clothing Dealers—Women's and Misses'—Retail

Under this heading the directory lists thirty-one stores to which I have added from other sources of information sixteen additional stores with the result that the following list is, in my opinion, complete:

Bon Ton Cloak and Suit Co.	320 So. Fourth Street
Buell, Inc.	441 So. Fourth Street
Butterfly Frocks	317 W. Oak Street
Casse Frocks	625 So. Fourth Street
Madeline Chez	1468 St. James Ct.
Conrad Schultz	607 So. Fourth Street
DuRand Perry Co.	538 So. Fourth Street
Hyman Eichenholz	716 W. Market Street
Elson's	530 W. Market Street
Greenstein's	216 W. Market Street
Hollywood Shops	519 So. Fourth Street
The Howard Co.	507 So. Third Street
Husch Brothers	212 So. Fourth Street
J. A. Jaglowics	309 Speed Building
Jerome's	130 W. Market Street
Johnson's Fashion Shop	623 W. Walnut Street
LaMode Apparel Shop	218 So. Fourth Street
Le-Chic Co.	611 So. Fourth Street
The Lerner Shop	517 So. Fourth Street
Lord's	516 So. Fourth Street
Carrie Pembroke	1122 W. Walnut Street
Redfern Garment Co.	223 So. Fourth Street
Sag's Ready-to-Wear Shop	104 W. Market Street
Specialty Shop	1004 W. Walnut Street
Standard Outfitting Co.	404½ W. Jefferson St.
Star Garment Co.	628 W. Market Street
Virginia Dare Dress Shops	609½ So. Fourth Street
Ward-Stilson Co.	310 I. S. Life Bldg.
S. A. Weinberg	1625 W. Market Street
Weinberg's	303 W. Broadway
Worth	222 So. Fourth Street
Jenny Lind	640 So. Fourth Street
Besten-Langen Company	518 So. Fourth Street
Byck Bros & Co.	532 So. Fourth Street
Diamond Bros.	546 So. Fourth Street
[fol. 350] Evelyn-Ann Shoppe	617 So. 4th Street
Fallahay, Inc.	Martin-Brown Building
Fleischaker's, Inc.	1519 W. Market Street
Graves-Sanders	222 So. Fourth Street
P. E. Henchey	607 W. Main Street
Jay Lane, Inc.	448 So. Fourth Street
Joseph Jacob	Commercial Building
Mangels, Inc.	528 So. Fourth Street

Pandora Dress Shop	458 So. Fourth Street
Patti	Starks Building
Sally Frocks	522 So. Fourth Street
Yarbra Gast Co.	208 W. Market Street
H. P. Selman Co.	4th Street at Walnut

Of these stores more than one-half of them are located in the downtown shopping district where the competition for trade is strenuous, and these stores are competing actively with Stewarts, and others similarly situated, for this character of business.

The following stores, only, in the above list have sales in excess of $400,000.00.

DuRand Perry Co	538 So. Fourth Street
Besten-Langen Company	518 South Fourth Street
Byck Bros. Co.	532 So. Fourth Street
Mangels, Inc.	528 So. Fourth Street
H. P. Selman Co	4th St., at Walnut

There is no essential difference between the methods of doing business of the above stores located in the downtown shopping district and Stewarts, but the discrimination against Stewarts and in favor of the large majority of the specialized stores selling the same character of goods in the same way is approximately fifteen times per dollar of sales in the amount of tax threatened.

D. Draperies

The Directory lists four drapery stores to which I have added eight others, making the following complete list:

G. Bittner's Sons	427 So. First Street
Hubbuch Bros. & Wellendorff	619 So. Fourth Street
Hubbuch Jos. Sr. and Sons	890 West Market Street
George G. Fetter Company	410 W. Main Street
[fol. 351] Burdorf Company	427 So. Third Street
John W. Clare	309 Guthrie Street
Dant Bros.	1317 Bardstown Road
A. T. Duvall & Co	1315½ Bardstown Road
Elsie Kraziese Company	624 Baxter Avenue
J. L. Strassel	445 So. Third Street
Charlotte Whitehead	305 W. Ormsby Avenue
Zach C. Offutt & Helm	1244 So. Third Street

The sales of the largest store of this kind in the City are approximately $400,000.00, including their sales of rugs and furniture.

Based on this estimate their tax would be $200.00 less such deductions as they may be entitled to, while the tax for the drapery department in Stewarts would amount to $589.27 after all deductions on approximately one-fifth of the amount of business of the largest store in this line, conducted in all essential respects in the same way.

E. Dry Goods—Retail

The Directory lists 152 stores other than department stores which handle dry goods.

The following department stores have, in my opinion (in all departments, including dry goods) sales in excess of $400,000.00.

J. Bacon & Sons	334 West Market Street
Jefferson Dry Goods Company	Fourth & Jefferson Sts.
Kaufman-Straus Company	427 South Fourth Street
John C. Lewis Company	450 South Fourth Street
Sears-Roebuck Company	820 West Broadway
W. T. Grant & Company	424 South Fourth Street
Ben Snyder Department Store	522 West Market Street
Herman Straus & Sons	Fourth & Market Streets

With the exception of the above, none of which are specialized stores, there is no store in Louisville, in my opinion, doing a retail dry goods business of $400,000.00, or more.

The following is a complete list of specialized dry goods stores as shown by the directory:

[fol. 352] Max Abroms	1008 W. Walnut Street
Lucille Akers	1819 Portland Avenue
Phillip Albert	3536 Greenwood Avenue
W. H. Allen	2023 St. Louis Avenue
Ethel Appel	426 So. Preston Street
Ralls Arnold	4620 Park Blvd.
Sarah Arnold	1008 East Oak Street
C. M. Baer	847 E. Walnut Street
Barbee Way Dry Goods Co	2048 So. Preston Street
Abraham Bass	1005 W. Walnut Street
Myer Bass	418 So. Preston

Beechmont Dry Goods Co	324 W. Woodlawn
Emma B. Benson	1912 Bardstown Road
Besendorf C. P	1459 So. Shelby
Jos. Bischof	2062 So. Shelby
Samuel Bolstein	1138 So. 7th Street
Boulevard Dry Goods Co	3501 Taylor Blvd.
W. F. Braun	340 E. Ormsby
Lillian M. Breckel	1922 So. Preston
Chas. Briskman	210 E. Market Street
Maude Bryant	329 North 25th Street
Mary E. Burkarth	1228 So. Shelby Street
Margaret Butler	4003 Shelby Rd.
Claude Campbell	1402 Hemlock
T. O. Cecil	301 North 34th Street
Dan Cohen	748 E. Market Street
Jennie Cohen	1450 So. 7th Street
Community Shoppe	1503 Dixie Highway
Myrtle Conder	2933 W. Walnut Street
E. & L. Conroy	4001 Vermont Avenue
Conroy Shoppe	1405 So. 2d Street
L. H. Crosby	1602 Bardstown Road
F. J. Dalton	844 E. Walnut Street
Max Dashoff	336 E. Oak Street
Stella Daugherty	616 Winkler Avenue
Elizabeth Dauth	3507 W. Market Street
A. B. Davidson	2932 So. Fourth Street
Jos. Davidson	910 W. Market Street
Carrie Deeb	2608 Portland
Ida M. Depeudry	607 So. 28th Street
Barbara Dolfinger	961 Charles
[fol. 353] Anna Ernst	1420 St. Anthony Place
Minnie Everett	1735 W. Market Street
Ida Fierst	1248 So. Shelby Street
Julia A. Fink	1051 Bardstown Road
Abraham Fish	122 E. Market Street
Henry Fleischaker	632 E. Market Street
Moses Fleischer	244 E. Market Street
Vincent Fleitz	1832 Frankfort Avenue
P. W. Frehling	1149 So. 7th Street
J. H. French	2326 Portland Avenue
B. Friedman & Son	409 So. 7th Street
Morris Friedman	906 W. Market Street

Phillip Friedman	1002 W. Market Street
M. J. Gathof	1718 Bardstown Road
Thersa Georgel (Mrs.)	1515 Story Avenue
Jessie A. Gray	2340 W. Hill Street
Phillip Greenwald	1105 W. Walnut Street
W. C. Guthrie	1429 Washington
Nellie Hall	962 So. 12th Street
Anna Harman	1138 Goss Avenue
W. F. Hauck	1000 Goss Avenue
Anna Heinzman	785 So. Shelby Street
C. M. Herrman	1241 Dixie Highway
W. S. Hert	1039 So. 32d Street
Louis Herzberg	1903 W. Broadway
Nora Heuger	723 Vine Street
H. M. Hoffman	3938 So. 2d Street
Alice Hofstatter	3322 Rudd Avenue
Mary A. Holland	2001 W. Walnut Street
Helen Howard	118 E. Barbee Street
Edw. Howell	2632 So. 6th Street
M. Hulsmeier	948 Dixie Highway
S. L. Hymson	457 So. 7th Street
Matilda Ising	2207 So. Preston
Ida M. Jenkins	657 So. 26th Street
Martha Kelcher	2335 W. Market Street
Peter Karem	131 E. Jefferson
J. P. Koch	3312 W. Broadway
P. L. Kozlove	328 E. Market Street
Krapp Dry Goods Co	1506 Hickory
Lillian Krauss	2232 Frankfort Avenue
Benj. Levine	234 E. Market Street
Margaret M. Lowe	2221 Wilson Avenue
[fol. 354] Robt. Lucas	1810 Frankfort Avenue
Samuel Lurie	210 So. Floyd Street
Sadie Lynn	2210 Dundee Road
Isaac Lynn	532 So. Preston
Norma Nagel	3319 W. Market Street
Thomas Maguire	1900 So. 4th Street
Anna M. Malin	2601 W. Kentucky Street
Elmore Marks	1231 W. Walnut Street
Marmor and Keniff	640 Lampton
Florence Mattingly	627 Baxter Avenue
Elizabeth A. Matz	1107 E. St. Catherine
Mary B. McCormack	1160 So. 15th Street

Miles Silk Shop	632 So. 4th Street
Meller Rose	1461 Dixie Highway
Lily K. Misback	645 E. Madison Street
Jessie Monroe	2932 Portland
Rady M. Morris	3934 So. Brook
Bessie Moss	506 So. Preston
P. B. Muier	1025 So. 28th Street
T. J. Naughton	918 So. Preston Street
Henry Niemeier Jr.	1136 So. 32d Street
C. C. Nolting	200 North 26th Street
Norman's Dry Goods Co.	535 W. Oak Street
G. L. Peal	1008 W. Market Street
E. W. Perry	4109 Reservoir Avenue
Kate Pfaffinger	1308 Story Avenue
J. F. and M. Pfeffer	1508 So. Shelby Street
Clara Pitt	1598 Fulton Street
Mrs. Prosper Plouvier	1426 W. Kentucky Street
Gus Potosky	315 So. 7th Street
Mrs. C. E. Ray	1702 Frankfort Avenue
John Renck	1511 So. 7th Street
Minnie B. Rice	4340 Taylor Blvd.
E. B. Rodman	312 Hiawatha
A. J. Roth	411 So. Preston Street
Alvina Ruschival	2332 W. Broadway
Josephine Sauer	3280 Taylor Blvd.
C. F. Schenck	1907 W. Market Street
Anna G. Schmitt	2014 W. Walnut Street
A. J. Schmitt & Sons	2704 So. 4th Street
J. Scholtes & Son	1704 W. Market Street
[fol. 355] Belle Schulman	2501 Griffith Avenue
E. Schulman & Son	524 E. Market Street
Alex Seligman	622 E. Market Street
Samuel Shaheen	2604 Portland Avenue
Morris Shersky	1430 W. Walnut Street
W. A. Shields	2734 Frankfort Avenue
B. H. Silverman	4444 Park Blvd.
Mrs. Lillian Stoker	1100 Logan Street
Gustave Stosberg	650 So. Shelby Street
Gertrude Stuckenberg	Poplar Level Road
Isaac Tennebaum	926 Baxter Avenue
Marie E. Tierney	2829 W. Market Street
R. E. Vaughn	301 North 19th Street
Mrs. Mary E. Vinson	4478 Park Blvd.
H. A. Vittitoe	902 So. 15th Street

Wackenthaler Jos.	1237 Logan Street
J. J. Walsh	1601 W. Ormsby
H. W. Waterman Co.	2453 Bardstown Road
Waterman and Taustine	636 W. Market Street
Anna E. Weber	992 Barrett Avenue
Frederica Weber	992 Barrett Avenue
Williams & Belinsky	410 So. Preston Street
Rosa Wilson	817 So. Preston
Samuel Winer	1732 W. Walnut Street
Katie Wiser	4400 Stolz
Philip Wolfson	1023 Dixie Highway
C. J. Wright	4456 Park Blvd.

Accurate comparison between Stewarts and the above stores having sales of less than $400,000.00 is not possible because of variations in the class and kinds of goods handled, and the materials furnishing the basis of competition. However, the discrimination against Stewarts, and others similarly situated, and in favor of the 152 small independent stores, above mentioned, is approximately fifteen to one, per dollar of sales, although the dry goods business is conducted by both groups in the same way in all essential respects.

F. Fur Dealers and Furriers

The following list includes to the best of my knowledge all of the stores in the City of Louisville, other than [fol. 356] Stewarts, handling furs. Due to the small number involved I have included department stores in this list with the specialized stores:

Lucille Cahill	664 So. 43d Street
Fifth Avenue Furriers	520 So. 5th Street
The Fur Shop	954 So. 3d Street
Green & Green Furriers	1138 So. 3d Street
Lee Furriers	201 W. Breckinridge Street
Louisville Furriers	208 Martin Brown Bldg.
New York Furriers	618 So. Fourth Street
Minnie B. Read	1108 So. First Street
Frank Schulman	1551 So. Bardstown Road
Gordon's Fur Shop	428 W. Chestnut Street
Younger the Furrier	637 So. Fourth Street
Besten & Langen	518 So. Fourth Street

H. P. Selman & Co.	Fourth & Walnut Streets
Durand-Perry Company	540 So. Fourth Street
Byck Bros. & Co.	532 So. Fourth Street
Kaufman-Straus & Company	427 So. Fourth Street
Herman Straus & Company	Fourth & Market Streets
J. Bacon & Sons	Fourth & Market Streets
John C. Lewis & Company	450 So. 4th Street
Bon Ton Cloak & Suit Co.	322 So. 4th Street

None of the above specialized stores nor fur departments of department stores have as much as $400,000.00 annual sales. In fact, none of them, in my opinion, have sales aggregating as much as $150,000.00 in furs.

The discrimination against Stewarts, and others similarly situated, and in favor of the specialized shops listed above, is here, again, approximately fifteen to one.

It is further to be noted that, due to the unreasonable graduated fefature of the 1930 Sales Tax Law, the fur department of each of the various department stores will pay at a different rate per dollar of sales on this class of goods (and the same is, of course, true of other departments) when the sales of furs of one department store may be greatly above or greatly below those of the others. In other words, the rate per dollar of sales has no connection whatever with the volume of sales of a particular department.

G. Furniture Dealers—Retail

[fol. 357] The city directory and the classified section of the telephone book list sixty-nine retail furniture dealers. This list has been carefully checked and those stores whose business is entirely or mostly in second-hand furniture have been eliminated. The following list of fifty-six stores includes all of the specialized retail furniture dealers competing with Stewarts and others similarly situated.

Allen and K. Furniture Store	430 E. Market
J. Bacon and Sons	334 W. Market
Bell and Moss	1400 W. Market
Bensinger Outfitting Co.	315 W. Market
G. Bittner's Sons	426 So. First
Block and Goldberg	619 W. Market
Brooklyn Furniture Co.	448 E. Market

Brown and Melville	1201 W. Walnut
Central Furniture Co.	226 W. Market
Hyman Cohen	113 E. Market
Dant Brothers	1319 Bardstown Road
Denhard Co.	219 W. Market
A. K. Easley	746 E. Jefferson
H. C. Evans	312 E. Market
Gem Furniture Co.	826 W. Market
H. M. Gerber Co.	810 E. Broadway
Great Western Furniture Co.	720 E. Market
James Greene	419 E. Market
Albert Hess Furniture Co.	550 E. Market
Household Outfitting Co.	525 E. Market
Kaufman-Straus Co.	437 So. Fourth
Fred W. Keisker and Son	315 W. Walnut
Kelly's Furniture Co.	631 W. Market
Louis Kort and Sons	323 W. Market
Joseph Lang	525 E. Market
Leader Furniture Co.	319 W. Market
Liberty Outfitting Co.	334 E. Market
W. F. Mayer	413 W. Market
Morris Monsky	701 W. Market
Raffo's	426 W. Market
Reliable Furniture Co.	520 E. Market
Rhodes Burford Co.	626 E. Market
Rinne Furniture Co.	513 W. Market
[fol. 358] Sage Furniture Co.	316 E. Market
Sales Furniture Co.	307 W. Market
Spurrier Furniture Co.	920 W. Market
Spurrier and Wortham	830 W. Market
Herman Straus and Sons	318 W. Market
W. B. Trumbo Co.	900 W. Market
United Furniture Co.	447 E. Market
Weiss Outfitting Co.	1604 W. Market
West End Furniture Ex.	1636 W. Market
Wilson Chase Co.	521 W. Main
P. Cohen and Son	221 E. Market
H. B. Fortwengler	633 So. 1st
E. Hyman	127 E. Market
Elsie Krazeise Co.	624 Baxter
O. K. Furniture Co.	804 W. Market
Square Deal Furniture	423 E. Market
J. L. Strassel	445 So. 3d
A. Salas	345 E. Market

Bass Sales Co.	208 E. Market
I. Robinsons	814 W. Market
Jean Furniture Co.	802 W. Market
Jos. Hubboch & Sons	800 W. Market
Sternau's	732 E. Market

Of the above, the sales of the following six stores exceed $400,000.00.

Bensinger Outfitting Co.	315 W. Market Street
Central Furniture Co.	226 W. Market Street
Denhard Co.	219 W. Market Street
Great West Furn. Co.	720 E. Market Street
Fred W. Keisker & Son	315 W. Walnut Street
United Furniture Co.	900 W. Market Street

Only eleven of the above fifty-six stores, and only one of the larger stores, are located off of Market Street. It is apparent, therefore, that the center of activity in retail furniture is on said street, which is three blocks north of the location of Stewarts and rents and taxes on said street are considerably lower. Against this factor of cheaper location, the furniture department of Stewarts, and others similarly situated, must likewise carry the burden of this threatened tax which is approximately fifteen times the amount, per dollar of sales, that will be paid by fifty of the [fol. 359] above fifty-six merchants and larger per dollar of sales than any of the remaining six although these six merchants each do a much larger volume of business than the furniture department of Stewarts.

The sales of the store having the largest volume of sales in said list do not exceed $700,000.00. Based on this estimate their tax under the 1930 Sales Tax Law, would be $950.00 less deductions. Compared with this the tax on the furniture department of Stewarts would be $1,097.96 after deductions on approximately 1-5th the volume of business. In other words, the tax per dollar of sales in the furniture department of Stewarts is at least five times greater than the tax per dollar of sales of the largest store in this line.

H. Music Dealers

For purposes of comparison here I have lumped together the stores listed under the following headings in the direc-

tory: Piano Dealers, Phonographs and Records, Radio Sets and Supplies and Radio Equipment and Supplies. In my opinion the following list includes all of the recognized music stores in the city:

Baldwin Piano Co.	Broadway Corner Third
Johnson Piano Co.	213 W. Walnut Street
Shackelton Piano Co.	324 W. Chestnut Street
F. M. Tiller	515 South Third Street
The Rudolph Wurlitzer Co.	628 So. Fourth Street
C. J. Baron	510 E. Market Street
Bruner Greenup Music Shops	307 So. Fourth Street
Lucinda E. Smith	1205 W. Walnut Street
Stump's Music Shop	427 E. Jefferson Street
A. J. Waldman	500 So. Preston Street
Gus Boldt Radio Co.	427 W. Chestnut Street
Broadway Radio Shoppe	713 E. Broadway
P. I. Burks and Co.	911 W. Broadway
Cherokee Radio Shop	1315 Bardstown Road
Chiquelin Radio Co.	1587 Bardstown Road
Crescent Hill Radio Shop	2728 Frankfort Avenue
Thos. Crutcher, Jr.	1933 So. Fourth Street
Arthur Demling	2205 Frankfort Avenue
Ditto Radio Sales	3801 W. Broadway
[fol. 360] Doup's Point Radio Shop	2435 Bardstown Road
S. C. Glass	2459 Bardstown Road
Grays Radio and Tire Service	104 Breckinridge Lane
Henderson Radio Corporation	501 W. Chestnut Street
Highland Radio Service	1021 Bardstown Road
Hills St. Radio Shop	1799 W. Hill Street
W. H. Hobbs	2129 Eastview Avenue
Jarrett Radio Co.	1521 Bardstown Road
Henry Kiefer	133 Amherst Avenue
J. C. Kirchdorfer	922 Baxter Avenue
W. F. Long	1837 Deerwood Avenue
Louisville B. T. Radio Co.	1763 Bardstown Road
Monarch Sales Co.	729 So. 8th Street
Parkland Electric Co.	1103 So. 26th Street
Portland Radio Co.	2614 Portland
Radio Corporation of Ky.	618 So. 2nd
Radio Doctors	204 W. Market
Radio Service Shops	1022 Bardstown Road
F. G. Schack	619 So. 42d

Scientific Radio Corp.	637 So. 18th Street
Southern Radio Co.	1801½ W. Market Street
Speedometer and Radio Shoppe	1007 E. Broadway
Stilz-Ave. Radio Shoppe	100 Stilz Ave.
Super Radio Co.	1134 So. 25th
Tiller-Langley Radio Shop	First Floor Breslin Bldg
C. E. Watkins	1107½ Bardstown Road
O. W. Wittig	2537 Garland Ave.
Acme Electric Company	1162 So. 4th Street
Fourth Avenue Sales Co.	628 So. 4th Street
Gas & Electric Shop	309 W. Chestnut Street
Bomar-Summers Hardware Co.	315 West Jefferson
Kelsall Music Company	909 West Broadway
Milliken Tire & Battery Co.	955 So. Third Stre-t
Alex J. Schultz	226 W. Broadway
The Sutcliffe Co.	225 So. Fourth Street
Greenfields Majestic Shoppe	2250 South Shelby Street
Wm. F. Schaetzly	1930 So. 3d Street
Charles Stauble	1806 Frankfort Avenue
Tonini's Radio Store	Shelby & Gray Streets
Albin H. Wunderlich	652 Baxter Avenue

None of the above stores have sales in excess of $400,000.00. The largest has annual sales which do not exceed [fol. 361] $150,000.00, upon which the tax would be $75.00 less deductions. Compared with this the tax on the music departments at Stewarts is $549.23 after all deductions and on a volume of sales approximately one-half of those of the largest specialized store in this line. In other words, on half the volume of sales the tax against Stewarts is more than seven times greater.

I. Milliners

The following list of thirty-eight specialized millinery shops is in my opinion complete:

Mabel H. Bateman	410 Camp
Bilharz Millinery Co.	230 So. Fourth
Rose E. Burgy	1159 Dixie Highway
Pauline Clausen	130 E. Market Street
Sophia Dreyfus	706 W. Market Street
Gordon's Millinery	529 So. Fourth Street
Ella M. Grabler	115 So. 26th Street

Grace & Merit	562 So. Fourth Street
Gross Millinery Co.	226 So. Fourth Street
A. C. Hand	713 So. Fourth Street
Sadie Hilbert	627 So. Shelby
Minnie Holstner	1713 West Market Street
Mae King Shoppe	316 W. Chestnut Street
Lizzie Kummritz	726 W. Market Street
Maude Long	713 W. Jefferson Street
Marie Luxemburg	1932 W. Market Street
Marjden Hat Shop	524 So. 4th Street
The Mary Louise	127 W. Oak Street
Anna McGill and Co.	627 So. Fourth Street
Esther Mondry	645 So. Fourth Street
Margaret L. O'Neil	520 W. Breckinridge
Amy Badecker	664 So. 4th Street
Riehlmann's Millinery	1580 Bardstown Road
M. G. Ruwe	310 West Market Street
Eulalia W. Sauermann	2918 Frankfort Avenue
Elizabeth M. Schmidt	1246 So. Shelby Street
Irene Seidell	1609 West Market Street
Pansy L. Seyfert	336 W. Broadway
Shenley's	514 So. 4th Street
Sivori's	138 E. Market Street
E. Strange Co.	247 Starks Bldg.
[fol. 362] Chapeau Suzanne	206 Martin Brown Bldg.
Alpha Thixton	400 E. Oak Street
Lois C. Thomas	1045 Bardstown Road
Emma J. Warren	407 W. Broadway
Maggie U. Wobben	1733 W. Market Street
Miss A. Wentzel	1208 So. 3d Street
Wm. Wolf	306 W. Broadway

Two stores located on Fourth Street which, I am advised, are owned by the same merchant have together probably the largest volume of sales of any of the stores listed. Their joint sales are not in excess of $150,000.00.

Based upon this estimate their tax, under the 1930 Sales Tax Law, would be $75.00, with deductions. Compared with this the tax chargeable to the millinery department of Stewarts would be $549.95, after all deductions, on approximately half the volume of business above set out.

Approximately half of the stores which I have listed are in the downtown shopping district where they are in continuous active competition with the millinery department of

Stewarts, and others similarly situated. In this class of goods the discrimination against Stewarts and in favor of the specialized stores is, again, 15 times, per dollar of sales.

J. Shoes

The following sixty-six stores specialize in the handling of women's and children's shoes as are handled by the shoe department of Stewarts:

D. A. Anderson	788 So. Shelby Street
Arch Preserver Shoe Shop	609 So. 4th Street
Baker's Shoe Store	220 So. Fourth Street
Morris Bash	206 So. Preston
A. H. Bass	1705 W. Market Street
A. J. Besendorf	1561 Bardstown Road
V. J. Besendorf	2235 W. Market Street
Boston Shoe Co.	417 So. 4th Street
F. C. Bruch	1257 So. Preston
Cantilever Boot Shop	327 W. Walnut Street
Chandler Boot Shop	460 So. 4th Street
Churney's Shoe Store	1618 Bardstown Road
Dan Cohen	740 E. Market Street
Dan Cohen Co.	229 So. 4th Street
[fol. 363] Nathan Cohen	417 So. 7th Street
Dixie Shoe Store	210 W. Market Street
Donald's	421 W. Walnut Street
Dorothy May Shoe Shop	421 So. 4th Street
Michael Dougherty	622 W. Market Street
Katherine Drescher	919 So. Shelby Street
Adam Eigelbach	1221 So. Shelby
Emerson Shoe Co.	405 So. 4th
Feige's Shoe Store	431 E. Market St.
Feltman & Curme Shoe Stores Co.	321 So. 4th
Forsythe Shoe Corp.	548 So. 4th Street
Jacob Friedman	1460 Dixie Highway
Gekco Co. of Louisville	521 So. 4th Street
Wolf Glazer	1633 W. Market Street
Morris Cross	342 E. Market
Ground Gripper Shoe Store	423 W. Walnut St.
H. & E. Shoe Company	412 So. 4th Street
H. W. Hauenstein	1365 So. 7th Street
John Hauerstein	1478 So. 7th Street
J. B. Hinkebein	802 E. Broadway

Jacob's Shoe Store	207 So. 4th Street
Juvenile Arch Preserver Shoe Shop	1506 Bardtown Road
Kay's	432 W. Market Street
Emma Kircher	1410 Story Avenue
Jos. Markuson	447 So. 7th Street
Michael Shoe Co.	336 W. Market Street
Model Shoe Store	1033 Dixie Highway
J. C. Moffet	915 Baxter Avenue
Robt. Mairin	106 E. Market Street
Nisley Shoe Co.	308 So. 4th Street
Novelty Shoe Store	207 So. 4th Street
Passamaneck's Shoe Store	320 E. Market Street
Novelty Shoe Store	309 So. 4th Street
Potter's Shoe Store	464 So. 5th Street
Samuel Pozitzer	220 So. Preston
Queen Quality Boot Shop	536 So. 4th Street
Harry Rosenberg	1466 Dixie Highway
The Sample Shoe Store	621 W. Walnut Street
Isadore Schlossberg	210 So. Preston
Edw. Shaikun	708 W. Market
Shoe Market	424 W. Market
Spalding Shoe Co.	769 Dixie Highway
[fol. 364] Sutt & Son	216 E. Market Street
Three Dollar Shoe Shop	336 W. Jefferson Street
Travers Shoe Store	459 So. 7th Street
J. H. Walser & Sons	1276 So. Shelby
Simon Wells	314 E. Market
J. C. Warner	2604 W. Market
White Shoe Store	134 W. Market
C. W. Whitman	3473 Taylor Blvd.
J. Zoll & Son	1136 W. Market Street

The sales of the largest of these stores does not exceed $500,000.00, upon which the tax would be $300.00, or .0006% per dollar of sales, without taking deductions into account. Compared with this the tax after deductions of .00743% per dollar of sales by Stewarts is more than twelve times greater. Approximately a third of these sixty-six stores are in the downtown shopping district where they are in continuous active competition with Stewarts for the trade of the public. As to the great majority of all of said stores the discrimination is again fifteen times on the dollar of sales.

4. The above lists do not, by any means, cover all of the stores in the city with which Stewarts is in active competition in its various departments. It is, however, the most complete list as to classes of merchants that I know how to make from the sources of information available to me.

Various specific instances as to other departments occur to me, demonstrating the discrimination against Stewart's, and others similarly situated, and in favor of the more or less specialized stores and smaller stores. For example, the Sutcliffe Company, which specializes in sporting goods and toys competes actively with the toy department at Stewarts. No tax is paid by Sutcliffe Company. Based upon my estimate of their sales their tax would be $300.00 which is completely offset by its corporation license taxes and license taxes paid for handling pistols, playing cards, and so forth, aggregating $318.50. Compared with this, Stewarts, on toys alone is chargeable with a tax of $313.10 after all deductions on sales approximately 1-5th in amount of those made by said company.

Again, our china and glassware department competes with Edward Dolfinger, Inc. Dolfinger's, for many years, [fol. 365] conducted a large business in china and glassware. Some years ago they discontinued business but reopened again two years ago and now are doing an annual business not exceeding $100,000.00. Here, as in the case of all smaller stores, Stewarts is required to pay fifteen times the amount per dollar of sales in taxes under the threatened levy of the 1930 Sales Tax Law.

The directory lists 487 restaurants in the City of Louisville. Stewarts serves only luncheon in its restaurant while the majority of those listed serve three meals. Here again the discrimination is fifteen times on the dollar of sales in every instance that I know of.

There is no essential difference between the methods of conducting the business of Stewarts, and others similarly situated, and the other stores mentioned in this affidavit. Many of these stores carry more than one type of goods and divide their business into two or more departments, some of which compete with one or more departments of Stewarts and others, perhaps do not.

In every essential respect these smaller stores are doing a similar business to that that is being conducted by Stewarts, appealing to much the same public, buying, in many

cases, in equal or larger quantities, sometimes from the same wholesalers, and selling in the same way to the same people on credit and for cash.

Stewarts now pays more in taxes than any other retail merchant in Louisville—approximately $80,000.00 in direct taxes during 1930—not considering this threatened tax. It is called upon for contributions to numerous civic and charitable enterprises, and takes a leading part in many such activities either as a store or through its officers and employees.

Stewarts' trade is not confined to the city of Louisville, but it attracts customers from all nearby cities in this and other states. Many of the smaller stores profit directly from the shoppers who are attracted to Stewarts from outside the city and it, therefore, enhances real estate values in its neighborhood.

A substantial volume of Stewart's sales are made in interstate commerce to customers residing in other States and buying merchandise by telephone, mail or personally from Stewarts, to be delivered to the buyers at their residences in such other States.

[fol. 366] Stewarts has over 2,000 regular charge accounts with persons residing in the State of Indiana alone, and numerous charge accounts with persons residing in States other than Kentucky and Indiana.

Merchandise sold on all such accounts is regularly delivered by Stewarts to the buyers at their residences, in the regular course of interstate commerce. In fact, Stewarts makes daily deliveries to its customers residing in Jeffersonville and New Albany, Indiana.

In nearly all of the cases which I have mentioned the specialized stores competing with one or more of our departments have the great advantages of ground floor location and window space for permanent displays. Stewarts, of course, cannot make permanent window displays of the goods of all its departments but must allot such space at intervals throughout the year. Also, the departments located in the basement or on the six floors above the ground floor obviously do not have the same advantages that come from ground floor location.

Stewarts and other retail merchants in Kentucky are also brought into direct competition with mail order houses located in other States who secure by mail and catalogue,

orders for goods to be shipped into Kentucky to buyers resident in Kentucky.

Another type of competition which is felt by Stewarts is with the sales of prominent New York and Chicago shops who send representatives to Louisville and make sales from sample. These exhibitors include such stores as Best & Company, Saks-Fifth Avenue, Brooks Brothers, Delman, De Pinna, Crossways Shop, Frank Brothers, McCutcheon, Peck and Peck, and numerous others. While the sales made by these shops are free from taxation throughout Kentucky, it is apparent that their competition is felt only in cities large enough to attract their exhibitions. It is only in the larger cities that there are stores of sufficient size to pay any substantial tax under the 1930 Sales Tax Law. Consequently the large stores in Kentucky must meet this outside competition and also suffer the discriminations of this law upon every sale which they make.

The principles and results apparent from the comparisons which I have made are equally applicable for other years than 1930, and to other lines of trade than those [fol. 367] which I have expressly mentioned herein. There are no stores competing with Stewarts in the city of Louisville other than those listed herein that have sales in excess of $400,000.00. I know of no reasonable basis upon which the classification made by the 1930 Sales Tax Law can be justified.

——— ———.

Subscribed and sworn to before me by Robert J. McKim this — day of February, 1931. My commission expires the — day of ———, 19—. ——— ———, Notary Public, Jefferson County, Kentucky.

AFFIDAVIT OF FRED LEVY

STATE OF KENTUCKY,
County of Jefferson, ss:

Affiant, Fred Levy, on oath states:

I am senior member of the partnership Levy Bros., plaintiffs in a suit for injunction against John B. Lewis, et al., brought in the United States District Court for the Western

District of Kentucky, at Louisville, being No. 610 on the equity docket.

I am 53 years of age and all my life I have been in touch with the business of Levy Bros., founded by my father and his brothers about 70 years ago and from the beginning conducted in one store at the same location. Having been connected with this firm for over 36 years. After the death of my father and his brothers, I became the senior member of the firm, and in that capacity I have had for more than 20 years the most intimate knowledge of the business of the firm and the conditions affecting it, such as the problems of financing, development, competition, buying, selling, display of goods, advertising, and the many other questions of vital importance that determine the success or failure of a retail store, and especially of a store like that of Levy Bros., handling lines of merchandise in which the taste of the buying public must be trained as well as indulged.

I know the recurring problems of ever-changing conditions and keen competition constantly facing retail merchants in such a business as that of Levy Bros. I know the [fol. 368] value of a good name and a good business reputation in developing and preserving the good-will of a business. My firm has devoted 70 years of its business life to building up a reputation for integrity and fair dealing with the buying public and for selling goods of high quality at the lowest prices consistent with successful operation of its business.

At the same time, I know that, year by year, we have met new problems in changing tastes, styles and modes of dress, and new as well as old competition. Sometimes this competition comes from old-established business houses doing business under fairly similar conditions. Sometimes it comes from the small merchant with a store and stock of such size that he can handle it at small expense by himself or members of his family with little outside expense.

Sometimes the competition comes from a large organization operating a branch store in Louisville under conditions that favor such competitor at the expense of this affiant's firm. This is particularly emphasized under the so-called "Gross Sales Tax Law" enacted at the 1930 session of the Kentucky Legislature.

Under equal conditions Levy Bros. welcome any fair competition, but they cannot afford to concede any tax advantages.

For example: Levy Bros. are the largest retail dealers in ready-made clothing in the State of Kentucky. In that branch of their business, for the calendar year of 1930, their gross annual sales were over a million dollars. If the Kentucky "Gross Sales Tax Law" of 1930 be upheld as valid and enforced against Levy Bros., they will be put to a great disadvantage and subjected to a great handicap in the way of taxation discriminatory against them and in favor of 52 other retail stores in Louisville dealing specially in men's and boys' clothing, to say nothing of similar stores located elsewhere. Taxes properly chargeable against and allocated to the clothing department in the store of Levy Bros. will be greatly augmented under the 1930 Gross Sales Tax Law, and the discrimination resulting therefrom, in favor of their competitors and against Levy Bros., is fully, fairly and correctly stated in the bill of complaint filed by them in their suit against John B. Lewis, et al., above mentioned.

In addition to the competition above pointed out, a new business rival has entered the field of competition with [fol. 369] Levy Bros. Richman Bros Co., a corporation, which is a very large chain store organization, has within the last few months established a store for the sale at retail of men's ready-to-wear clothing, suits, overcoats and similar articles of clothing, on Fourth Street between Liberty and Walnut streets, within the central retail business district of Louisville. The Richman Bros. Co. does not own or operate any other store in Kentucky. Its gross annual sales in the store established by it in Louisville will not exceed $400,000, and hence it would be taxed under the 1930 law in the lowest bracket, whereas the men's clothing department of Levy Bros. would, as set forth in their bill of complaint, be taxed in much higher brackets.

Such discriminatory and unequal burden of taxation is imposed by the 1930 Act upon Levy Bros., and especially upon their men's clothing department, in the conduct of their business in competition with Richman Bros. Co., who will be actually taxed under said Act at less than one-twentieth of one per cent, when approximately thirty to forty times that rate of taxation will be imposed by the same Act upon Levy Bros.' clothing department.

There is no conceivable or justifiable reason for such

discrimination. For example, Richman Bros. Co. is a chain organization conducting in other States a great many stores for the handling of a similar line of merchandise. Its aggregate volume of business in all of its stores is many times larger than the volume of Levy Bros.' business. It advertises and displays its merchandise for sale in the most effective and up-to-date methods. Its business is owned by non-residents of Kentucky, and the earnings derived from the conduct of its business are sent out of Kentucky to be spent or invested in other States.

Every conceivable argument, whether sound or fallacious, that could possibly be urged in favor of a heavy tax upon chain stores and for the relief of individual merchants is flouted by a law which imposes upon Levy Bros. a rate of taxation approximately forty times that imposed upon Richman Bros. Co. as one of its competitors.

Likewise, the same situation exactly exists with respect to other chain stores, such as Wilson Bros., National Shirt Company, and others that deal in men's furnishings in competition with similar departments conducted by Levy Bros. [fol. 370] Many other instances could be cited in shoes and hats as well as the above clothing and furnishings, but these are typical examples of clear and hostile discriminations against Levy Bros. effected by the 1930 Gross Sales Tax Law.

Affiant has for many years been active in the business life of Louisville, and particularly has taken his part in studying and promoting the interests of retail merchants generally in Louisville and throughout the State and country. He has not only been President of the Louisville Retail Merchants' Association and of the old Louisville Commercial Club, now merged with the Louisville Board of Trade, but he has also been President of the Kentucky State Clothiers' Association and President of the National Association of Clothiers and Furnishers, composed of over 8,000 members. By virtue of his experience and training in his business and in the allied lines of his activities, affiant has now and for years past he has been quite familiar with the general retail situation in the city of Louisville, and particularly with the nature and extent of business done by stores conducting the same type of business as Levy Bros. He has had an opportunity to observe and he has observed the nature and extent of the business done by the competitors of his firm, and by reason of his study of

conditions he is qualified to state approximately the amount of business done by them.

Affiant has read the affidavit of Robert J. McKim, filed in these suits to enjoin the enforcement of the 1930 Kentucky Gross Sales Tax Law. Based upon his own survey and careful and long-continued study of local retail conditions in Louisville affecting retail stores generally, as well as retail stores conducting a business similar to that of Levy Bros., affiant is enabled to state and he does state from his own study and observation and his own knowledge gained thereby:

(1) That the statements set forth in said McKim's affidavit are all true with respect to the gross annual sales of retail merchants in Louisville dealing in articles similar to those handled and sold by Levy Bros. in their various departments as set forth in their bill of complaint in this litigation.

[fol. 371] (2) That the statements set forth in said McKim's affidavit are all true with respect to the operations and gross annual sales of other retail merchants in Louisville dealing in merchandise of various kinds other than the kinds of merchandise handled and sold by Levy Bros.

(3) That the statements set forth in said McKim's affidavit are true with respect to the number of retail merchants of all classes and kinds in Louisville who have gross annual sales exceeding in volume the sum of $400,000.

The business of selling motor vehicles of various kinds in the city of Louisville is so essentially different from other forms of merchandising (if automobiles should be properly classed as merchandise or dealers therein should be properly classed as retail merchants operating retail stores in Louisville) that affiant has no personal knowledge as to the gross annual sales of vendors of motor vehicles in Louisville, and therefore he does not undertake in this affidavit to make any statement with respect to their gross annual sales, and no statement on that subject is made in the affidavit of said McKim.

The same is true of dealers in various kinds of commodities and manufactured articles not usually handled by retail merchants of the class specified in said McKim's affidavit, and the same is true with respect to retail grocers and other merchants in Louisville handling lines of goods that

do not come in competition with Levy Bros. as retail merchants.

Fred Levy.

Subscribed and sworn to before me by Fred Levy this 7th day of February, 1931. My commission expires February 28, 1934. Lillian Nunemacher, Notary Public, Jefferson County, Kentucky. (Seal.)

AFFIDAVIT OF DANN BYCK

STATE OF KENTUCKY,
County of Jefferson, ss:

Dann Byck, being first duly sworn, makes the following statement under oath:

[fol. 372] My name is Dann Byck and I reside in Louisville, Ky. I am President and General Manager of Byck Bros. & Co., a corporation organized under the laws of Kentucky, which operates a retail establishment in the heart of Louisville which specializes in women's clothes. This store is an independent store, that is the owners do not own or control any other store. The establishment is divided into 10 departments each of which handles a different type of article from that handled by any other department. Each department is a separate unit and is entirely distinct from any other department. Each department is charged with its floor space, its electric light, its payroll, etc., and in effect each department is a separate store under the same roof. The competition for each department is offered by outside stores selling similar articles and in many instances outside competitors who sell only a single type of goods have greater sales than the department in our store handling that article.

Byck Bros. & Company has annual sales of approximately $700,000 each year where the sales of all departments are added together but the sales of any single department does not exceed $300,000. These departments as stated before compete directly with stores which handle the same type of article and nothing else, and since their volume of sales is no larger than the sales of these competitors they should not be subjected to a higher rate of taxation. However the

Kentucky Gross Sales Tax law fixes the rate of taxation by adding the sales of these departments, thereby subjecting each department to a tax which approaches 1%. Competitors on the other hand are only subjected to a nominal tax.

For example, we operate a millinery department which has annual sales of $15,000. This store meets the competition of The Gordon Shop, Marjdon and Shenley's. All three of these establishments are in the immediate vicinity and their sales tremendously exceed the sales of our millinery department. Their tax, however, would only be 1/20 of 1% since their sales do not exceed $400,000, whereas our millinery department doing the same kind of business as these competitors must bear a much heavier burden.

I have spent the last 10 years in the employ of Byck Bros. & Co. and I am familiar with the general rules governing the operation of stores carrying on this type of business. In our case we operate on the basis of a small margin of profit. [fol. 373] This is one of the outstanding features of efficient merchandising. Our records show that we make 1% profit for each dollar of sale. Investigations which have been made by the Harvard Bureau of Research show that this is about the average that can be expected from a store of our type. It can be readily seen that the Kentucky Gross sales tax takes a large percentage of this profit.

This store was established 30 years ago by my father. At that time he had three employees. Today the establishment is doing about $700,000 worth of business annually and is giving employment to 100 people. Our growth is due to the adoption of efficient merchandising methods and we would be discarding these methods if we attempted to secure a larger profit than we are making. We will have to content ourselves, therefore, with the 1% profit we are making. If we increase our sales the per cent of profit to sale will not increase but the tax would. For example, let us assume that through intense effort and application we are able in 1930 to increase our business an additional one hundred thousand dollars, on which we would earn, figuring on a 1% basis, a net profit of $1,000. Under the confiscatory terms of this tax $700 of this $1,000 profit would be taken. If, in the course of another year, we gain another $100,000 volume and its accompanying $1,000 profit, $850 of this additional $1,000 profit will be taken as tax. And finally in the third year, if we are able to reach our goal of $1,000,000 by

adding another $100,000 volume, the entire $1,000 profit derived from this increase will be taken as additional tax.

Departments selling a special article are so distinct from the remainder of the store that they are often leased out to persons who operate them much in the same way as they would operate their own store. In addition to operating the store in Louisville, Byck Bros. & Co. lease a department in the store operated by the Wolf Wile Co. in Lexington, Ky. This department, of course, is in no way affected by the sale of goods in Louisville. It competes directly with stores in Lexington which sell the same type of goods. Its volume of sales is $47,000 a year and its competitors having an equal volume would only have to pay 1/20 of 1%. Under the gross sales tax law, this department would be taxed at a much higher rate. In order to determine the rate of taxation, the statute requires that sales of this department should be added either to the sales of all other departments [fol. 374] in the establishment operated by the Wolf Wile Co. or else to the sales of the store operated by us in Louisville. I am not certain whether the sales of this department will be added to Wolf Wile's sales or to the sales of our Louisville store but I am certain that the sales will not be taxed without reference to any other sales. No matter how the gross sales tax statute is construed in this regard this department is discriminated against. If its sales are added to Wolf Wile's it will fall in the higher brackets and we will have to pay approximately 1% on its sales merely because somebody else sells another type of goods under the same roof. If the sales of this department are added to our sales in Louisville then it increases our sales and places us in a bracket where our tax approaches 1% and as a result this department would be subjected to a higher tax merely because we operate a store selling a great many different items in a different city. Persons competing with this department in Lexington who sell nothing but ladies shoes and who have as great or a greater volume of sales pay a tax of 1/20 of 1% or a tax which is about 19/20 of 1% below the tax on the department operated by us.

This 1% tax which is imposed upon us and not upon competitors who sell the same goods but who confine themselves to the sale of only one type of goods enables those competitors to undersell us in their particular line and take away our business without subjecting themselves to the tax. It must be borne in mind that these persons have the same

buying facilities that we have. About 95% of them belong to buying organizations and they purchase for their store as much or more than we buy for the department which competes with them. Our Inexpensive Dress department has sales of about $50,000 per year. The Hollywood Shop operating on the same block sells Inexpensive Dresses and is in direct competition with this department. This competitor sells nothing else and his sales are greater than the sales of our department. If we should increase the sales of this particular department or any department the increased sales would be subject to a tax which would be subjected to a tax which would approximate 1%. On the other hand The Hollywood Shop could undersell us because of the fact that we have to pay a heavy tax not imposed on him. He could, therefore, take away all this business and increase his sales [fol. 375] to about $150,000 but he would not have to pay more than 1/20 of 1%.

The same sales would be taxed at 1% if we would make them and only 1/20 of 1% if our competitor would make them.

Louisville, Ky., January 15, 1931.

(Signed) Dann C. Byck.

Subscribed and sworn to before me by D. C. Byck this 15th day of January, 1931. Chas. Troxler, N. P., J. C., Ky. My commission expires Jan. 20, 1932. (Seal.)

AFFIDAVIT OF C. B. TURLEY

STATE OF KENTUCKY,
County of Jefferson, ss:

C. B. Turley, being first duly sworn, makes the following statement under oath:

My name is C. B. Turley and I live in Louisville, Kentucky. I am President of the Kaufman-Straus Company, Incorporated, which operates a Department Store in the City of Louisville. We sell Shoes, Dressgoods, Stationery and Household Goods. The Kaufman-Straus Store is divided into twenty-five Departments, each of which handles a specialized article. Each Department is a separate unit and is entirely disconnected from every other Department

in the Store. Each Department is charged with its floor space, its advertising, its Pay Roll, its lighting, etc. Most of the Departments have special Buyers, who attend to the matters of that Department and are not concerned with any other Department.

Each Department competes with stores selling similar articles. Many of these stores are operated by persons and corporations who do not operate any other stores and who do not handle in their one store anything but an article similar to the article handled by a particular Department in this store. The sales in any one Department of the Kaufman-Straus Store do not exceed Four Hundred Thousand Dollars ($400,000.00) and as a matter of fact, the max- [fol. 376] imum sales of any particular Department are $100,000.00. Many competitors who operate only a single store and who sell at that store articles which are handled by particular Departments in this store and nothing else, have sales which are equal to or exceed the sales of the Department in this store with which it competes.

For example, Ladies' Shoes has sales of approximately $55,000.00 annually. It competes directly with Boston Shoe Store and Walk-Over Shoe Company, who sell nothing but Shoes. The sales of these competitors are equal to the sales in this Department, but they do not exceed $400,000.00, and as a result, these competitors would only have to pay at the rate of one-twentieth of one per cent under the Gross Sales Tax Law of Kentucky. On the other hand, our Ladies' Shoes would have to pay approximately one per cent on its sales, although they only amount to $55,000.00. This is due to the fact that the Gross Sales Tax Law of Kentucky compels us to add the sales of the Shoe Department to the sales of the other Departments in the Store, thus throwing us into the higher bracket. Another example is our Silk Department, which has sales of approximately $100,000.00 annually. It competes directly with the Miles Silk Shop, which sells nothing but silks, and the same tax bracket would apply as above.

Thirty-two Departments are leased out to different Corporations, which operate them in the same manner that they would operate their own stores. These Departments are no different than the other Departments which are operated by the Kaufman-Straus store, except that these are owned by corporations which do not own or operate any other Department in this store. I am informed and be-

lieve that these leased Departments would only be subjected to a tax of one-twentieth of one per cent, whereas, other Departments would be subjected to a one per cent tax.

The provision of the Gross Sales Tax Law of Kentucky compels the aggregation of all the sales in all Departments operated by the Kaufman-Straus store. The total sales will exceed $400,000.00, thus placing us in a higher bracket.

If the Taxing Statute is construed in such manner that the sales of the Leased Departments would be added to our sales, our tax would be increased by the outside sales. Under either construction, the addition of sales in unre- [fol. 377] lated Departments and the imposition of a graduated tax on the total discriminates against Department Stores and is in favor of individual stores which handle only one line of goods. Departments in such a store as the Kaufman-Straus Company are operated on the basis of a small margin of profit, which does not exceed one per cent. The increase of Departments in a particular store would not add to the per cent of profit per dollar of sales in another Department. The per cent of profit, therefore, does not increase with the increased sales of the entire store. The per cent of profit for each dollar of sale is less than one per cent and the imposition of an additional one per cent tax would take all of this profit and would be prohibitive and confiscatory. The proposed tax could not be shifted to the consumer. An increase in price would enable competing stores to undersell us and deprive us of business. However, these competitors would only subject themselves to a tax of one-twentieth of one per cent as a result of this increased business. For example, a Department Store operates ten Departments, each of which has sales of $200,000.00; the total sales in the store would be two million dollars ($2,000,000.00) and each Department would have to pay a one per cent tax. On the other hand, the ten competitors, each of which sells an article similar to that sold in one Department and each of which has sales of Two Hundred Thousand Dollars ($200,000.00) per year, would only have to pay a tax of one-twentieth of one per cent. Each competitor could take away the business from a Department store in the particular line in which he is engaged, and as a result each competitor would have sales of Four Hundred Thousand Dollars ($400,000.00) and still be subject to the lowest rate of taxation. In other words, although all our business is taxable at a high rate, our competitors could

take it all away and only be liable for a tax of one-twentieth of one per cent.

C. B. Turley.

Subscribed and sworn to before me this 24th day of January, 1931. Herbert M. Scott, Notary Public, Jefferson County, Ky. My commission expires July 5, 1933.

[fol. 378] Newport

AFFIDAVIT OF MILTON MARX

STATE OF KENTUCKY,
Campbell County, ss:

Milton Marx, being first duly sworn, makes the following statement under oath:

My name is Milton Marx and I live on Marion Avenue in Cincinnati, Ohio.

I am a member of the partnership of Louis Marx and Brothers. We conduct retail stores for the sale of furniture in the cities of Covington and Newport, Kentucky, and I have had charge of the Newport store for the last forty years. Because of my experience in business in the city of Newport, I am familiar with the general retail situation in that city. I am acquainted with the location and type of all the larger retail stores in Newport, and I had an opportunity to, and have observed the nature, extent and character of their businesses.

In my opinion there is not a single store in the city of Newport which has sales over $400,000.00. There are some merchants, however, in this city who have sales in Kentucky which exceed $400,000,00. but this volume is only caused by virtue of the fact that they operate stores in the city of Covington in addition to the store operated by them in the city of Newport. In my opinion the number of such merchants does not exceed five.

Milton Marx.

Sworn to before me and subscribed in my presence this tenth day of February, 1931. I. V. Guy, Notary Public. My commission expires January 27, 1932. (Seal.)

Affidavit of Daniel M. Cohen

State of Ohio,
Hamilton County, ss:

Daniel M. Cohen, being first duly sworn, makes the following statement under oath:

[fol. 379] My name is Daniel M. Cohen and I live at Cincinnati, Ohio.

I am a Director of The Dan Cohen Shoe Company. This corporation conducts retail stores for the sale of shoes and I have charge of the store operated by it at No. 24 Pike Street, Covington, Kentucky. Because of my experience in business in the City of Covington, I am familiar with the general retail situation in that city. I am acquainted with the location and type of all the larger retail stores in Covington and I have had an opportunity to and have observed the nature, extent and character of their businesses.

In my opinion, and to the best of my knowledge, there are only three stores in the City of Covington which have sales over $400,000.00 in their Covington, Kentucky, stores.

Daniel M. Cohen.

[Duly verified.]

Paducah

Affidavit of H. C. Amstutz

County of McCracken,
State of Kentucky:

H. C. Armstutz states that he is the manager of the J. C. Penney Company retail dry goods store at Paducah, Kentucky; that he has been a resident of said city since January 1, 1928; that by virtue of his employment he is familiar with the general retail situation in the city of Paducah and particularly with the retail dry goods and specialty business in said city; that he is familiar with the location, management and type of the various other stores in said city; that he has had an opportunity to observe the amount and character of their business; that basing his opinion upon these various factors and his own experience and general

knowledge of the retail trade and by comparison with his own store and sales therein he is able to estimate the sales made by the particular stores hereinafter mentioned. Affiant states:

1. That the Paducah store of the J. C. Penney Company is divided into the following departments, to-wit:

A. Wash Goods, Draperies, Rugs and House Furnishings.

C. Knitwear—All kinds including Hosiery, underwear, and Lingerie.

[fol. 380] D. Better dress and Silk yard fabrics.

E. Women's and children's Ready-to-wear, including Coats, dresses and accessories.

F. Complete line of rubber, Felt and Leather Footwear for the entire family.

G. Toilet articles, notions and miscellaneous accessories.

H. Men's and boys' clothing.

K. Women's Millinery, Men's Hats and caps.

L. Work Clothes, dress shirts and general haberdashery.

2. That the names and estimated gross sales and number of employees of all other department and specialty retail stores known to affiant in the city of Paducah are as follows, to-wit:

	Estimated sales
Paducah, Dry Goods Company	$350,000
Rudy's Department Store	250,000
Lowenthal Ready-to-Wear	80,000
Wallerstein Men's Shop	90,000
Weille's Men's & Women's Apparel	200,000
Finkle Store	100,000
Bright Bros.	100,000
Guthrie Dept. Store, F. W. Woolworth Co., Montgomery Ward Co., Kresge Co., Sears, Roebuck & Co., W. T. Grant & Co., New System Dept. Store	Excess of 50,000
Approximately 10 others	Below 50,000

3. That of the other retail merchants in the city of Paducah in other lines than dry goods and specialties as set out above, there are the following:

Name and type of store	Estimated sales in excess of
None	$1,000,000
"	900,000
"	800,000
"	700,000
"	600,000
"	500,000
"	400,000

Approximate number below 400,000 as shown by directory.

[fol. 381] 4. That affiant has lived in the city of Paducah with his family, and now owns his own home, since January 1, 1928.

That he is a member of the following local civic organizations:

Rotary Club.

Member of Local Masonic Lodge.

Manager and Wife member of Local Eastern Star.

Entire family liberal contributing members of local Church.

Red Cross.

Member of Municipal Golf Club.

Member of Y. M. C. A. (just recently closed).

Retail Merchants Association.

5. That the Paducah store of the J. C. Penney Company has contributed to the following organizations and charities during the year 1930 in the amounts set op-osite to their names:

Cousin Molly	$15.00
Volunteer Prison League	10.00
Paducah Board of Trade	25.00
Paducah Boy Scouts	25.00
Christian Record Publishing Co.	2.00
Augusta Tilghman High School	5.00
Kentucky Children Home Society	3.00
Noble Park Playground	50.00
McKee Button Factory (New Industry Committee)	35.00
Retail Merchants Association	49.50
Salvation Army	5.00
Cumberland Presbyterian Church	2.50

Cousin Molly Milk Fund	5.00
Retail Merchants Ass'n (Fire Convention Funds)	4.00
Kentucky Progress Commission	25.00
Mammoth Cave National Park Association	50.00
Paducah, Mother Club	5.00
American Red Cross	5.00
Settlement House	5.00
McCracken County Public Health League	15.00
Christmas Decoration—Main Street	12.50
Total	$353.50
City License	50.00
	$403.50

[fol. 382] 6. That affiant, as manager of the Paducah store of the J. C. Penney Company, has charge of practically all matters relating to said store as though he was the sole proprietor thereof; that he keeps a bank deposit on behalf of the J. C. Penney Company in a local bank at Paducah from which he pays the employees of the store and other expenses and remits at intervals to the J. C. Penney Company head office; that he has charge of all buying and the selection of all merchandise for the Paducah store from the general purchases of the J. C. Penney Company buyers; that he determines what lines and what departments he can handle to the best advantage and all other matters of local concern.

That each department in the Paducah store is run practically apart from other departments, as though it was itself a separate store, competing with similar departments in other stores and with specialty stores selling that character of goods exclusively. For example: The millinery department competes with purely millinery stores, the shoe department with shoe stores, the men's furnishings department with haberdashery stores, etc.

That each department is charged, in bookkeeping, with its floor space, its proportion of advertising, payroll, taxes, rent, heat, light and other items of general overhead expense like so many separate stores under one management.

That no department in the Paducah store has sales in excess of $400,000.00, the sales for the whole store aggregating only $312,400.00 for the year 1930; that the sales since March 17, 1930, for the remainder of the year amount

to approximately $262,140.00; that if each department was taxed only as a separate unit the minimum rate of 1/20th of one per cent would be applied to sales in said store, whereas by virtue of the fact that the departments are operated by the same company and not by different owners and by virtue of the fact that the J. C. Penney Company owns twenty-one stores in the State of Kentucky the tax chargeable to said Paducah store amounts to almost 1% of its entire gross sales, and considerably more than 1% of the net sales thereof; that said tax amounts to almost twenty times the amount paid by practically all of affiant's competitors.

Affiant states that under his contract as manager of the Paducah store for the J. C. Penney Company, he receives [fol. 383] a percentage of the profits of said store in addition to his salary; that he is further given the privilege of purchasing stock in the said company at a price below the current market quotations thereon with the result that he is practically a partner with his employer in the operation of said store; that the imposition of this tax would directly affect the income which affiant receives from said business by reducing the profits therefrom and also reducing the amount of sales made by said store due to the inability of said store to meet competition in various highly competitive lines if this tax must be added to the price of articles sold in said lines.

Affiant states that all of the foregoing statements are true, as he verily believes.

H. C. Amstutz.

Lexington

AFFIDAVIT OF DOLPH WILE

COUNTY OF FAYETTE,
State of Kentucky, ss:

Dolph Wile, being first duly sworn states:

I am the President and chief officer of the Wolf-Wile Company of Lexington, Kentucky. The Wolf-Wile Company operates the largest retail department store in Lexington. I have been in the department store business for thirty years and was one of the organizers of the Wolf-Wile Company.

[fol. 384] By virtue of my employment and experience in the department store business and in the retail dry goods business, I am familiar with the general retail situation in the City of Lexington, Kentucky. I am familiar with the location, management and type of the various other stores in Lexington and over a period of a great many years I have had an opportunity to observe the amount and character of their business. Basing my opinion upon these various factors and my own experiences and general knowledge of the retail trade, and by comparisons with my own store and the sales made therein, I am qualified to estimate the sales made by the particular stores herein mentioned.

I have made a survey of the City of Lexington using the classified telephone directory as a basis for obtaining the names of the various stores, and in my opinion the following are the only stores in the City of Lexington, having annual sales in excess of $400,000.00:

Name of store		Estimated annual sales
Denton Co.	Department Store	$500,000.00
J. D. Purcell Co.	" "	900,000.00
Brower & Co.	Furniture	400,000.00
Fred Bryant	Automobiles (Chevrolet)	500,000.00
Jess Frazer	Automobiles (Ford)	500,000.00
Graves-Cox & Co.		450,000.00
Wolf-Wile Co.		900,000.00

Basing my opinion as aforesaid I estimate that there are approximately 650 other retail stores in said city having annual sales of less than $400,000.00.

I have read the affidavit of Mr. Robert J. McKim, President of the Stewart Dry Goods Company in Louisville, and the facts which he has set out therein in regard to the discrimination against department stores under the 1930 Kentucky Sales Tax Law are true in principle, and are applicable to the situation in Lexington, in the same manner in which he has demonstrated their application to the City of Louisville.

Dolph Wile.

Subscribed and sworn to before me by Dolph Wile this 4th day of February, 1931. My commission expires on the 18th day of October, 1934. Hattie Mitchell, Notary Public, Fayette County, Kentucky. (Seal.)

[fol. 385] AFFIDAVIT OF PAUL H. NYSTROM

STATE OF NEW YORK,
County of New York, ss:

Paul H. Nystrom, being first duly sworn, made the following statement under oath:

I reside in New York and am fifty-three years of age. I am a graduate of the University of Wisconsin and also hold the degrees of Master and of Doctor of Philosophy from the same institution. I am a professor of marketing in the School of Business of Columbia University. The School of Business is a college of equal rank with the colleges of law, medicine, engineering, and others making up the University. As a professor of marketing it is my duty [fol. 386] to conduct courses in marketing including general marketing, retail merchandising, and studies in consumer demand, as well as to guide advanced or graduate students in their research in problems of marketing. In addition to my educational work I also devote considerable time to market analysis for and consultation with private businesses. My clients include manufacturers, wholesalers, and retailers.

My experience began at the age of fifteen as an employee in middle western country general merchandise stores for four years. This was followed by positions as teacher and principal successively in country, village, and city schools for a period of six years. During these years I was constantly employed out of school hours and during vacation periods in commercial activities. From 1909 to 1914 I was a member of the Faculty of the University of Wisconsin rising in that period to the grade of Assistant Professor of Political Economy. During three successive years, 1906-1908, while in educational work in Wisconsin, I also served as special investigator for the Wisconsin State Tax Commission. During the school year 1914-1915 I served as Associate Professor of Economics in the University of Minnesota. I resigned my position there in the spring of 1915 and took up work as assistant to the president on marketing problems in the U. S. Rubber Company, New York City. In June, 1917, I was appointed director of research and

later sales manager of the International Magazine Company, publishers of Cosmopolitan, Good Housekeeping, and four other well-known magazines of national circulation. From January, 1921, down to June, 1927, I was managing director of the Retail Research Association, a co-operative group of eighteen independent department stores with headquarters in New York. On leaving the Retail Research Association in 1927 I was appointed to the Faculty of the School of Business of Columbia University and took up my present activities in education and business consulting.

I am the author of several books including the "Economics of Retailing," first published in 1915, but revised twice since, a book which has served as a standard text in educational institutions and as a practical guide to men in business since it was first issued. Among the other books of which I am the author are the "Economic Principles of Consumption," "Economics of Fashion," "Retail Selling and Store Management," and a pamphlet published by the [fol. 387] Chamber of Commerce of the U. S. on "Chain Stores." I am also the author of the articles on marketing appearing in the Twelfth, Thirteenth, and Fourteenth editions of the Encyclopedia Britannica. Besides the foregoing I have also written many articles on marketing for periodicals and have lectured frequently before trade and business groups on the same subject.

In the course of my studies on marketing which have been carried on for a period of over twenty years, I have been much interested, both from a practical and theoretical standpoint, in the development of the chain store systems and their effects upon business and upon public welfare in general.

I have read the Kentucky Gross Sales Tax Law and have given careful thought to its effects if permitted to remain in force in that state. The following represent my conclusions concerning the operation of the law.

The Kentucky Gross Sales Tax Law seems to assume either or both that:

1. As the volume of sales in retail concerns increases beyond $400,000 a year there is an increasing rate of net profit and therefore ability to pay increasing rates of taxes.

2. Retail concerns having a sales volume in excess of $400,000 a year are responsible for the decline in number

of small independent retailers and that for this they should be regulated, checked, or punished. Both of these assumptions are incorrect.

One of the marked characteristics of the retail trade as compared with manufacturing and other industries is that with certain exceptions, costs of operation do not decline when sales increase. In stores having but very small sales the expenses of operation, when properly charged, do run higher than the average, but when a retail store has reached a certain volume of business which varies according to lines handled and services rendered, but which for purposes of illustration may be said to amount to about $25,000 in sales per year in grocery stores and somewhat more than that in drug stores and hardware stores, a minimum cost of doing business is reached. Beyond this point increases in sales volume are usually accompanied by increases in expenses of operation so that the rates of expenses in larger stores are rarely less than in the smaller stores doing the [fol. 388] same kind of business and that have reached a point of efficient operation. Indeed the rates of expenses in concerns with higher sales are usually higher. Accurate compilations of retail store expense figures are available in support of this statement, such as the reports of the Harvard Bureau of Business Research on operating expenses in retail grocery stores, shoe stores, department stores, specialty stores, stationery and office supplies; the reports of the Bureau of Business Research of the State University of Iowa on grocery stores and the reports of the National Association of Retail Clothiers and Furnishers on men's clothing. In the reports of hundreds of retail stores compiled and presented in the foregoing there is a well established indication that, after some minimum sales point has been reached, which represents the necessary amount for efficient retail operation, the rates of expenses tend to rise as retail sales increase. There are a few retail lines in which there seems to be an exception to this rule just mentioned, such as in the hardware and the retail building material business, in both of which it appears that the rates of expenses of operation tend to decline slightly as the sales volumes increase. In all such cases, however, there are strong possibilities that the declines in expense rates found in concerns with larger sales may be due to differences in lines handled and services rendered. Thus, a hardware

dealer with a large volume of sales may and does often include heating and roofing contract work, the sale of automobiles and agricultural implements, and even wholesaling to local industries. These special forms of selling require less expense per dollar of sales and naturally tend to reduce the rates of expenses for the whole business.

It is a fairly well established fact that in retail businesses of the same kind, selling the same kinds of goods and offering the same services, the rates of expenses tend to increase as sales volumes rise. The reason for this difference in expense trends in the retail business compared with costs of operation in manufacturing and other industries is that the typical unit operation in retailing is the making of a sale to an individual customer and this most important part of retail store operation has never been and probably can never be reduced to the routine, the time and labor saving operations, characteristic of the mass production methods of a factory. Thus, the final cost of selling and delivering [fol. 389] the goods to the ultimate consumer tends to remain constant no matter what the size of business. There are economies in large retail institutions such as come from the distribution of general items of overhead expense over increasing sales, including rent, interest, heat, light, etc., but these savings are counterbalanced by the increases in expense due to additional supervision and record keeping required to maintain a large retail concern in efficient operation.

Since the rates of expense tend to rise with increases in sales volume in retail businesses of the same kind rendering the same types of services; the advantage in increasing sales lies in increasing purchasing power of the larger concern and thereby enabling it to buy its goods in larger quantities and at lower prices. To meet this advantage of the larger stores smaller independent retailers are uniting in large numbers for purposes of co-operative purchasing.

The most important factor in the earning of net profits in retailing as well as in every other business is managing ability. There are wide differences in actual net profits earned in all kinds of retail businesses and in all sizes of such businesses. There are numerous instances of retail concerns with small sales volumes who are able to earn high rates of net profit. Such energy and ability in the

smaller concern leads to its growth. Many of the larger retail concerns, though not without exceptions, represent higher average efficiency in operation. The range in managing ability is greater among small independent retailers than among concerns with large sales, but there are important differences in operating efficiency and net profit earning capacity in the large concerns as well. High net profits in the retail business are almost invariably the result of good management and not of size of concern or volume of sales.

It would be inaccurate to judge the chain store movement by the published statements of a few chain store systems, even of the leaders. There are well over eight thousand chain systems in the U. S. of which the sales records and statistics of operation of less than 100 are available. Of the seventy or more well known chain store systems several have enjoyed unusually high net profits for the following reasons:

[fol. 390] They have offered new and desirable varieties of goods and new services at new or different price lines not covered by the older retail dealers and have as a consequence grown rapidly and have earned very high profits. As an illustration, the 5 and 10 cent stores sell a hammer for ten cents, something unavailable at that price in the regular hardware stores before the chain stores came into existence. True, this ten cent hammer has very few of the qualities of a Maydole or a Plumb hammer, but it serves its purpose for many people who do not need a better quality hammer and the fact that it can be bought for ten cents instead of seventy-five cents or a dollar makes it a highly useful service to the public. Anyone may see on passing through the 5 and 10 cent chain stores, and many others as well, that much of the merchandise handled is not precisely competitive with the merchandise formerly found in the regular stores, but is of a different class and price level. The chain store systems have through their initiative in developing these new lines of trade earned and are entitled to their growth and success.

High net profits characterize all new and successful business enterprises but the high profits likewise attract and develop competition. The small regular independent retailers have learned and are learning the methods of the chains. They are adapting these methods to their own use

and, as a result, are able not only to hold their own against chain stores, but, as has been amply proved in a great many communities, are able to outsell their chain store neighbors. An examination of chain store trends during recent years has led many competent students of business to the conclusion that their era of pioneering and of high profits has already passed its peak and may henceforth be expected to decline. This does not mean that chain stores may not continue to grow, but it may mean that their growth will be much less spectacular in the future. Certainly the chain store systems taken as a whole have given no indication of any special ability to withstand the stress of business depressions any better than independent retailers. The chain store method of operation is not a sure road to profit-making success.

The belief that chain store organizations are in some way responsible for the high mortality rate among small independent retailers as well as for the decline in impor- [fol. 391] tance of many small trading centers needs but a little analysis to show its fallacy. The failure rate among small independent retailers has always been high and long before chain store systems appeared in our system of distribution. As early as 1840, General Henry A. S. Dearborn, then collector of the port of Boston, in an address before the Massachusetts Legislature, stated: "After an extensive acquaintance with business men and having long been an attentive observer of the course of events in the mercantile community, I am satisfied that among one hundred merchants and traders not more than three in this city ever acquire independence."

In 1870's, David A. Wells, a well known American economist of that period, estimated that at least ninety per cent of those who go into the retail business fail.

In his testimony before the Industrial Commission in 1900, John Wanamaker stated that only about four per cent of all who embark in mercantile business succeed. He also quoted A. T. Stewart, a great New York merchant, who died in 1876, who had claimed that only two per cent of all retail dealers succeeded. Much similar evidence might be added.

Certainly the present failure rate among retailers is no higher than, if indeed as high as, it was in these earlier years. This statement is based on studies made by myself

and described in "Economics of Retailing," Vol. I, Chap. XIV, "Failure Rate in the Retail Business," and by Professor E. D. McGarry of the University of Buffalo in his "Retail Trade Mortality."

With respect to the decline in importance as trading centers of many small towns throughout the country it is obvious that this decline has had little or nothing to do with the chain store development and would certainly have taken place had there never been any chain stores. The main reason for the decline of trade in the smaller towns is, of course, the increased facility of transportation by rail, especially by good roads and automobiles, and more recently by cheap bus fares. With the present development of good roads and the common use of automobiles in the state of Kentucky there cannot be many families who are more than two or three hours riding distance from a good sized city either within or outside of the state. It is attractions of the larger cities that have caused the trade [fol. 392] in smaller towns to decline. The chains have had but little to do with this major movement. In fact, the coming of chain stores to small towns has in many cases helped to re-create the trade of those towns and to hold it from going to larger cities.

It is frequently alleged that the independent retailers in the smaller towns provide a substantial leadership in political, civic, social, religious, and educational interests which is broken down by the growth of the chain store systems. There are many independent retailers who do serve their communities s-lendidly, but it would be an error to assume that all or even a majority of independent retailers provide such excellent service to their communities. Most of them do not. How could it be otherwise? It must be borne in mind that a very large proportion of independent retailers have very insignificant businesses and, while the volume of business done is, of course, not a direct measure of the importance of the retailer in his community it may safely be taken as a rough guide. According to the trial census of distribution taken by the U. S. Bureau of the Census in 1927, covering eleven American cities, it was found that 28% of all of the independent retailers had sales volumes of less than $5,000 a year; 46% had sales of less than $10,000 a year; and 74% had a business of less than $25,000 a year. Obviously, with retail sales of less

than $5,000 or even less than $10,000 a year there can be no satisfactory economic business unit. Clearly, most of these small concerns are merely trial efforts, a fringe or margin of concerns recently established, of concerns about to give up business, or of concerns desperately trying to maintain a place in the distributive mechanism. A few of such small concerns eventually become larger and successful. Most of them eventually give up the struggle only to be followed by a constant stream of new beginners. These conditions clearly illustrate that most retailers are not and cannot be important factors in their communities. These conditions also explain why there is such a high failure rate as that which has always prevailed in the retail field. The chain store system of distribution is not responsible for these conditions for these conditions existed long before the chain stores were ever heard of. The chain store systems merely serve as a convenient but fallacious excuse [fol. 393] for the present rapid turnover of such retailers. Back in the years from 1905 to 1915 the mail order houses were blamed for the decline of small towns and the high failure rate of small independent retailers. In an earlier period, from 1895 down to 1905, many small retailers tried to place the responsibility for their failures on the department stores, that were then coming into prominence. After the present agitation about chain store systems has passed away I have no doubt but that some new reason will be advanced.

There is ample evidence that independent retailers do not need special protection against the chain store systems. There are thousands of independent retailers, small as well as large, who have amply demonstrated during recent years their ability to meet the competition of chain stores successfully. The elements of effective retailing are the same for all classes of retail institutions. They include convenient location, suitable building and equipment, carefully selected stocks of merchandise such as people want, fair competitive prices, good, clean housekeeping and attractive display, courteous, intelligent sales service, suitable forms of publicity and enough capital to finance the store, its purchases of goods and, where credits are granted, to carry customer accounts. There is not a single element in this list in which independents cannot by the application of intelligence and energy do as well as, or better

than, chain systems excepting possibly in the purchase of goods and in the use of certain forms of advertising. Chain store systems as well as larger stores, as is well known, are able to purchase larger quantities of all goods handled and consequently to buy them for less. The independent retailer cannot on his own secure this advantage, but by combining with a sufficient number of other retailers for the purpose of purchase of goods he can do as well as the chains. There has been a very rapid development in this direction. Considering but one field alone, more than 60,000 retail grocers throughout the country, and a proportionate number of these in the state of Kentucky, now belong to such co-operative buying organizations and enjoy the advantages of quantity buying which was introduced by the department and chain store system. Indeed with buying power equalized a great many independent retailers [fol. 394] are able, through the exercise of good management in the conduct of their business, to meet the requirements of their respective communities more successfully than the chain stores. The size of the chain store system is both its strength and its weakness. It possesses buying power and operates under highly standardized methods but its very size makes it inflexible and prevents it from meeting the individual requirements of local communities. It is in this respect, particularly, that independent retailers have shown themselves superior to the competition of chains.

The chain store system of distribution which has grown up as a part of our present distribution of goods has had the effect of setting the pace for the improvement of retailing, for better and cleaner stores, for more efficient operation, for lower prices, and for closer attention to the requirements of consumers. This does not mean that chain stores either invariably or regularly sell for less than independent stores, although there have been some local studies indicating this effect. It seems sounder to assume that, considering differences in qualities of goods handled and varieties of services rendered, there are probably not now any important differences in the prices charged by chain stores and independent stores wherever they are in active competition. Everyone must grant, however, that had it not been for the advent of the chain stores retail store operation would still be conducted in old-fashioned

ways, the expenses of operation would have been higher, there would have been more leaks and wastes in operation and prices of practically all commodities would have been higher to the public. Independent stores, both small and large where managed by competent business men, are everywhere meeting the challenge of chain store competition and are giving as good or better merchandise and service at as low prices as the chain store and the net result of this competition has been and is now enormously advantageous to the consuming public.

Chain store organizations are often criticized for their lack of interests in the civic and social affairs of the communities in which their stores are located. There has been some basis for this criticism. The earlier chain store operators have been so much taken up with the problems of the establishment and management of their new stores [fol. 395] that they have often forgotten that the success of their stores is, of necessity, dependent upon the success of the communities in which they are located. A chain store organization's interest in any community in which it has a store may not be so individual and particular as that of an independent retailer located in that community, but the chain store does have the same reasons for interest in the growth of the community as the independent. A more intelligent self-interest on the part of the chains is certain to result in a more active interest and participation in all community affairs. Some of the chain store systems have during recent years made serious approaches towards meeting this problem fairly and squarely and there is every reason to expect that others will follow their lead. The truth is that in many towns in which there are both chain stores and independent stores one now finds both chain store managers and independent retailers in increasing number working together for the welfare of their community.

The Kentucky Gross Sales Tax Law provides for the assessment of a graduated tax against gross sales rather than net sales. Gross sales constitutes an unfair basis for the computation of such a tax for gross sales represent the total volume of business without taking into account returned goods, adjustments, and deductions which must occur to some extent in every retail business. There are, however, very wide differences in the amount of returns

and allowances. They run considerably higher in clothing, furniture, floor coverings, and other kinds of home furnishings than in groceries and drugs. Returns run heavier in stores having a credit business and still heavier in instalment selling concerns than in all-cash businesses. Consequently the burden of this tax will fall heavier on certain kinds of businesses than on others. Furthermore it is the common experience in retailing that as the sales volume increases the volume of returns and allowances increases still more rapidly. In the report of operating results of department and specialty stores in 1929, Bulletin No. 83, Harvard Bureau of Business Research, page 46, it is shown that the amount of returns and allowances range from 1.7% for concerns with sales less than $150,000 and then regularly upward to 14% for concerns with sales of $10,000,000 or more per year. Under the terms of the Kentucky law the larger concerns with the heavier burdens of [fol. 396] returns and allowances would also have to bear heavier burdens of taxes not only on their actual net sales but also on their returns and allowances as well.

The incidence of the Kentucky Gross Sales Tax may be questioned. If the tax be added to the expenses of operating and the retail prices raised so as to shift the tax to the consumer then the real burden of the tax will fall on people least able to bear it. By far the largest part of the total sales of chain stores as well as of department stores, the stores which would be most affected by this tax, is made to the masses of the people who have but very moderate means. Granting many individual exceptions, wealthier classes of the people do not, as a rule, constitute an important amount of patronage of any chain or department store. These larger sales organizations are large because they serve the masses. A large part of the income of the poorer people is expended for food and other necessities of life bought in retail stores, whereas the more well-to-do spend smaller proportions of their incomes in this way. It is clear that if the tax can be shifted, then the main burden would fall on the poorer people of the state.

It is debatable, however, whether the tax can be shifted to the customer. Retail prices, on most goods, are subject to very keen competition. Most housewives who buy the necessities of consumption sold by retail stores are very keen to notice price differences. Any attempt on the part

of any retail dealer or group of retail dealers to raise their prices to cover the amount of this tax would be certain to meet a loss in custom. Even a one per cent difference in price, other things being equal, would result in a gradual transfer of trade. If the tax cannot be shifted then it places an inequitable burden on the concerns with the larger sales which, as we have pointed out, do not necessarily have greater ability to pay this tax.

This tax falls progressively heavier upon concerns whose gross volume exceeds $400,000 a year. It reaches its heaviest burden at a million dollars a year and more. Retail organizations with low net profits will find the tax confiscatory. Any concern with sales in excess of a million dollars a year but with a net profit of less than 1% on sales will have practically its entire profit taken by the tax. Less [fol. 397] than 1% net profit on sales is not unusual in the retail trade. In the Harvard report, referred to above, the average profits reported by over 600 department stores and specialty stores for 1929 averaged less than 1%. This was for a year of good business conditions; for a year such as 1930 the average results for all types of mercantile institutions must be even much lower. Retail stores having net profits of less than 1% on net sales will find it more profitable in net results to limit their sales to about $400,000 a year rather than to make additional efforts to increase this volume and retail concerns already enjoying sales volumes of a million dollars or more but with net profits of 1% or less will find it to their advantage to close up a part of their businesses, dismiss many of their employees and dispose of a large part of their retail store facilities. By so doing, they will be money ahead.

The net effect of the Kentucky Gross Sales Tax Law if continued will be to penalize the larger concern for its size and, in effect, to subsidize smaller retailers regardless of their relative efficiency in operation or usefulness to society. This tax will discourage the growth of business beyond certain points and eventually defeat its own purpose. It does not seem conceivable that these effects could have been given proper consideration by the legislature at the time the law was made.

One may sympathize with the efforts of the law-makers of the commonwealth of Kentucky in their struggle to shift the heavy tax burdens now carried by the people of that

state, but a tax of the nature directed by this law, which falls so inequitably on a small proportion of concerns whose sales happen to exceed the arbitrary limit of $400,000 a year cannot possibly be the final answer. The tax cannot help but be detrimental not only to those individual concerns who must immediately bear its burdens but also to the progressive development of the state of Kentucky.

Paul H. Nystrom.

[Duly verified.]

[fol. 398] AFFIDAVIT OF JAMES R. KARIBO

STATE OF KENTUCKY,
County of Jefferson, ss:

The affiant, James R. Karibo, being duly sworn, states:

I am Manager of Liggett's Drugstore, owned and operated by Louis K. Liggett Company, at 302 South Fourth Street in Louisville, Kentucky. I have held that position since the store was opened at that point on October 14, 1930.

The Louis K. Liggett Company owns and operates throughout the United States what is known as a system of chain drug stores, but it owns and operates only one drug store in the State of Kentucky.

As Manager of Liggett's Louisville Store, affiant, on February 4, 1931, received through the United States mail, in due course, the attached circular letter written upon a letterhead of the Kentucky Pharmaceutical Association, Secretary's Office, 228 West Main Street, Frankfort, Kentucky, which was enclosed and received in the attached envelope, postmarked as mailed at Frankfort, Kentucky, on February 3, 1931, at 6 P. M., and bearing the return address of J. W. Gayle, Secretary, Kentucky Pharmaceutical Association, 228 West Main Street, Frankfort, Kentucky. Such letter and envelope are filed herewith and made part of this affidavit, marked "Exhibit 1."

The attached letter speaks for itself, as to its terms, and therefore affiant will make no comment upon it further than to say that the letter bears the fac simile signature of J. W. Gayle, Secretary of the Kentucky Pharmaceutical Association, with which signature affiant is familiar because he has repeatedly seen it upon the licenses issued to registered

pharmacists employed in the drug store managed by affiant, said licenses being issued and signed by said J. W. Gayle in his capacity as Secretary of the State Board of Pharmacy of Kentucky.

James R. Karibo.

Subscribed and sworn to before me by James R. Karibo this 5th day of February, 1931. My commission expires March 4, 1934. Lilly R. Warren, Notary Public, Jefferson County, Kentucky.

[fol. 399] EXHIBIT 1

[Kentucky Pharmaceutical Association]

January 16, 1931.

To the Druggists of the State of Kentucky:

The retail sales tax law (anti-chain store bill) is being contested in the courts. If the courts decide against us it will be a victory for the chains and will cost you plenty. Read this letter and act quickly.

At the last session of the Kentucky Legislature that august body passed a retail sales tax law. That law is effective now and Kentucky merchants are compelled to file a schedule during January of 1931 indicating their sales for 1930.

This new law subjects you to the payment of a sales tax as follows:

1/20 of 1% on the first $400,000 of sales.
2/20 of 1% on the next $100,000 of sales.
5/20 of 1% on the next $100,000 of sales.
8/20 of 1% on the next $100,000 of sales.
11/20 of 1% on the next $100,000 of sales.
14/20 of 1% on the next $100,000 of sales.
17/20 of 1% on the next $100,000 of sales.
1% on all sales over $1,000,000.

The sliding scale, as indicated above, was inserted in the measure for our benefit. Credit for special license taxes was also made a part of the measure to lessen our burden under the act.

For instance: If you pay $5.00 to operate a soda fountain; $10.00 to handle tobacco and $10.00 to handle soft

drinks and ice cream, this $25.00 or any part thereof, may be deducted from the amount of tax you may be subject to under the new law. Prescription liquor sales are not taxable. State restaurant license and playing card licenses are also deductible from the tax.

To illustrate: If you sales are $50,000 annually, your sales tax, according to the above schedule of 1/20 of 1%, would be $25.00. If you paid the three special licenses rereferred to heretofore, you will be given a credit of $25.00, consequently you will file a return showing your sales and [fol. 400] by taking advantage of your credits the account will balance and you will pay nothing under the new law.

If the sliding scale had not been adopted and credits were not allowed for special licenses, the tax would have been as follows:

1% of sales on $50,000 business or $500.00 tax.

If your business amounts to $25,000 annually you would have been subject to a tax of $250.00. Using $25,000 as a basis of sales and with the schedule finally adopted of 1/20 of 1% your tax will be $12.50, subject of course to the deduction of any special licenses you might pay.

Any one knows that the State Legislature has a perfect right to instigate any legislation to take care of the state governm[illegible] expenses.

One half of the amount derived from this tax is to go to the Penal and Charities Board for the upkeep and extension of our penal and charitable institutions. The other half of the money derived under the law will go to retire the state debt.

The law is being contested in both State and Federal courts and will unquestionably be carried to the Supreme Court of the United States. Those who are seeking to prove that the law is unconstitutional are taking it into the courts on the grounds that the sliding scale is discriminatory and thereby violates both the State and Federal Constitutions.

In order to do this we must have funds to protect the law in the courts. The case has already been heard in the Franklin Circuit Court but no decision has as yet been handed down. Another suit has been filed in the United States District Court at Covington. One of the courts will no doubt throw the case out on the grounds that it has no jurisdiction or the cases will be consolidated. The battle is being waged on the sliding scale end of the law and if

the independent trade does not supply legal talent to defend the sliding scale the measure will have no champion. The opponents (chain stores) will use the best legal talent money can buy to set the law aside.

Each merchant in the State of Kentucky *MUST* subscribe $2.00 in order that we may engage the proper legal talent and thereby insure the independent merchants of this commonwealth appropriate representation in presenting its argument that the sliding scale is constitutional and should be upheld.

[fol. 401] If this sliding scale is thrown out there is no doubt but what a flat 1% sales tax law will be enacted and then the independents will be subject to the maximum tax instead of the minimum tax as is in evidence in the sliding scale.

Firms having two or more stores must couple their sales as one individual firm or institution. You can therefore readily see that chain institutions will be subject to the maximum tax while the independent will be subject to the minimum tax.

Our investigation has shown that very few independent retailers enjoy business in excess of $400,000. Our further investigation indicates that 90% enjoy a volume of less than $50,000, hence 90% of the independents will pay nothing under this new law and 10% will pay a very small tax. What a wallop the chains get by having to pay the maximum of 1% under the sliding scale.

We know that one chain institution alone will be subject to a tax under this new law in excess of $150,000.

The case was taken into the courts last week and the emergency calls for immediate action. Arrangements have been made for proper legal talent to represent the independents' interests. Your share in this is $2.00. Send it now. Do not wait a day. It is either pay $2.00 now or many, many times that amount later...

Action please!

Very truly yours, J. W. Gayle, Secretary.

P. S.—Make all checks payable to the Kentucky Pharmaceutical Association and mail to J. W. Gayle, Secretary, Frankfort, Kentucky.

[Envelope]

After 5 days, return to J. W. Gayle, Secretary, Kentucky Pharmaceutical Association, 228 West Main Street, Frankfort, Ky.

Frankfort, Ky., Feb. 3, 1931, 6 P. M.
Liggett's Drug Store, 302 S. 4th Str., Louisville, Ky.

[fol. 402] AFFIDAVIT OF N. A. BASH

STATE OF KENTUCKY,
County of Jefferson, ss:

The affiant, N. A. BASH, being duly sworn, states:

I am District Manager at Louisville, Kentucky, of the Hook Drug Company, which operates five retail drug stores in Louisville, Kentucky, four known as Hook Drug Company stores and one known as the E. H. Bennett Drug Company store, these being the only stores operated by it in the State of Kentucky. I have held my position since September, 1927.

The Hook Drug Company owns and operates in Kentucky and Indiana what is known as a system of chain drug stores, embracing 38 stores in Indiana, to which should be added 5 stores in Louisville, making 43 stores in all operated by it. I am a registered pharmacist in Kentucky, and by virtue of such registration I am, pursuant to Section 2627, Kentucky Statutes, a member of the Kentucky Pharmaceutical Association, which includes all registered pharmacists in the State.

I have read the affidavit of James R. Karibo and the circular letter attached thereto as "Exhibit 1," which is addressed under date January 16, 1931, "To the Druggists of the State of Kentucky" and signed by J. W. Gayle, Secretary, on behalf of the Kentucky Pharmaceutical Association, the said Gayle being also Secretary of the State Board of Pharmacy of Kentucky. By way of explaining the circumstances under which said circular letter was sent out, affiant makes the following statement:

In the retail drug trade in Louisville and in the larger cities of Kentucky there is keen competition among the so-called "National Chains," several of which own and operate retail drug stores in Kentucky, namely, Hook's, Wal-

green's, Liggett's, Dow's and Whelan's, the latter being known locally as Taylor Drug Company stores. There is also competition in the retail drug business between the so-called "chain" drug stores on the one hand, and the so-called "independent" drug stores (that are owned or operated either as individually-owned drug stores or as locally-owned chains) on the other hand. Accordingly the so-called independent or individually-owned drug stores have [fol. 403] attempted in every way to secure an advantage to themselves by advocating the enactment and enforcement of such legislation as the 1930 Kentucky "Gross Sales Tax Law" in order to handicap chain drug stores and other drug stores having a large volume of sales, with a heavy burden of taxation, from which all the so-called independent drug stores or locally-owned chains are practically exempt. In fact, fully 90 per cent of them will pay no tax under the law, and the remaining 10 per cent will pay but a very small tax.

To that end, the Secretary of the Kentucky Pharmaceutical Association has sent out to its members, who are widely scattered throughout the State and who include all pharmacists and assistant pharmacists registered in Kentucky, and even to some druggists who are not members, the circular letter addressed under date January 16, 1931, "To the Druggists of the State of Kentucky," a signed copy of which letter is attached to the affidavit of James R. Karibo.

Noah A. Bash.

Subscribed and sworn to before me by N. A. Bash this 6th day of February, 1931. My commission expires March 4, 1934. Lilly R. Warren, Notary Public, Jefferson County, Kentucky.

[Title omitted]

NARRATIVE OF TESTIMONY OF SHIRLEY E. HAAS GIVEN BEFORE CLARENCE E. WALKER ON THE TENTH DAY OF FEBRUARY, 1931

SHIRLEY E. HAAS testified as follows:

That he is a resident of Louisville, Kentucky, and is the Secretary of the Kentucky Food Distributor's Association,

the Retail Grocers Association and the National Association of Retail Grocers.

That as Secretary of the Kentucky Food Distributor's Association he sent out about December the 6th, 1930, a bulletin to the grocery trade of the state of Kentucky, a copy of which bulletin was introduced in evidence as Exhibit 1, and which bulletin reads as follows:

[fol. 404] "To the Grocery Trade of the State of Kentucky:

The retail sales tax law (anti-chain store bill) is being contested in the courts. If the courts decide against us it will be a victory for the chains and will cost you plenty. Read this letter and act quickly.

At the last session of the Kentucky Legislature that august body passed a retail sales tax law. That law is effective now and Kentucky merchants are compelled to file a schedule during January of 1931 indicating their sales for 1930.

This new law subjects you to the payment of a sales tax as follows:

1/20 of 1% on the first $400,000 of sales.
2/20 of 1% on the next 100,000 of sales.
5/20 of 1% on the next 100,000 of sales.
8/20 of 1% on the next 100,000 of sales.
11/20 of 1% on the next 100,000 of sales.
14/20 of 1% on the next 100,000 of sales.
17/20 of 1% on the next 100,000 of sales.
1% on all sales over $1,000,000.

This law, as originally planned was to be a straight 1% on all sales. The Kentucky Food Distributors Association insisted on the sliding scale indicated above. In addition, the Association was successful in writing into the bill a paragraph to the effect that all special state licenses could be credited against the sales tax.

For instance: If you pay $10.00 to handle oleomargarine; $10.00 to handle tobacco and $10.00 to handle soft drinks, this $30.00, or any part thereof, may be deducted from the amount of tax you may be subject to under the new law.

To illustrate: If your sales are $60,000 annually, your sales tax, according to the above schedule at 1/20 of 1%, would be $30.00. If you paid the three special licenses re-

ferred to heretofore, you will be given a credit of $30.00, consequently you will file a return showing your sales and by taking advantage of your credits the account will balance and you will pay nothing under the new law.

If the Association had not stepped in and insisted on a sliding schedule and credits for special licenses the tax would have been as follows:

1% of sales on a $60,000 business or $600.00 tax;

[fol. 405] If your business amounts to $25,000 annually you would have been subject to a tax of $250.00. Using $25,000 as a basis of sales and with the schedule finally adopted of 1/20 of 1% your tax will be $12.50, subject of course to the deduction of any special licenses you might pay.

Now here is the crux of the situation and the reason that this letter is being sent you.

Any one knows that the State Legislature has a perfect right to instigate any legislation to take care of the state government expenses. One half of the amount derived from this tax is to go to the Penal and Charities Board for the upkeep and extension of our penal and charities institutions. The other half of the money derived under the law will go to retire the state debt.

This law is to be contested in the courts of the State of Kentucky and will unquestionably be carried to the Supreme Court of the United States. Those who are seeking to prove that the law is unconstitutional are taking it into the courts on the grounds that the sliding scale is discriminatory and thereby violates both the State and Federal Constitutions.

It is up to this Association to prove in the Courts that the sliding scale is not discriminatory and does not conflict with either the State or Federal Constitution.

In order to do this we must have funds to carry the case into the courts. Suit is being filed now in the Franklin Circuit Court testing the constitutionality of the sliding scale end of this law. If the grocery trade does not supply legal talent to defend the sliding scale, the measure will have no champion. Consequently our opponents (chain stores) will use the best legal talent money can buy to set the law aside.

Each merchant in the state of Kentucky must subscribe $2.00 in order that the Association may engage the proper

legal talent and thereby insure the independent merchants of this commonwealth appropriate representation in presenting its argument that the sliding scale is constitutional and should be upheld.

If this sliding scale is thrown out there is no doubt but what a flat 1% sales tax law will be enacted and then the independents will be subject to the maximum tax instead of the minimum tax as is in evidence in the sliding scale.

Firms having two or more stores must couple their sales [fol. 406] as one individual firm or institution. You can therefore readily see that chain institutions will be subject to the maximum tax while the independent will be subject to the minimum tax.

Our investigation has shown that very few independent retailers enjoy business in excess of $400,000. Our further investigation indicates that 92% enjoy a volume of less than $60,000, hence 92% of the independents will pay nothing under this new law and 8% will pay a very small tax. What a wallop the chains get by having to pay the maximum 1% under the sliding scale.

We know that one chain institution alone (and one in the grocery business by the way) will be subject to a tax under this new law in excess of $150,000.

The case is being taken into the courts this week and the emergency calls for immediate action. The Association has therefore made arrangements for proper legal talent to represent the grocers' interests. Your share in this is $2.00. Send it now. Do not wait a day. It is either pay $2.00 now or many many times that amount later.

Action please!

Very truly yours, Shirley E. Haas, Secretary.

That the statements contained in the bulletin are true to the best of his knowledge; that few independent retailers enjoy business in excess of $400,000 and that 92% enjoy a volume of less than $60,000 and that for that reason 92% of the independent retailers would pay nothing under the Gross Sales Law of Kentucky, and that the remaining 8% of the independents would pay a very small tax under the Act; that his figures apply particularly to the Grocery trade; that one grocery concern, viz: The Great Atlantic & Pacific Tea Company, would be subject to a tax in excess of $150,000 under the law.

That about 2% of the merchants in the grocery business do above a quarter million dollars worth of sales; that there is a breakdown at $249,999, and another from $250,000 to $499,999 and that the next breakdown is $500,000 to $1,000,000 and over $1,000,000; that there is no breakdown figure at $400,000; that he could not point out any independent retailer outside of multiple outlet stores and department stores that enjoyed a business in excess of $400,000 aside from Byck Brothers, in Louisville.

[fol. 407] That about 800 or 1,000 bulletins similar to the one introduced in evidence were sent out to members of the Association; that upon request he attended the sessions of Kentucky Legislature at the time the Gross Sales Tax Law was passed, and that he attended one meeting of the Committee when the Bill was considered; that as a result he had personal knowledge of the statements made in the Bulletin with reference to the action of the Legislature.

That the sliding scale written into the Act was the one advocated by the Kentucky Food Distributors Association; that the Association suggested the paragraph in regard to crediting of special state licenses against the Sales Tax.

That the statement in the bulletin "suit is being filed in the Franklin Circuit Court attacking the constitutionality of the sliding scale and of this law" did not have reference to any particular suit but that at the time the statement was made he knew that suit was going to be filed; that the Chairman of the Penal and Charities Board, Judge Haswell, personally informed him that the Board was attempting to make certain purchases of land and certain alterations and improvements in Penal institutions and that they wanted to ascertain the amount of money that they could expect from the law in order to lay out their plans.

That this information was given to him some time in October or November of 1931 and that Haas was of the opinion that his assistance was desired; that suit was eventually brought in the Franklin Circuit Court of Kentucky by a Mr. Moore against the State Board of Charities and Corrections of Kentucky; that Mr. Forrest Moore, the plaintiff, was a member of the Association of which Mr. Haas was Secretary, prior to and at the time the suit was instituted; that Mr. Haas never communicated with Mr. Moore about the suit; that Mr. Haas did not know whether Mr. Moore

was present at the trial of the suit filed by him in Frankfort, and that Mr. Haas never communicated with Mr. Briggs, who was Mr. Moore's lawyer.

That the reference in the bulletin to suit being filed in the Franklin Circuit Court was not made in contemplation of the Moore suit, but was made with regard to a similar one on behalf of another man who had been picked out to file the suit; that Mr. Haas was informed through Leslie Morris, who represented the penal and Charities Board, that they would pick out someone as plaintiff to bring an action to [fol. 408] test the law; that he mailed out a bulletin on December 27 1930, which was addressed to the Grocery Manufacturers and Wholesalers in the State of Kentucky, which bulletin was introduced in evidence and reads as follows:

"To Grocery Manufacturing and Wholesalers in the State of Kentucky:

On December 9th we wrote you stating that a test suit had been filed in the Franklin Circuit Court to test the legality of House Bill No. 111, more appropriately termed "the 1930 retail sales tax law."

Since that time you doubtlessly have read in the press, confirmation of the above statement. You may think you are not interested in the outcome of this case, due to the fact that the law specifically states that the sales tax is to be levied only on retailers.

While our state law makers were considering this sales tax measure, a Committee from this Association worked with them in an attempt to create a measure that would be of the most value to independents w-ere engaged in manufacturing, wholesaling or retailing.

One of the hardest battles, fought and won by this Committee, was to have our State law makers insert in the measure the word "retail". We fought over this one word from ten o'clock one evening until five o'clock the next morning before we could convince our State Representatives and Senators that a straight sales tax on all branches of business would be unsound.

Here is another copy of the bulletin we enclosed with your letter of December 9th which is written primarily to appeal to retail distributors. It sets forth the final bill enacted by the 1930 General Assembly.

House Bill No. 111 was the only tax measure passed by the 1930 Assembly. The State must have money to retire its public debt and to take care of the overcrowded condition in the State Penal and Charitable institutions. If this law fails to run the gauntlet of the courts, a special session of the Legislature will unquestionably be called and just what new measure will be passed we will leave to your imagination.

We have evidence from the best legal authorities in the United States that the law as it is written is constitutional, [fol. 409] but we will have to supply the necessary legal talent to prove it. Won't you therefore not only send us your check for the $10.00 that we asked you for in our last letter, but get your sales force to work collecting $2.00 from the retailers as outlined in the enclosed bulletin?

A few wholesalers and manufacturers in Kentucky have responded gloriously and we thank them from the bottom of our heart, but not enough to take care of the task at hand. If you want to save yourself an abundance of grief in the future, send $10.00 now and get your sales force busy collecting $2.00 from each retailer.

For your own protection, act at once.

Very truly yours, Shirley E. Haas, Secretary."

and that he sent out bulletin dated December 9, 1930 to the Wholesale trade, which bulletin was introduced in evidence, marked Exhibit 3, and reads as follows:

December 9, 1930.

"To the Wholesale Trade:

A test suit has been filed in Franklin Circuit Court to test the legality of House Bill No. 111, which, as you know, is the so-called Anti-Chain Store Tax Bill, passed at the last session of the Kentucky Legislature.

Independent wholesale and retail grocers have been called on to meet the emergency and supply legal counsel for the defense of this measure. The chain stores will use every measure at their command to have the bill declared unconstitutional. If we are not represented by competent legal counsel, there is a likely possibility of the chains finding some flaw that will reduce the law to a flat rate of 1%

tax on all sales, whereas the present status of the bill protects independent retail grocers on a graduated scale of low rates.

The necessity for quick action on the part of the Kentucky Food Distributors Association in securing legal counsel made it impossible to consult all interested parties before obligating ourselves for the cost of defending this case through the courts. Those of us in position to know the importance of having legal representation felt safe in authorizing the Kentucky Food Distributors Association to employ legal counsel, and pro rate the cost among wholesale and retail grocers.

[fol. 410] An assessment of ten dollars against each wholesale grocer, and two dollars against retail grocers will be ample to carry the case through the courts. Of course, all who realize the importance of winning this case will be more than glad to contribute the small per capita sum needed to supply legal counsel. However, the real problem is getting the message to the retail grocer, and collecting the two dollars. This obligation must fall on wholesale grocers, who are doubtless in better position to make the collections, through their salesmen, than any one else.

The enclosed bulletin, treating the case from the retailers point of view, explains the whole proposition in detail. Please read carefully, and arrange to get your salesmen at work with retail grocers as soon as possible. Just a few days of well directed effort on the part of your salesmen will clear up our financial needs, and protect independent wholesale and retail merchants against the likelihood of tremendous losses which might be the result of our failure to defend the measure.

More of the enclosed bulletins will be supplied you if desired for your salesmen to use in presenting the case to the retail trade.

We must get our money together not later than December 20. Please mail your check for ten dollars at once, and get your salesmen to work with the least possible delay. It would be nothing short of a calamity to individual merchants if we fail to meet this emergency, and the cost would be many times more than our present investment should we fail to keep House Bill No. 111 a law.

Yours respectfully, Shirley E. Haas, Secretary."

That he sent out bulletin dated January 24, 1931, addressed to the Wholesale Grocery Trade of the State of Kentucky; which bulletin was introduced and marked Exhibit 4 and reads as follows:

"To the Wholesale Grocery Trade of the State of Kentucky:

Some of the wholesalers in the State of Kentucky have received retail sales tax blanks from the State Tax Commissioner at Frankfort with instructions from the Commission that wholesalers must pay a retail sales tax on all [fol. 411] sales made by them at retail. The instruction seem to imply that merchandise sold to restaurants, hotels, and institutions constitute a retail sale. This is not the case, according to a statement made to this office January 23rd, 1931, by Commissioner Glenn.

If you sell hotels, restaurants or institutions in wholesale quantities and at wholesale prices you are not subject to tax under the retail sales tax law. Therefore, you should not file a return with the Tax Commission, unless you actually carry on retail business.

This information is being passed on to you in order that you may thoroughly understand that the sales tax law passed by the last session of the Kentucky Legislature is purely a tax on retail sales only.

Respectfully yours, Shirley E. Haas, Secretary.

P. S.—Have you solicited your retail customers for $2.00 each as a subscription to the fund being created to furnish legal talent to our state authorities to prove the retail sales tax law constitutional? Assistance please!

S. E. H."

That to the best of his knowledge these were all the bulletins sent out to members of the Association relative to the Cross Sales law.

It is agreed by and between counsel for plaintiff and counsel for the defendant that the foregoing is a correct narrative statement of the testimony contained in the deposition of Shirley E. Haas taken before Clarence E. Walker, a Notary Public, on February 10, 1931, in Louisville, Ken-

tucky, and introduced in evidence in the above entitled case, and it is further agreed that this narrative form may be used as part of the record in the appeal to the Supreme Court of the United States as a substitute for the deposition introduced before the three-judge court.

——— ———, Counsel for Plaintiff. S. H. Brown, Counsel for Defendant.

[fol. 412] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY

In Equity. No. 3908

[Title omitted]

NARRATIVE OF TESTIMONY OF VARIOUS WITNESSES

W. P. Sullivan

W. P. SULLIVAN, called for plaintiff, testified as follows:

He was a member of the State Tax Commission since March, 1932. Prior to that time he had been Cashier of the Farmers Deposit Bank of Frankfort and had been connected with the bank for about 20 years. As a result of his experience he was able to state the market value of Kentucky State warrants issued against the general fund. He stated that State warrants sold at par until three or four years prior to the giving of his testimony which occurred on May 29, 1933. During the last three years preceding the time his deposition was taken he had seen warrants sell as low as 85. They were selling at 92 the day of his testimony.

In 1930 State warrants issued in 1925 were purchased by him and at that time he paid 97½, plus accrued interest. He thought they sold between 90 and 100 during the year 1931 and they went as low as 85 in 1932. They did not stay at 85 very long but went back to 96 in 1932.

[fol. 413] There was no cross-examination.

W. R. Robinson

W. R. Robinson, called for the plaintiff, testified as follows:

He was 33 years old and resided at Frankfort, Kentucky, and was supervisor of the Gross Sales Tax Department of the State of Kentucky, having acted as such since August, 1932. His predecessor in office was Joseph Martin, who at the time the testimony was taken was no longer employed by or on behalf of the State of Kentucky. Mr. Robinson was acquainted with A. H. Brendel, an accountant residing at Cincinnati, Ohio. The latter had done work under the supervision and with the permisssion of Mr. Robinson which work consisted of checking over the returns and making an analysis of the retail sales tax returns. Mr. Brednel had only been in the department once since Robinson had been in charge but prior to that time Brendel was there twice to Mr. Robinson's knowledge. Mr. Robinson was assistant supervisor at the time Martin was in charge of the department.

Mr. Brendel checked the records from the receipt books. These receipts show the amount of sales, the gross sales, the exemptions and the amount of tax paid. The witness thereupon produced some books and identified them as the receipt books which were made available for examination by Mr. Brendel. He thereupon stated that these books contained the information as to the amount of the tax, who made the return and the amount paid. They also showed exemptions and deductions allowable under the law. He testified that Mr. Brendel had access to the returns themselves but he did not know whether Brendel used them or not. The witness then produced some of the actual returns which were reports for current years, being reports for the calendar year ending December 31, 1932. The wit- [fol. 414] ness had checked one of the reports made by Brendel and he found it to be accurate with a few minor errors. The particular analysis which he checked was the one for the year 1930, covering returns filed during the period ending December 2, 1932.

The witness then stated that the paper which he had filed showed that reports showing retail sales in excess of one million dollars were filed to the number of four, three indicating a tax and one indicating no tax.

The witness then produced the tax return for D. T. Bohon Company for the year 1930.

The witness thereupon was asked several questions about the return. Upon the advice of the Assistant Attorney General he declined to reply to the questions. He also declined to produce the reports for the same company for the years 1931 and 1932.

The question of whether the particular report could be introduced as an exhibit was certified to the United States District Court, which court subsequently ruled in favor of the plaintiff and the report was introduced. It is attached hereto and marked Exhibit 1 (Robinson).

There was no cross-examination.

ROBINSON EXHIBIT 1

(Here follow photolithograph of Robinson Exhibit No. 1, side folios 415 and 416)

(1-192)

Sales—1

Report of Gross Retail Sales

For The Year Ending December 31st, 19.....

TO BE FILED ON OR BEFORE FEBRUARY 1ST, 19....., WITH

State Tax Commission, Frankfort, Ky.

For Use of State Tax Commission Only	
Date Rec'd	[illegible]
Am't Remitted $	
Audited by	[illegible]

FILED

Case 3908

Name of Merchant The Bolon Co

Address of Principal Office Harrodsburg Kentucky

Name and Address of ~~Owner or~~ President L H Bolon

Is Owner Individual, Partnership or Corporation? Corporation

If Corporation, Date Incorporated ..... In What State? Kentucky

Nature and Kind of Business General Merchandise When Begun

Was Business Discontinued During Year? ..... If so, When? .....

Number of Stores Operated in This State (11) Eleven

Location of Each Store	Name and Address of Officer ~~or Agent~~ in Charge of ~~Each~~ Store	Gross Sales of Each Store
Harrodsburg	Winchester	$
[illegible]	[illegible]	$ 460 187 14
Ashland	Madisonville	$
[illegible]	[illegible]	$
[illegible]	[illegible]	$

For The Year Ending December 31st, 19____

TO BE FILED ON OR BEFORE FEBRUARY 1ST, 19____, WITH

State Tax Commission, Frankfort, Ky.

Date Rec'd [illegible]
Am't Remitted $
Audited by [illegible]

FILED
AUG 2 1 193[illegible]
[illegible]

Name of Merchant The [illegible] Bolon Co.

Address of Principal Office Harrodsburg Kentucky

Name and Address of ~~Owner or~~ President L H Bolon

Is Owner Individual, Partnership or Corporation? Corporation

If Corporation, Date Incorporated _____ In What State? Kentucky

Nature and Kind of Business General Merchandise When Begun _____

Was Business Discontinued During Year? _____ If so, When? _____

Number of Stores Operated in This State (11) Eleven

Location of Each Store	Name and Address of Officer ~~or Agent~~ in Charge of ~~Each~~ Store	Gross Sales of Each Store
Harrodsburg	Winchester	$
[illegible]	[illegible]	$ 460 187 04
Richmond	Madisonville	$
[illegible]	[illegible]	$
Richmond	[illegible]	

L H Bolon

TOTAL GROSS RETAIL SALES OF ALL KENTUCKY STORES $ 460 187 04

DEDUCT TOTAL SALES OF GASOLINE AND PRESCRIPTION WHISKEY $ _____

TOTAL GROSS RETAIL SALES SUBJECT TO TAX $ 460 187 04

CALCULATION OF TAX

Amount of Sales not over $400,000	$ 400 000	@ 1/20 of 1% or 5c on the $100	$ 200
Amount of Sales over $400,000 but not over $500,000	$ 60 187 04	@ 2/20 of 1% or 10c on the $100	$ 60.14
Amount of Sales over $500,000 but not over $600,000	$	@ 5/20 of 1% or 25c on the $100	$
Amount of Sales over $600,000 but not over $700,000	$	@ 8/20 of 1% or 40c on the $100	$
Amount of Sales over $700,000 but not over $800,000	$	@ 11/20 of 1% or 55c on the $100	$
Amount of Sales over $800,000 but not over $900,000	$	@ 14/20 of 1% or 70c on the $100	$
Amount of Sales over $900,000 but not over $1,000,000	$	@ 17/20 of 1% or 85c on the $100	$
Amount of Sales over $1,000,000	$	@ 1% or $1.00 on the $100	$

TOTAL AMOUNT OF TAX $ 260.14

OK

Credit by Amount of State Corporation License $ 379.43

Credit by Amount of State Occupational License $ 379.43
(See Instruction Sheet, Rule 7)

NET AMOUNT OF TAX $ No tax due

Make Check for Amount of Tax Payable to State Treasurer and Mail with Report

(Over)

415

366A

ROBINSON EXHIBIT 1

STATE OF Kentucky

COUNTY OF Mercer

I, Hanly Bohon, do solemnly swear that the statements contained in this report are true to the best of my knowledge and belief.

Hanly Bohon, President
Name Title

Subscribed and sworn to before me by Hanly Bohon this "5" day of Sept, 1934

O. L. Flagg
Notary Public Mercer County
my commission expires Jany 7. 1934.

(Seal)

No. 19432

REPORT
OF
GROSS RETAIL SALES

D. L. Bohon Company
Harrodsburg Kentucky
Chain

For the Year Ending Dec. 31, 1936

To be Filed on or Before February 1st, Following Close of Year for Which Report is Made.

TOTAL GROSS SALES $ 460.187.04

AMOUNT OF TAX $ Nolay dres rubber stamp

State Tax Commission
FRANKFORT, KY.

3661

[fol. 417] A. H. Brendel

A. H. BRENDEL, called for the plaintiff, testified as follows:

He resided at Cincinnati, Ohio, and was 49 years of age; was a partner in the firm of J. D. Cloud & Company, Certified Public Accountants. He had made an analysis of the returns from the files of the State Tax Department of the State of Kentucky. He had been in Frankfort about six times to make this analysis. Some times he spent a few days there and at times he was there as long as six weeks.

Approximately six men worked under him in making the analysis. He had been a certified public accountant since 1912. The first time that he went to Frankfort was in February, 1931. At that time Joseph Martin was supervisor of the Gross Sales Tax Department and cooperated with Mr. Brendel in making the analysis. A joint report was made to the Attorney General and to Judge Wood, counsel for the plaintiff. The witness thereupon identified a copy of the first report. Originally, compilations were made directly from the returns filed by the taxpayers but later the State Department adopted a form of receipt book and then he made his compilations from the stubs of the receipt. All analyses were made under his personal supervision, the last one having been made in April, 1933. This one included the compilations made on his previous visits. The witness thereupon produced the report made as a result of his examination on April 17, 1933, for tax returns filed for the year 1930. This was introduced and marked "Brendel Exhibit No. 1." The witness examined the exhibit and stated that it was a correct analysis of the Kentucky Gross Retail Sales for 1930 and covered all returns filed during the period from the inauguration of the tax to April 17, 1933.

Similar reports had been made for the years 1931 and 1933. The witness thereupon identified the 1931 report which was offered in evidence and received as Brendel's Exhibit No. 2, and the 1932 report which was identified as Brendel's Exhibit No. 3. The witness stated that Exhibit 2 was a correct compilation of returns filed up to April, 1933. The same was true with regard to the analysis for 1932.

There was no cross-examination.

[fols. 418 & 419] EXHIBIT BRENDEL No. 1

Accountants' Report

Analysis of Kentucky Gross Retail Sales Tax Returns for the Year 1930, Filed During the Period from the Inauguration of the Tax to April 17, 1933

J. D. Cloud & Co., Certified Public Accountants, Cincinnati, O.

[fol. 420] April 21, 1933.

Hon Frank E. Wood, Atty., Traction Bldg., Cincinnati.

SIR:

Complying with your instructions, we have made a compilation of all the Kentucky Gross Retail Sales Tax Returns for the year 1930 filed during the period from December 2, 1932, to and including April 17, 1933, which together with our previous compilations are shown in total on the following statements:

Schedule "A"—Analysis of Kentucky Gross Retail Sales Tax Returns for the Year 1930 Filed during the Period from the Inauguration of the Tax to April 17, 1933.

Schedule "B"—Statement showing Number of Retail Merchants reporting Gross Sales Taxes for the Year 1930 from the Inauguration of the Tax to April 17, 1933, Classified by Amounts of Tax Paid.

Schedule "A" shows in detail the Gross Sales, Gross Tax, Credits Allowed and Credits Claimed in excess of Tax Liability, for the year 1930 together with the number of Merchants reporting sales of $10,000.00 or less and graduated sales to and over $400,000.00.

Schedule "B" is a statement of the number of Taxpayers classified as to the amount of tax paid by each taxpayer.

The information contained in this report was obtained by us in the following manner:

For returns for the year 1930 filed during the period from the inauguration of the tax to May 18, 1931, from an inspection of the tax returns;

For returns for the year 1930 filed during the period from May 19, 1931, to July 21, 1931, from a report submitted to us by J. Martin, Supervisor of the Kentucky Gross Retail Sales Tax Department;

[fol. 421] For returns for the year 1930 filed during the period from July 22, 1931, to April 17, 1933, from the duplicate copy of the receipt issued to the taxpayer.

Certification

We hereby certify that the information contained in this report, based on tabulations made as stated heretofore, are to the best of our knowledge and belief, true and correct.

Respectfully submitted, J. D. Cloud & Co., Certified Public Accountants.

(Here follows side folio 422)

[fol. 422]

Analysis of Kentucky Gross Retail Sales Tax Returns for the Year

Number of Reports Filed by Retail Merchants—	Numbe filed
Showing Retail Sales less than $400,000	24,12
Showing Retail Sales between 400,000 and 500,000	1
Showing Retail Sales between 500,000 and 600,000	
Showing Retail Sales between 600,000 and 700,000	
Showing Retail Sales between 700,000 and 800,000	
Showing Retail Sales between 800,000 and 900,000	
Showing Retail Sales between 900,000 and 1,000,000	
Showing Retail Sales in excess of $1,000,000	
Totals	24,16

Analysis of Reports Showing Tax Liability—	Number return
Showing Sales less than $400,000	24,12
Showing Sales between 400,000 and 500,000	1
Showing Sales between 500,000 and 600,000	
Showing Sales between 600,000 and 700,000	
Showing Sales between 700,000 and 800,000	
Showing Sales between 800,000 and 900,000	
Showing Sales between 900,000 and 1,000,000	
Showing Sales in excess of $1,000,000	
Totals	24,16

Number of Merchants Reporting Sales of—	Showin tax liabilit
Less than $10,000	8,80
$ 10,000 and under $ 25,000	4,43
25,000 and under 50,000	1,91
50,000 and under 75,000	59
75,000 and under 100,000	24
100,000 and under 150,000	21
150,000 and under 200,000	9
200,000 and under 250,000	4
250,000 and under 300,000	2
300,000 and under 400,000	3
Over $400,000	2
Totals	16,43

[fol. 422]

SCHEDULE "A"

Analysis of Kentucky Gross Retail Sales Tax Returns for the Year 1930, Filed During the Period from the Inauguration of the Tax to April 17, 1933

Number of Reports Filed by Retail Merchants—	Number filed	Number indicating tax	Number indicating no tax
Showing Retail Sales less than $400,000	24,128	16,413	7,715
Showing Retail Sales between 400,000 and 500,000	13	7	6
Showing Retail Sales between 500,000 and 600,000	8	5	3
Showing Retail Sales between 600,000 and 700,000	5	4	1
Showing Retail Sales between 700,000 and 800,000	4	2	2
Showing Retail Sales between 800,000 and 900,000	1	0	1
Showing Retail Sales between 900,000 and 1,000,000	0	0	0
Showing Retail Sales in excess of $1,000,000	4	3	1
Totals	24,163	16,434	7,729

Analysis of Reports Showing Tax Liability—	Number of returns	Gross sales	Gross tax	Credits allowed	Net tax	Credits shown in excess of tax liability
Showing Sales less than $400,000	24,128	340,197,497.00	167,880.34	78,659.58	89,220.76	226,979.91
Showing Sales between 400,000 and 500,000	13	5,866,935.00	3,454.81	2,193.44	1,261.37	6,709.42
Showing Sales between 500,000 and 600,000	8	4,416,568.00	3,440.42	2,123.02	1,317.40	5,306.50
Showing Sales between 600,000 and 700,000	5	3,234,563.00	3,266.68	1,498.12	1,768.56	177.20
Showing Sales between 700,000 and 800,000	4	2,989,019.00	4,110.66	2,727.57	1,383.09	2,298.47
Showing Sales between 800,000 and 900,000	1	814,559.00	636.15	636.15	0	1,755.24
Showing Sales between 900,000 and 1,000,000	0	0	0	0	0	0
Showing Sales in excess of $1,000,000	4	5,329,123.00	25,491.24	14,099.48	11,391.76	4,593.15
Totals	24,163	362,848,264.00	208,280.30	101,937.36	106,342.94	247,819.89

Number of Merchants Reporting Sales of—	Showing tax liability	Showing no tax liability
Less than $10,000	8,808	5,374
$ 10,000 and under $ 25,000	4,436	1,556
25,000 and under 50,000	1,911	508
50,000 and under 75,000	596	149
75,000 and under 100,000	242	45
100,000 and under 150,000	217	41
150,000 and under 200,000	91	20
200,000 and under 250,000	48	12
250,000 and under 300,000	28	3
300,000 and under 400,000	36	7
Over $400,000	21	14
Totals	16,434	7,729

[fol. 423] SCHEDULE "B"

Statement Showing Number of Retail Merchants Reporting Gross Sales Taxes for the Year 1930 Classified by Amount of Tax Paid, Filed During the Period from the Inauguration of the Tax to April 17, 1933

Number of taxpayers reporting tax less than 50¢	2,640
" " " " " 50c to 1.00	2,192
" " " " " 1.00 to 2.00	2,748
" " " " " 2.00 to 3.00	1,754
" " " " " 3.00 to 4.00	1,187
" " " " " 4.00 to 5.00	890
" " " " " 5.00 to 10.00	2,054
" " " " " 10.00 to 15.00	818
" " " " " 15.00 to 20.00	431
" " " " " 20.00 to 25.00	342
" " " " " 25.00 to 50.00	495
" " " " " 50.00 to 100.00	176
" " " " " 100.00 to 200.00	60
" " " " " 200.00 to 300.00	6
" " " " " 300.00 to 400.00	4
" " " " " 400.00 to 500.00	1
" " " " " 500.00 to 600.00	....
" " " " " 600.00 to 700.00	2
" " " " " 700.00 to 800.00	1
Over $1,000.00	3
Total	15,804
Undetermined and unclassified	630
	16,434

[fol. 424] EXHIBIT BRENDEL #2

[fol. 425] Accountants' Report

Analysis of Kentucky Gross Retail Sales Tax Returns for the Year 1931, Filed During the Period from December 7, 1932, to April 18, 1933

J. D. Cloud & Co., Certified Public Accountants, Cincinnati, O.

[fol. 426] April 21, 1933.

Hon. Frank E. Wood, Atty., Traction Bldg., Cincinnati.

SIR:

Complying with your instructions, we have made a compilation of all the Kentucky Gross Retail Sales Tax Returns for the year 1931 filed during the period from December 7, 1932, to April 18, 1933, which together with our previous compilations are shown in total on the following statements:

Schedule "A"—Analysis of Kentucky Gross Retail Sales Tax Returns for the Year 1931 filed during the period from January 1, 1932, to April 18, 1933.

Schedule "B"—Statement showing Number of Retail Merchants reporting Gross Sales Taxes for the Year 1931 from January 1, 1932, to April 18, 1933, classified by amount of tax paid.

Schedule "A" shows in detail the Gross Sales, Gross Tax, Credits Allowed and Credits Claimed in excess of Tax Liability for the Year 1931 together with the number of merchants reporting sales of $10,000.00 or less and graduated sales to and over $400,000.00.

Schedule "B" is a statement of the number of taxpayers classified as to the amount of tax paid by each taxpayer.

The information contained in this report was compiled from the duplicate copies of receipts issued to the taxpayers.

Certification

We hereby certify that the information contained in this report, based on tabulations as stated heretofore, are to the best of our knowledge and belief, true and correct.

Respectfully submitted, J. D. Cloud & Co., Certified Public Accountants.

(Here follows side folio 427)

[fol. 427]

Analysis of Kentucky Gross Retail Sales Tax Returns for

Number of Reports Filed by Retail Merchants—	Num... fil...
Showing Retail Sales less than $400,000	20...
Showing Retail Sales between 400,000 and 500,000	
Showing Retail Sales between 500,000 and 600,000	
Showing Retail Sales between 600,000 and 700,000	
Showing Retail Sales between 700,000 and 800,000	
Showing Retail Sales between 800,000 and 900,000	
Showing Retail Sales between 900,000 and 1,000,000	
Showing Retail Sales in excess of 1,000,000	
Totals	20...

Analysis of Reports Showing Tax Liability—	Num... re...
Showing Sales less than $400,000	20...
Showing Sales between 400,000 and 500,000	
Showing Sales between 500,000 and 600,000	
Showing Sales between 600,000 and 700,000	
Showing Sales between 700,000 and 800,000	
Showing Sales between 800,000 and 900,000	
Showing Sales between 900,000 and 1,000,000	
Showing Sales in excess of 1,000,000	
Totals	20...

Number of Merchants Reporting Sales of—	Sh... lia...
Less than $10,000.00	8...
$10,000 and under $25,000	1...
25,000 and under 50,000	1...
50,000 and under 75,000	
75,000 and under 100,000	
100,000 and under 150,000	
150,000 and under 200,000	
200,000 and under 250,000	
250,000 and under 300,000	
300,000 and under 400,000	
Over $400,000	
Totals	12...

SCHEDULE "A"

Analysis of Kentucky Gross Retail Sales Tax Returns for the Year 1931, Filed During the Period from January 1, 1932 to April 18, 1933

of Reports Filed by Retail Merchants—	Number filed	Number indicating tax	Number indicating no tax
wing Retail Sales less than $400,000	20,351	12,173	8,178
wing Retail Sales between 400,000 and 500,000	10	6	4
wing Retail Sales between 500,000 and 600,000	9	6	3
wing Retail Sales between 600,000 and 700,000	3	3	0
wing Retail Sales between 700,000 and 800,000	2	1	1
wing Retail Sales between 800,000 and 900,000	3	2	1
wing Retail Sales between 900,000 and 1,000,000	2	2	0
wing Retail Sales in excess of 1,000,000	2	2	0
Totals	20,382	12,195	8,187

s of Reports Showing Tax Liability—	Number of returns	Gross sales	Gross tax	Credits allowed	Net tax	Credits shown on reports in excess of tax liability
wing Sales less than $400,000	20,351	290,824,180.00	145,489.13	78,719.31	66,769.82	179,339.94
wing Sales between 400,000 and 500,000	10	4,520,653.00	2,520.64	1,513.05	1,007.59	3,260.06
wing Sales between 500,000 and 600,000	9	4,887,385.00	3,572.59	2,212.57	1,360.02	5,699.06
wing Sales between 600,000 and 700,000	3	1,927,791.00	2,161.17	700.00	1,461.17	.....
wing Sales between 700,000 and 800,000	2	1,472,166.00	2,296.25	1,391.17	905.08	3,109.00
wing Sales between 800,000 and 900,000	3	2,549,814.00	5,548.72	2,429.98	3,118.74	237.08
wing Sales between 900,000 and 1,000,000	2	1,895,680.00	5,213.29	1,084.94	4,128.35	.....
wing Sales in excess of 1,000,000	2	2,389,404.00	9,994.07	3,607.85	6,386.22	.....
Totals	20,382	310,467,073.00	176,795.86	91,658.87	85,136.99	191,645.14

of Merchants Reporting Sales of—	Showing tax liability	Showing no tax liability
s than $10,000.00	8,531	4,942
0,000 and under $25,000	1,818	2,160
5,000 and under 50,000	1,006	759
0,000 and under 75,000	388	145
5,000 and under 100,000	175	45
0,000 and under 150,000	128	68
0,000 and under 200,000	63	27
0,000 and under 250,000	24	12
0,000 and under 300,000	19	11
0,000 and under 400,000	21	9
er $400,000	22	9
Totals	12,195	8,187

[fol. 428] SCHEDULE "B"

Statement Showing Number of Retail Merchants Reporting Gross Sales Taxes for the Year 1931 Classified by Amount of Tax Paid, Filed During the Period from January 1, 1932 to April 18, 1933

Number of Taxpayers Reporting Tax					less than	50¢			2,220
"	"	"	"	"	50¢	to	1.00		1,838
"	"	"	"	"	1.00	"	2.00		2,323
"	"	"	"	"	2.00	"	3.00		1,239
"	"	"	"	"	3.00	"	4.00		733
"	"	"	"	"	4.00	"	5.00		585
"	"	"	"	"	5.00	"	10.00		1,490
"	"	"	"	"	10.00	"	15.00		642
"	"	"	"	"	15.00	"	20.00		339
"	"	"	"	"	20.00	"	25.00		212
"	"	"	"	"	25.00	"	50.00		400
"	"	"	"	"	50.00	"	100.00		126
"	"	"	"	"	100.00	"	200.00		31
"	"	"	"	"	200.00	"	300.00		7
"	"	"	"	"	300.00	"	400.00		2
"	"	"	"	"	400.00	"	500.00		1
"	"	"	"	"	500.00	"	600.00		0
"	"	"	"	"	600.00	"	700.00		0
"	"	"	"	"	700.00	"	800.00		0
"	"	"	"	"	800.00	"	900.00		1
"	"	"	"	"	900.00	"	1,000.00		2
Over $1,000.00									4
Total									12,195

[fol. 429] EXHIBIT BRENDEL #3

[fol. 430] Accountants' Report

Analysis of Kentucky Gross Retail Sales Tax Returns for the Year 1932, Filed During the Period from January 1, 1933, to April 17, 1933

J. D. Cloud & Co., Certified Public Accountants, Cincinnati, O.

[fol. 431] April 21, 1933.

Mr. Frank E. Wood, Atty., Traction Bldg., Cincinnati.

SIR:

In accordance with your instructions, we have made a compilation of all the Kentucky Gross Retail Sales Tax Returns for the year 1932 filed during the period from January 1, 1933, to April 17, 1933, and we submit herewith the following statements showing the results of this compilation:

Schedule "A"—Analysis of Kentucky Gross Retail Sales Tax Returns for the Year 1932 filed during the period from January 1, 1933, to April 17, 1933.

Schedule "B"—Statement Showing Number of Retail Merchants reporting Gross Sales Taxes for the Year 1932 —classified by amounts of tax paid-filed during the period from January 1, 1933, to April 17, 1933.

Schedule "A" shows in detail the Gross Sales, Gross Tax, Credits Allowed and Credits Claimed in excess of Tax Liability for the year 1932 together with the number of Merchants reporting sales of $10,000.00 or less and graduated sales up to and over $400,000.

Schedule "B" is a statement showing the number of Taxpayers classified as to the amount of tax paid.

The information contained in this report was compiled from the duplicate copies of the receipts issued to the taxpayers.

Certification

We hereby certify that the information contained in this report, based on tabulations made as stated heretofore, are true and correct to the best of our knowledge and belief.

Respectfully submitted, J. D. Cloud & Co., Certified Public Accountants.

(Here follows side folio 432)

[fol. 432]

Analysis of Kentucky Gross Retail Sales Tax Returns for t

	Num fil
Number of Reports Filed by Retail Merchants—	
Showing Retail Sales less than $400,000	14
Showing Retail Sales between 400,000 and 500,000	
Showing Retail Sales between 500,000 and 600,000	
Showing Retail Sales between 600,000 and 700,000	
Showing Retail Sales between 700,000 and 800,000	
Showing Retail Sales between 800,000 and 900,000	
Showing Retail Sales between 900,000 and 1,000,000	
Showing Retail Sales in excess of 1,000,000	
Totals	14

	Num retu
Analysis of Reports Showing Tax Liability—	
Showing Sales less than $400,000	14
Showing Sales between 400,000 and 500,000	
Showing Sales between 500,000 and 600,000	
Showing Sales between 600,000 and 700,000	
Showing Sales between 700,000 and 800,000	
Showing Sales between 800,000 and 900,000	
Showing Sales between 900,000 and 1,000,000	
Showing Sales in excess of 1,000,000	
Totals	14

	Show tax liab
Number of Merchants Reporting Sales of—	
Less than 10,000	5
$10,000 and under $25,000	1
25,000 and under 50,000	
50,000 and under 75,000	
75,000 and under 100,000	
100,000 and under 150,000	
150,000 and under 200,000	
200,000 and under 250,000	
250,000 and under 300,000	
300,000 and under 400,000	
Over 400,000	1
Totals	8

SCHEDULE "A"

Analysis of Kentucky Gross Retail Sales Tax Returns for the Year 1932, Filed During the Period from January 1, 1933, to April 17, 1933

of Reports Filed by Retail Merchants—	Number filed	Number indicating tax	Number indicating no tax
wing Retail Sales less than $400,000	14,582	8,068	6,514
wing Retail Sales between 400,000 and 500,000	4	2	2
wing Retail Sales between 500,000 and 600,000	5	5	.....
wing Retail Sales between 600,000 and 700,000	1	.....	1
wing Retail Sales between 700,000 and 800,000	2	1	1
wing Retail Sales between 800,000 and 900,000	1	1	.....
wing Retail Sales between 900,000 and 1,000,000	1	.....	1
wing Retail Sales in excess of 1,000,000	1	1	.....
Totals	14,597	8,078	6,519

of Reports Showing Tax Liability—	Number of returns	Gross sales	Gross tax	Credits allowed	Net tax	Credits shown on reports in excess of tax liability
wing Sales less than $400,000	14,582	176,783,514.26	88,522.10	52,573.72	35,948.38	152,954.91
wing Sales between 400,000 and 500,000	4	1,835,261.79	1,035.27	752.99	282.28	6,163.47
wing Sales between 500,000 and 600,000	5	2,764,557.75	2,071.04	963.54	1,107.50	.....
wing Sales between 600,000 and 700,000	1	601,558.29	556.23	556.23	.....	35.73
wing Sales between 700,000 and 800,000	2	1,522,598.66	2,574.30	1,277.24	1,297.06	908.68
wing Sales between 800,000 and 900,000	1	864,205.61	1,949.44	415.00	1,534.44	.....
wing Sales between 900,000 and 1,000,000	1	939,417.13	2,535.04	2,535.04	.....	117.45
wing Sales in excess of 1,000,000	1	1,001,903.32	3,169.03	422.00	2,747.03	.....
Totals	14,597	186,313,016.81	102,412.45	59,495.76	42,916.69	160,180.24

r of Merchants Reporting Sales of—	Showing tax liability	Showing no tax liability
s than 10,000	5,903	4,157
0,000 and under $25,000	1,185	1,688
5,000 and under 50,000	636	446
0,000 and under 75,000	181	96
5,000 and under 100,000	58	46
0,000 and under 150,000	50	38
0,000 and under 200,000	25	18
0,000 and under 250,000	11	9
0,000 and under 300,000	13	6
0,000 and under 400,000	6	10
er 400,000	10	5
Totals	8,078	6,519

[fol. 433] SCHEDULE "B"

Statement Showing Number of Retail Merchants Reporting Gross Sales Taxes for the Year 1932 Classified by Amount of Tax Paid, Filed During the Period from January 1, 1933 to April 17, 1933

Number of Taxpayers Reporting Tax less than 50¢										1,667
"	"	"	"	"	"	of	50¢	to	1.00	1,247
"	"	"	"	"	"	1.00	"	2.00		1,569
"	"	"	"	"	"	2.00	"	3.00		813
"	"	"	"	"	"	3.00	"	4.00		494
"	"	"	"	"	"	4.00	"	5.00		369
"	"	"	"	"	"	5.00	"	10.00		1,000
"	"	"	"	"	"	10.00	"	15.00		381
"	"	"	"	"	"	15.00	"	20.00		195
"	"	"	"	"	"	20.00	"	25.00		114
"	"	"	"	"	"	25.00	"	50.00		164
"	"	"	"	"	"	50.00	"	100.00		50
"	"	"	"	"	"	100.00	"	200.00		9
"	"	"	"	"	"	200.00	"	300.00		2
"	"	"	"	"	"	300.00	"	400.00		1
"	"	"	"	"	"	400.00	"	500.00		0
"	"	"	"	"	"	500.00	"	600.00		0
"	"	"	"	"	"	600.00	"	700.00		0
"	"	"	"	"	"	700.00	"	800.00		0
"	"	"	"	"	"	800.00	"	900.00		0
"	"	"	"	"	"	900.00	"	1,000.00		0
"	"	"	"	"	over	1,000.00				3
Total										8,078

[fol. 434] Albert H. Morrill

ALBERT H. MORRILL, called for the plaintiff, testified as follows:

He resided in Cincinnati, Ohio and his business address was 35 E. Seventh Street, Cincinnati, Ohio. He was an attorney at law but had not been practicing since April 1, [fol. 435] 1930. Since that time he had been President of The Kroger Grocery & Baking Company and of the Piggly Wiggly Corporation. Prior to the time he became President he was counsel for The Kroger Grocery & Baking Company for approximately 15 years, and as such he was in close touch with their business affairs. He had charge of the acquisition of various stores during the period 1927, 1928 and 1929. He was also familiar with the business of the Piggly Wiggly Corporation and had been familiar with it since 1928. At that time he supervised the acquisition of the stock of the Piggly Wiggly Corporation by The Kroger Grocery & Baking Company.

The Kroger Grocery & Baking Company was engaged in the distribution of food at retail. Piggly Wiggly Corporation owns patents, trade names, copyrights, all of which

are leased out to operators in various parts of the United States, Kroger being next to the largest operator under these licenses and paying a license fee the same as any other operator. The organizations are entirely separate. All of the Piggly Wiggly licensees are engaged in the grocery business, being retail distributors. They operate all over the United States with the exception of some territories. They also operate in some foreign countries, including Australia, Hawaii, Alaska and Canada.

Mr. Morrill's association with the operations of the Piggly Wiggly Corporation bring him into touch with economic conditions pertaining to the food industry and with competitive conditions thereon throughout the United States.

The Kroger Grocery & Baking Company engages in business in seventeen states in the middle west, beginning in the northwest with Wisconsin and running substantially south taking in Oklahoma, then east through Mississippi, Tennessee, southwestern Virginia and western part of Pennsylvania and along the northern boundary of the United States, east from Wisconsin. In addition to being connected with The Kroger Grocery & Baking Company [fol. 436] and the Piggly Wiggly Corporation he had been associated from about 1915 on with The Colter Company, a wholesale concern which ran a chain of 350 stores, having served as a Director of that company. In connection with that business, he had become familiar with the organization and operation of so-called cooperative or voluntary grocery chains. He had organized and drafted the cooperative contracts with what is known as Associated Community Stores. For two and one-half years he filled positions in the National Chain Store Association and for a while he acted as President. During his term as President he became familiar with the economics and general operation of large-scale business enterprises which he studied. At that time he spoke at various institutions, before places of learning, legislature and trade associations. He has also had close contact with the General Stores Association in Germany, France, Austria and England and he had attended some of their meetings and had negotiated the sale of Piggly Wiggly rights to the largest chain in England. He had visited foreign countries and talked to operators and studied their bookkeeping, delivery, warehousing methods

and everything connected with the business. At the time of his testimony he was Vice President of the National Chain Store Association.

He has had constant contact with legislation effecting business in the United States on behalf of the Kroger Company and other companies. He has qualified to testify as an expert in cases involving taxes on retail merchants in Hamtramck, Michigan, and Maplewood, Missouri. He has appeared before a great number of legislative committees and has lectured on merchandising subjects at the Northwestern University, the University of Virginia and the Washington and Lee University, at Lexington, Virginia. [fol. 437] He thought he had sufficient experience and qualification to testify as an expert concerning economics and operations, and management and the relation thereto in the food industry generally in the United States.

He stated that the primary purpose of The Kroger Grocery & Baking Company is to distribute food through retail stores throughout the middle west. Its objective is to cut down the cost of distribution and for the purpose of securing this result it seeks to get as close to the producer, the farmer and other producers as it can and it also seeks to bring their food products through a rapid movement and fast turnover and as small a mark-up as possible to the customers who come into the stores. For the purpose of securing this result, it operates dairies, farms, packing houses, bakers' shops, coffee plants, creameries and butter factories. The prime object is to secure food stuffs from a source which is as close to the producer as possible and bring it to the consumer with only one mark-up. The Kroger Company and all similar businesses are built on an extremely small margin of profit, the percentage varying from a red figure to 2.50% or 3.8%, the higher figure being the exception.

The average percentage of net profit in the United States during the three years that the tax had been in effect in Kentucky, namely, 1930, 1931 and 1932 was 1%. Since a company of the character of the Kroger Company only secures a small profit, it must have a large volume of sales in order to exist. In addition to grocery stores working on this method, there are also such organizations as mail order houses with separate retail stores such as Sears-Roebuck & Company and Montgomery Ward & Company. In the

moderate price department store field there are Penney and Grant.. The drug field is represented by Walgreen, Dows and many others. The Melville Shoe Company is an example of such an organization which sells shoes. Retail [fol. 438] sales of the Kroger Company in Kentucky have been as follows:

1930	$14,653,448.00
1931	13,496,915.00
1932	11,447,611.00

The profits in the company made on its Kentucky business in the State of Kentucky during the three years, without regard to Kentucky Gross Sales Tax but after all other taxes, was as follows:

1930	$172,892.93
1931	151,734.19
1932	86,230.98

The Kentucky Gross Sales Tax for the three years, without consideration of credits, amounted to—

1930	$139,584.48
1931	128,019.15
1932	107,526.12

The credits due Kroger on account of license taxes paid were:

1930	$15,369.00
1931	15,643.84
1932	12,271.75

When the credits are considered the Kroger tax under the Kentucky Gross Sales Tax was as follows:

1930	$124,215.48
1931	112,377.31
1932	95,254.37

The net profit in Kentucky after deducting the Kentucky Sales Tax was as follows:

1930	$48,677.45
1931	39,358.88
1932	9,023.39

In other words, in 1932 the application of the Kentucky Sales Tax would turn a net profit of over $80,000.00 into a loss in excess of $9,000.00. It took all of the profits and absorbed part of the capital.

The percentage of net profits before and after the tax was as follows:

[fol. 439]

	Per cent of net profit before tax	Per cent of net profit after tax
1930	1.18%	.33%
1931	1.13%	.29%
1932	.75%	Loss .078%

The defendant objected to the introduction of the above evidence.

The company does not operate any stores except food stores, in which is included groceries, meats, some delicatessen items, produce and green groceries. It sells butter, eggs, milk, cream, cheese of all sorts, vegetables, pork, lamb, beef, canned goods, everything that comes off of a farm and goes on to the table for food. It also distributes seed and in some sections of the country fertilizer.

Kroger operated 289 stores in Kentucky in 1930, 254 in 1931 and 249 in 1932. Profits per store before and after the tax were as follows:

	Profits per store before tax	Profits per store after tax
1930	$598.00	$168.00
1931	598.00	155.00
1932	347.00	Loss 36.00

The tax per store under the Kentucky Act was as follows:

1930	$429.00
1931	442.00
1932	382.00

When special license taxes which must be paid are added then the tax per store was $483.00 for 1930, $504 for 1931 and $432.00 for 1932. In addition to that the Kroger Company paid taxes on its physical property in the State of Kentucky the same as all other property owners. Kroger owned land, buildings, machinery, equipment, leaseholds and inventories, which at the close of 1932 amounted to $1,211,876.17. It owned a large plant at Louisville, Kentucky. It leased its stores for the most part at higher ren-

tals then they would cost if the property was purchased. The stores were always located in what was considered desirable locations.

[fol. 440] Kroger rentals as a rule are based on the taxes paid by the landlord.

The Kroger Company paid direct to the Federal Government on the Kentucky business, that is, allocating such part of it as was proper, $20,291.51 in 1931, and it collected and turned over to the Federal Government, in the way of taxes on various things like oleomargarine and cigarettes, $204,701.38.

Witness stated that to the best of his recollection taxes represented approximately 25% of the rent. At the end of 1932 rental commitments such as leases amounted to $332,297.52, many of them being on long leases, two and three years, and some as much as five years.

Outside of the gross sales tax the company paid the State of Kentucky in 1932 $169,971.59. In addition to that the company is subjected to taxes on store operations by various municipalities.

The company operated 5302 stores in 1930; 4980 stores in 1931 and 4816 stores in 1932. Profits and sales of the company during those three years were as follows:

	Sales	Profits
1930	$267,094,345.26	$1,475,671.06
1931	244,371,147.17	2,199,444.46
1932	213,159,742.69	2,441,089.41

The profit represents what was made from the operation of the grocery business, exclusive of any income from investments. The percent of net profit to sales was .55% in 1930, .90% in 1931 and 1.15% in 1932.

If the same sales tax in effect in the State of Kentucky had applied to Kroger's business in each of the states in which Kroger operates then Kroger would have lost $767,000.00 in 1930, made $171,000 in 1931 and $650,548 in 1932. The Kroger tax runs pretty close to 1% and unless a profit of 1% is made on sales then the Kentucky tax causes a loss. The percent of tax to sales in Kentucky would have been .84 of 1% in 1930, .83 of 1% in 1931 and .84 of 1% in 1932. The tax would not be passed on to the consum-

[fol. 441] ing public because it does not apply to everybody. It is not the usual sales tax which has been adopted in

Indiana, Mississippi and Illinois. It exempts practically everybody in the State of Kentucky, leaving only the larger concerns subject to the tax. Competition in the food industry being very keen has a great effect on the price. A concern operating on less than 2% net profit cannot keep its volume of sales up when it raises its price. Once the prices are raised the people do not shop at the store but go to competitors. Kroger could not compete with small chains like those that exist in Louisville when it has to pay a tax of the size which is imposed on it and is not imposed on other people. It would be impossible to pass on a 1% tax to the consuming public when that tax applied only to a few concerns. As a result the tax would fall directly on the corporation and would come out of capital. It actually did come out of capital in 1932.

In 1930 the tax would have caused a net loss close to One Million Dollars if it had been effective throughout the United States. A net loss of such an amount would prevent the operation of the company any longer than three years. Possibly it might exist five years. The reason for this is that the business is operated on a cash basis. Sales are made for cash and payments are made in cash. The company needs many millions of dollars to do business on. The company statement as of December 31, 1932, shows $12,000,000. in cash. If it should get below seven or eight million dollars the company would not have enough money to do business on. With a loss of one million dollars a year the company would be put out of business, from a practical standpoint, in five years. Of course, the company could not get any new money if it showed losses. No bank would lend the company money and no one would buy the securities.

[fol. 442] The rate of profit at which the company earned in 1930 and 1931 was somewhat lower than the rate of profit earned by the average grocery store chain. The rate of profit for 1932 was somewhat higher than that earned by the average grocery chain. This is based not on all the chains in the United States but from a knowledge of two or three chains that have better sales than Kroger. A majority of the stores are operated at a loss of 1%. The difference insofar as profits were concerned was not due to territory but to management. That is the entire thing in a grocery business.

The defendant objected to the introduction of the above testimony.

The chief characteristic of the economic period of American business covered by the years 1927, 1928 and 1929 was an enormous inflation of prices and expenditures. There was a public psychology which made anybody willing to buy anything irrespective of the price. In the opinion of the witness those years are not a great criterion of the profits and earnings which can normally be made in the conduct of retail merchandising, whether in the food or other retail merchandising field. The crash in these values occurred in September, 1929. This was the first one. Another one occurred in October, 1929, and a third during the next summer. Values varied thereafter causing disorganization and chaos in business generally. With a comparatively few exceptions business profits disappeared in retail business after the crash in the Fall of 1929. Many of the larger companies got into the red and went into the hands of Receivers. A large number of the smaller grocery chains also went into Receivership and their assets melted away. Almar Stores in Pennsylvania is an example of a large grocery chain which failed and went into the hands of a Receiver since 1929. The Saunders Systems of Louisville, Memphis and Nashville also went into the hands of a Receiver and was sold through the United States Court in the latter part of 1930 and 1931. Some smaller ones the names of which he could not recall failed since 1929. In other types of retail merchandising Liggetts, The United [fol. 443] Cigar Stores, Bellas-Hess, Grant-Silver and McCrory Stores are examples of chain store organizations which were placed in Receivership.

The Kentucky Gross Sales Tax has no relationship to what is commonly known as a sales tax. The so-called sales tax levies a tax on sales at a flat rate. In some of the states the law provides that no person selling merchandise or an article that is taxed shall advertise or say he is paying the tax. The purpose of that tax is to put it on the consumer, leaving the operations of business as little disturbed as possible. In contradistinction to that the Kentucky Sales Tax in its operations admittedly exempts all sales made provided they do not run over a certain amount. It graduates very rapidly so as to put concerns

doing a large business in a hopeless competitive position with the twenty or thirty thousand other people who are aggregating a larger volume of business but who individually do a smaller volume of business.

The witness testified that from his experience he would say that profits tend to decrease with increased sales. However, there are many exceptions to this rule. The increased sales has no necessary relation to net profits. A striking example of that was that of Clarence Saunders, who controlled stores in two or three cities and made a nice profit on his sales. As his volume of sales increased, however, his profits decreased and he was out of business in the course of a year or so. Under exceptionally skillful management the relationship between a large volume of sales and return on invested capital maintains itself and sometimes increases. But what actually happens, the so-called law of diminishing returns begins to work and when sales increase to a million or more one does not secure the same proportionate amount of profits. Actually, you have a smaller proportion of profits than under less sales.

[fol. 444] Sales are not a measure of the amount invested in business. There is no relationship between the two. The amount invested in business may be in dead assets or in poorly located stores and unless by proper management, proper location or proper use of capital it is turned into life it means nothing. It comes back again to the question of management and this is peculiarly so in the retail distribution of food stuffs through stores.

The witness had had twenty odd years of experience in retailing merchandising business and from his observation he thought that prior to 1929 success was due in large measure to luck. Since that time economic success depended 90% on personnel of the organization. This referred not so much to the top of the organization as to the organization below.

Average sales per store for 1930 were $50,376.00; 1931, $49,070.00, and 1932, $44,260.00. Sales per store per week in the country as a whole average $956.50 for 1930; $943.56 for 1931, and $851.17 for 1932.

Excluding the return from investments, net profit of the company as a whole on a per store basis in 1930 was $278.32; 1931, $441.66, and 1932, $506.87. The invested capital and

the return earned by Kroger on its invested capital for the three years was as follows:

	Invested capital	Return earned on invested capital
1930	$50,932,462.32	4.26%
1931	51,521,172.84	5.30%
1932	46,084,825.70	5.95%

The Kroger Company had 1,813,486 and six-twentieths of a share outstanding in 1930 and 1931. In 1932 it had 1,811,091 and six-twentieths of a share. In both 1931 and 1932 the company paid $1.00 dividend on outstanding stock. In 1930 it paid $1.00 per share, plus a part of a stock dividend of 5%. The stock is owned by approximately 20,000 shareholders, 78% of whom are located in the middle west. There are a number of stockholders in Kentucky. The stock is [fol. 445] widely scattered. Only two stockholders have any quantity of stock and three of the largest stockholders together have less than 1%. Approximately six or seven thousand shareholders own less than 100 or 200 shares. 40% of the stockholders own less than 100 shares each. A large percentage of the stockholders are women. The same is true with regard to charitable institutions.

In the event the gross sales tax act continues to absorb all profits the company could withdraw from the state but to do so would mean a total loss on all investments in Kentucky and on all rentals. It would also result in a severe loss on automotive equipment which is especially designed to meet the Kentucky laws. All monies expended in improvement on leaseholds and fixtures would be lost. There might be a salvage with regard to fixtures in the amount of 25%. The good will of the company in the state would be entirely lost. Kroger has been one of the largest users of newspaper space in Kentucky since 1927. A large amount of money has been expended in this way building up good will. Money has also been contributed to the various Chambers of Commerce for the same purpose. A fine personnel drawn almost without exception from Kentuckians has also added to the good will. The working organization which is receiving salaries from the company could not be used elsewhere in the event the company withdrew from Kentucky. A large amount of money is expended in building such an organization. Kroger trains its men, having regular train-

ing schools and diplomas. There the men learn the business. Kroger also maintains in Cincinnati the so-called Kroger Food Foundation which checks all of the Kroger purchases, in a scientific, practical way and does a great deal of consumers research work.

Kroger, a short time prior to the time the testimony was given, gave a food show in Louisville, which cost it some Ten Thousand Dollars. The show was attended by tens of thousands of people. This has all resulted in the build- [fol. 446] ing up of a good will for assisting the customers and removal from Kentucky would involve a loss on this intangible property as well as other.

Kroger had 865 employees at the end of 1932. This was slightly more than they had in 1929. In 1932 Kroger paid $1,203,000 in wages in Kentucky. It purchased a large amount of food supplies and other products in Kentucky. Annual expenditures in Kentucky for products of that State's soil is a little less than Five Million Dollars. There is little difference between the stores of The Kroger Grocery & Baking Company and the stores of its competitors who are engaged in the same kind of business. There is no difference between the grocery store conducted by members of the Independent Grocers Association, or I. G. A., and a grocery store conducted by The Kroger Grocery & Baking Company, or The Great Atlantic & Pacific Tea Company. The only exception is that in one case there is individual ownership by a member of the association and a corporate owner in the case of the Kroger Company. In both cases there is one organization buying for all of the stores. In both cases they have a uniform store layout and joint advertising for the benefit of all of the stores. Deliveries are made to stores in both organizations by the same trucks of a standardized order. Both have a uniform system of accounting in the stores and contribute a part of their earnings to a common fund. The only difference is ownership.

I. G. A. is a voluntary chain which claims to have eighteen thousand member stores in the United States. They have a mass purchasing and a mass selling and advertising ability which is in excess of Kroger. In addition to the I. G. A. there are a number of other voluntary cooperative sales organizations, all of which are organized along the same lines.

Today there is no difference between the Kroger stores and that of a neighborhood grocery affiliated with a voluntary chain store association. Members of voluntary chain associations purchase from wholesale grocers and also directly from the manufacturer. They sometimes purchase their [fol. 447] meats through an intermediary but often they purchase it from Swift and Armour much in the same manner as Kroger does. Their purchases are once or twice or three times removed from the producer but Kroger takes it directly from the producer. Sometimes it is once removed from the producer.

The Kroger stores require no more police regulation than any other similar business and probably less. The company carries its own insurance and is very strict about fire hazards. It requires constant supervision. There is a supervisor for every twenty stores. It is his business to see that the stores are clean, that there is no inflamable material in the cellar. The goods in the Kroger stores is similar to that in other stores insofar as fire hazards and police supervision is concerned. Kroger conforms in every case to every known regulation of the municipal authorities. One of its chief endeavors is to have a clean store. The food sold is fresh and in its urban sections it has daily deliveries. As a result, it delivers perishables almost every day. With few exceptions it has mechanical refrigeration. The turn over is rapid. In the country Kroger never keeps a supply for more than thirty days and only keeps a week's supply of perishables. Everything the company buys is tested in the Kroger Food Foundation. A great deal of the products submitted are turned down. The company is forced to conform to the law of supply and demand insofar as the prices which it pays for merchandise is concerned.

In the opinion of the witness, as a result of his years of experience, it is impossible for a grocery merchant to remain in business and earn a fair return on his investment and pay a tax of $400.00 to $500.00 per store in addition to what i-s competitors pay. There is no difference between the business of the Kroger Company and that of its competitors. It does not require a different personnel.

[fol. 448] Cross-examination:

The witness has been President of The Kroger Grocery and Baking Company since April 1, 1930. At that time

there was a complete change in the personnel of the officers, only one of officers remaining of those who held office prior to April 1, 1930.

Mr. William H. Albers, who served in the capacity of President and General Manager prior to April 1, 1930, was no longer connected with the Kroger Company. There were one or two other executives of the company who had been directors who left the company at the same time. The change in the directorship was due to the discovery of earning figures of 1928 and 1929 that were not correct.

The company was not refinanced nor was there any new money introduced at that time. Mr. Bernard H. Kroger, the original founder of the company was not connected with it at the time the witness' testimony was taken, he having retired during 1927 or the early part of 1928.

At the time Mr. Morrill took charge there was a change in the method of conducting the business.

The books of the company are kept by bookkeepers and accountants and are audited and supervised by a certified public accountant. The audit is continuous and a general audit is made each year by Lybrand Ross Bros. and Montgomery. The only records kept at each individual store are the sales sheets, inventory sheets, expense sheets, cash, miscellaneous expense, such as light and power and various other things that enter into the operation of the particular store. The records at the individual stores do not show all the expenses incurred in operating that store. They do not show hauling, warehousing and a number of other things. Book-keeping at each store is reduced to a minimum. The books show the amount of sales at each store. [fol. 449] Bookkeeping methods are uniform throughout all the stores. Books kept at branch headquarters show the operation of the particular branch including profit and loss. One of the branches is located in Kentucky, but five of them do business in that state. Above the branch is the general office. Complete records are kept there. These records show the operations of the company as a whole and are made up from reports of the branches. The general office is at Cincinnati, Ohio.

Commencing with the middle of 1930, a system of operating was developed, but prior to that time there was no such system and for this reason there are no books showing profit and loss prior to that time. However, there are records since 1930 showing result of operation. It is impos-

sible, with any degree of accuracy, to determine the results of operation preceding 1930. The present operating system shows sales, expenses and taxes, wages paid, cash discounts obtained, depreciation, net profit, etc. The records show daily, as well as weekly reports. The Kroger Grocery & Baking Company does not keep records for each months operation. They divide every four weeks into a different period and this is combined at the end of the year for the report which is prepared by Lybrand Ross Bros. and Montgomery. Kroger operates thirteen 4-week periods in each year rather than on the actual calendar year.

At the close of 1932, Kroger operated 4816 stores. Of that number 289 were in Kentucky. Profits in Kentucky are derived by taking the profits of the different stores and combining them and taking the cost of the merchandise, the figures on gross profits and deducting expenses. The records used in reaching this result are located at Charleston, W. Va., Louisville, Ky., Carbondale, Tenn., and Cincinnati, Ohio, these being branches of the Kroger Company, and it is possible from these reports to determine the profits [fol. 450] made in Kentucky during the years 1930, 1931 and 1932. The net profit is derived by taking the sales at the various stores, the store gain, and, after combining those and adding to them the profit on manufacturing operations in Kentucky and deducting the expenses necessary and incident to the running of the stores in Kentucky. The resulting figure is the net profit. (In getting up these figures, reliance was made solely upon profit and loss from the retail business, all operations of Kentucky being included.) However, operations other than store operations are not very great. These operations include, among other things, a bakery. No part of the overhead for the central office was charged to Kentucky in getting up the figures.

Profits are determined by the store gain which represents the difference between the cost of merchandise and the various expenses in the store.

Witness stated that no separate records had been kept of the Kentucky stores for the past three years. The witness was unable to give the inventory of the Kentucky stores as of the beginning of the year 1930; that he had no information available on the cost or purchase price of the goods in the Kentucky stores; that he did not think records were available to show these facts. He stated that he had no

records to show the salaries paid in Kentucky stores during the year 1930, and that he had no records of the amount expended for rent in Kentucky for the same year. He thought the records could be collected in Cincinnati.

The witness did not personally make the examination of the record but relied upon reports of others who were employes and executives. The figures given were the result of compilation made especially for the particular law suit. [fol. 451] When witness' statements of earnings were given concerning Kentucky stores, he did not draw his conclusions from the details of operations of those stores which had resulted from considering the cost of goods, salaries, earnings and every other such item of expense incurred in Kentucky. He did not arrive at his conclusion in this manner because this method would have "occupied too much time," and "one person could not have gotten this information altogether." Witness had gathered his information on these subjects from numerous sources at the branches where the records were located, from the auditing and treasury departments, he himself not having made an examination of the sources of such information, but he relied on the reports of others.

The average profits for Kentucky, before the Kentucky tax, per store for 1930 was $598.00. This was higher than the average in the United States. In the United States the ayerage net profit per store for 1931 was $441.56, and in Kentucky, before the Kentucky tax, it was $498.00; in 1932 the average net profit was $506.87 including investments, and in Kentucky, without the tax, it was $347.00. Witness was not able to explain the reason for the fact that the average profit of the Kentucky stores in 1932 was less than the average in the United States, but he was of the opinion that the burden of the tax caused the net sales to drop off. Various branches were losing heavily in *in* 1929 and 1930 and they improved during 1932, but the improvement was better in other branches than Kentucky. (Testimony, p. 74.) Witness cannot explain the fact that his average profits in 1932 were considerably less than the average for the while, U. S. Conditions there were worse than the United States as a whole but they were no worse than Michigan or Northern Ohio or Western Pennsylvania and other industrial centers. Insofar as Kentucky was con-

[fol. 452] cerned, tobacco was very low and the people in that business in Kentucky did not have any money to spend.

In referring to profits, from investments, witness meant profits from stocks, such as Piggly-Wiggly Corporation. The annual report for 1932 shows net earnings of subsidiary companies, including a dividend of $299,778.03, which represents the income from investments. Nothing is credited for good will. The expense of the cooking school held in the City of Louisville, which amounted to $10,000 was charged to the general office with the exception of about 2% which was charged to the Louisville branch. None of the general office expenses are allocated to Kentucky.

The largest merchandising food firm is the Great Atlantic and Pacific Tea Company. This is one of the chief competitors of Kroger. It is not true that Kroger opens a store in the same neighborhood as the A. & P. every time that concern establishes a store. There are many instances where Kroger stores are located near A. & P. Stores but the Kroger Company does not establish stores near A. & P. stores unless business justifies it. The Great Atlantic and Pacific Tea Company operates all over the United States except in the far west. They do operate, however, in California. The First National Stores do not operate in Kentucky and the American Stores operate chiefly in Pennsylvania, Delaware, New Jersey and New York, but do not operate in Kentucky. The National Tea Company which operates in Illinois, Iowa, Wisconsin and Minnesota does not operate in Kentucky. Safeway Stores which operate in Kansas City does not do business in Kentucky. Those named are the chief grocery chains. None of those named have ever failed. Pender, operating in Virginia and the Carolinas does not operate in Kentucky. They are in the hands of banks and creditors. Southern Stores operate in Florida and adjoining states, but not in Kentucky, and they are also in the hands of creditors. All of the concerns mentioned are grocery food chains. Loblaw operating in New York and Canada, but not in Kentucky, [fol. 453] is doing all right. None of the larger firms mentioned have failed or gone into the hands of receivers, for the most part the failures having been among the smaller chains in the grocery line. (Testimony, page 80.) "Outside of Saunders I don't know of any failure since 1930."

The Atlantic and Pacific and Kroger are the only two of the large chains affected by the Kentucky law. There have been a larger number of failures among smaller individuals. According to figures shown by the Louisville Grocery Survey, the mortality rate among individual groceries was 100% every three and one-half years. Since the advent of chains in 1920, the mortality rate has not been quite as great and it has been progressively decreasing. The Louisville Grocery Survey shows that the chains actually help out the individual grocer since he learns from the chain and fixes up his store and gets better merchandising, better displays, better salesmanship and better personnel. As a result the independent grocer was not suffering the same mortality rate up to 1930 as he had in the years prior to 1919.

The witness calculated the book value of the capital stock at approximately $46,000,000.00. (Testimony, p. 81.) Witness stated that he could not give the book value of Kroger common stock, but it was between $22.00 and $22.50 per share; that some adjustments had been made last year (1932) and that they had written off a "lot of obsolete stuff." The total net earnings for the year 1930, including investments, was $2,168,247.58. In arriving at the income produced in Kentucky, the exact gross income per store was taken and in making deductions there was an allocation of such items as could not be assigned to a specific store. Advertising expense, interest charges, branch expenses, such as supervision, warehousing, hauling and administration for stores in and out of Kentucky were allocated proportionately according to the number of stores based on sales. The same was true of branch legal expense, office supplies, printing, stationery, telephone, telegraph and postage. Depreciation is charged from month to month and carried into operations as an expense charge against net income. On buildings the rate runs about fifty years and on retail store equipment the depreciation varies from a year to the period of the lease. Fixtures in the store [fols. 454-457] of a more or less permanent nature, such as mechanical refrigeration, shelving, etc, are written off during the term of the lease if possible.

The profits of the company for the first six months of 1933 were $2,294,794.27. The sales for that period were $91,997,867.55. The percent of profit to the sales was 2.49.

The Kroger Company business was much more profitable for the first six months of 1933 than it was for the similar period in 1932, the increase in profits being $929,749.17.

There has been an improvement in net earnings since April, 1930, the time when the witness took charge as President.

The Kroger Company took over the Piggly Wiggly Corporation in Kentucky in 1928. The company has been eliminating stores ever since the witness took charge. In the last three or four years Kroger has been consolidating its possessions in Kentucky in an attempt to improve its operations there. Kentucky is logically Kroger territory. There is no opportunity for expansion there, the necessity being for contraction. Kentucky is rather overbuilt insofar as grocery retail outlets are concerned. This is shown by the Louisville Grocery Survey. Kroger Company established stores in Kentucky in 1897. There was a gradual increase up to 1927, at which time stores belonging to other chains were purchased. These stores were located in Paducah and Louisville. They augmented the number of stores operated by Kroger by several hundred. At that time Kroger had some stores in Louisville, Newport, Covington and Lexington. Since that time Kroger has been attempting to cut out competition between its own stores. Witness estimated that the increased expense of operation due to the National Industrial Recovery Act would take all of the profits earned in the first half of 1933. He expected that there would be some adjustment in prices to meet this increased cost.

[fol. 458] EXHIBIT (MORRILL)

Annual Report for Year Ending Jan. 3, 1931

February 11, 1931.

To the Shareholders of The Kroger Grocery and Baking Company:

This report is more in detail than is customary because of the unusual conditions to which your Company has been subjected during 1930. It is intended to be something more than a bare statement of financial operations, and to lodge with the shareholders a general idea of the Company, its operations and the industry of which it is a part.

The Chain Store Industry and Your Company's Position in It

The Chain Store Industry is engaged fundamentally and principally in merchandising, that is, in buying and selling. Its basic principle is to buy in large quantities and to distribute its purchases to the consumer with as small a loss of time, with as low a mark-up and at as low a price and as high a quality as is consistent with a reasonable profit. In order to apply this principle to profitable operations, the Chain must buy as close to the source as possible, whether this source be factory or farmer. In order to move closer to the source, in some instances, the Industry departs from its fundamental purpose of merchandising and manufactures its own products. By operating efficiently from this fundamental principle, the Chain accomplishes a quick movement from producer to consumer, a rapid turn-over in merchandise it has bought and delivers it to its customers generally at a price below and at a standard of quality above that which can be fixed by the retailer who has bought his merchandise after it has passed through various hands and been subjected to various marks-ups.

Production in the United States has developed to a point of efficiency and low cost never before equalled. Methods of distribution of the merchandise thus produced have failed to keep pace with improved manufacturing methods. The difficult problem thus created has found no solution except the theory of distribution developed by the Chains.

A decade ago the Chain Store Industry as it exists today was unknown. Through this period it developed by leaps and bounds until in 1931 it appears as the outstanding development of recent years in the economic life of the nation. During and because of this period of rapid growth, it has suffered from lack of organization and failure to apply to its operations well-thought-out and long term policies.

These faults were not apparent until some two years ago. At that time general and competitive conditions in the grocery chain field began to change rapidly. This change is still continuing. It is only by radical correction of these faults that the grocery chain can maintain and improve its condition.

Today the Industry as a whole is awakening to its deficiencies of the past, the unsoundness of a business built

solely on price appeal, and to the evils of competition which often concerned itself more with outwitting a competitor than with meeting the needs of the consumer and thereby insuring a reasonable, consistent profit for its shareholders, month after month, and year after year.

The Industry is sound in principle and is of great economic value to the body politic as a whole, and therefore has great vitality. It has sucessfully weathered the first serious period of depression since its major development during which it has maintained its volume of sales, and equalled or exceeded its record of previous years in the amount of wages paid.

[fol. 459] Your Company is engaged in the buying and selling of a class of merchandise the most fundamentally necessary of all of those handled by the Chain Store Industry. In volume of sales and number of stores, it ranks second in the nation. It is well financed, and no additional financing or issuance of stock is contemplated during 1931. The territory which it services is comparatively compact and is inhabited by people who, year in and year out, are as prosperous as any similar sized group in the nation.

What is reported under this heading pertains to the last nine months of 1930.

Operating and Organization Development

Personnel

The operations of your Company cannot be mechanized. It is from first to last dependent on the character and morale of its personnel, to a degree unknown in a manufacturing operation. Therefore, immediate and vigorous attention was given to the personnel beginning April 1, 1930.

During the last nine months the official personnel has been strengthened by the addition of Mr. Charles M. Robertson, Vice-President and Treasurer, assigned to the Department of Finance and Accounting; Colonel C. O. Sherrill, Vice-President, assigned to the Department of Engineering, which includes plant layout, manufacturing methods and processes, automotive equipment, design and use, and research pertaining thereto, and Mr. Alvin E. Dodd, Assistant to the President, who came to us with a wide merchandising experience, Mr. J. B. Bonham, Vice-President, assigned to Merchandising Operations, has added the

last nine months to his previous many and effective years with your Company.

Direct personal contact, between different officials, between officials and executives and employees, and between General Office and Branch Organizations was considered of prime importance. This contact has been initiated and developed by a system of conferences between the various groups, both at General Office and in the field. This policy will be continued and improved.

Training courses for many classes of executives and employees have been initiated and put into operation. These are now being perfected and extended. They include a system of temporary transfer by which executives are enabled to familiarize themselves with all phases of the business, a course of intensive training for present and prospective supervisors and store managers, and a meat cutters' training school of sixteen weeks duration, where standards of meat cutting and salesmanship are taught under skilled instruction. The first class of the meat training school graduated on January 27th, and of twelve to whom were awarded diplomas, five were college graduates.

Store Expansion

A careful survey indicated a duplication of service by many of our smaller stores due, in large part, to acquisition of other chains in recent years. Those unnecessary to our purposes have been closed or combined with larger stores. This to a large degree accounts for the difference in the number of our stores, 5575 on December 31, 1929, and the number of our stores, 5165 on January 3, 1931, a decrease of 410 stores or 7.35 per cent of the total number.

However, numbers of stores is misleading because of the variations in size, localities, lines handled, margin of profits on these lines and the consequent profit on each store opera- [fol. 460] tion. One complete store may make more profit than a number of smaller stores.

Plans for expansion by an orderly process of opening new stores in desirable territory will be completed shortly and will be based on exhaustive research work as to customer possibilities and population trends, taken in connection with our existing branch facilities.

Stores have been remodelled during the year to the number of 843, the remodelling being accomplished almost en-

tirely by the rebuilding of old equipment by our own departments and by the factory located at Jackson, Tennessee, of the Piggly Wiggly Corporation, owned by your Company. A program for extensive similar remodelling of stores is planned for 1931.

On June 6, 1930, in Cincinnati, Ohio, was opened a new type of complete food market, with an artistic eye appeal and decorative scheme, both interior and exterior. Photographs of this store are attached to this report. It was an instant success and has produced a fair return on the investment, and raised the standing of Kroger in the eyes of the consuming public. Careful survey of other large urban centers, in which we operate, has enabled us to formulate a policy for the establishment of similar large stores in these centers.

Under an arrangement with Sears, Roebuck & Company, grocery departments, owned and operated by your Company, have been established in the Sears stores in Chicago, Cincinnati and Minneapolis, and have proved their value. When research, now under way, is completed, it is possible that our operations in Sears Stores may be extended to other centers.

Sales

In 1930, including two operating days in 1931, sales amounted to $267,086,028, as compared to $286,611,214 for the year 1929, a decrease of 6.81%. Reflecting on this decrease is the decrease in number of stores referred to above. Comparison of tonnage figures of sales are not available, but it is apparent by a comparison between our dollar sales and the decrease in price of food commodities generally that our tonnage sales were larger in 1930 than in 1929.

Decentralization

Centralization of operations was abandoned early in April of 1930. On April 14th, the first branch, Louisville, was decentralized, and on December 1st, the last of our twenty-three branches was decentralized. Under this policy, responsibility is placed upon the Branch Manager for successful operations, including small local purchasing, major buying being retained at the general office. Duplication in reports and communications have thus been materially reduced, with consequent saving. A localization of

our operations has made for a community of interest between your Company and the people with which it deals.

Armored Car Service

Cash losses from hold-up robberies of our stores reached serious proportions some months ago. The hold-ups constitute a great mental hazard to our customers and store personnel. A contract was recently awarded, under which [fol. 461] a specially designed type of safe will be installed, within the next few months, in all our stores, and collections made in the majority of cases by armored car service. The arrangement under which these safes are purchased and the service rendered will make the combined annual cost materially less than the annual cash loss caused by such robberies in the past.

Organization

As the result of many months of study, there has been established an organization plan, with the activities of the Company grouped in appropriate departments, under definite lines of responsibility and authority, which have been totally lacking in the past. This reorganization has been completed and all activities are now being carried on under it with marked increased of efficiency.

Active Subsidiaries

Piggly Wiggly Corporation, owner of trade-marks, patents, labels and merchandising methods, which licenses various operators to use these methods, receiving a royalty from these operators, based on gross sales, is almost wholly owned by your Company, 1½% of the outstanding stock being in the hands of the public.

On January 3, 1931, there were in operation, 2770 stores in different States and foreign countries, all using the Piggly Wiggly name, patents, labels and the self-service system of and supervised by the Piggly Wiggly Corporation. Due to a drop in the sales of the operators, royalties paid to the Corporation were somewhat less in 1930 than in 1929. Upon return to normal economic conditions the royalties should materially increase. The service rendered by this Corporation to the operators has been materially increased and improved during 1930, and the entire facili-

ties of the Kroger organization have been put at the operators' disposal. A program of aggressive development among the operators and in unallotted territory has been mapped out and is under way for 1931.

A Produce Buying Corporation, with offices in the principal produce centers was organized on November 22, 1930, and is operating successfully. By this means your Company is able to purchase and sell a highly perishable and profitable class of merchandise under the most advantageout circumstances.

Kroger Food Foundation

Extensive research during the past seven months indicated conclusively that price appeal alone would not in the future give to Kroger the good-will and volume to which it is entitled. It appeared clearly that Kroger must be something other than just another grocery chain. To meet this necessity there has been established and is now being developed what is known as the Kroger Food Foundation. It is headed by Dr. Andrew H. Ryan, a food scientist of national reputation. Under his direction, there will be developed standards of food quality and content to which Kroger merchandise must conform, standards and methods of home dietetics, and scientific and nutritive research, which will be of great benefit to Kroger customers and to the Food Industry as a whole. The Foundation is the first institution of its kind in the grocery chain industry and has met with general approval. It will be maintained by the expenditure of an amount equal, approximately, to the return on one million dollars.

Any increased expenditure due to the operation of the [fol. 462] Foundation, should be more than offset by increased sales and profits when our consumers have become familiar with the work and value of the Foundation.

Accounting and Finance

Thirteen Week Period

In the past, comparison of sales, earnings and expenses of one month in one year with the same month in preceding years has been difficult, because of the difference of operating days in the months compared. To obviate this, on January 4, 1931, your Company adopted a fiscal year be-

ginning on that date, consisting of thirteen periods, of four weeks each. All our operations and reports in the future will be on the basis of periods instead of months.

Budgetary Control

On October 1, 1930, for the first time in the history of your Company, there went into operation, as a preliminary test, a system of budgetary control, under which all items of prospective operations for the various periods are estimated. Under such control, definitely effective January 4, 1931, each activity of the Company can be checked from week to week against the budget estimate. While budgetary control in your Company is in its infancy, it has already proved its value.

Accounting System and Reports

The management found it necessary, during 1930, to report to you adjustments amounting to $1,284,294.00 net. During the last nine months the accounting system and to an extent the personnel of the Accounting Department has been completely reorganized, and new and accurate systems installed. The Consolidated Income Account herewith reveals marked departure from former methods of reporting Cost of Sales and Operating Expenses. With the various checks on the Accounting Department recently established, shareholders can be assured in the future that the figures submitted to them are accurate and trustworthy.

Depreciation

During 1930, we have absorbed out of earnings and charged to depreciation the sum of $3,192,819.84 which is $1,332,559,64 more than was absorbed and charged in 1929, about 20% of which increase is due to increase in amount of fixed assets. This policy, involving application of higher rates, has been followed throughout the year. It was adopted out of abundant caution and was intended to absorb possible depreciation deficiencies of past years, which could not be accurately determined except by the expenditure of an unwarranted amount of time and money.

Unusual Expense in 1930

The expense incident to change in our Auditing and Accounting systems, establishment of budgetary control,

decentralization and reorganization in general, including temporary loss of efficiency has been large and for the most part should be non-recurrent.

Federal Income Tax Recoveries

As a result of the adjustments in earnings of previous years, reported on April 23 and September 2, 1930, claims for abatement have been allowed amounting to $215,218.19 and added to earned surplus.

[fol. 463]

Cash Position

On December 31, 1929, your Company had cash amounting to $7,516,136. On January 3, 1931, it had cash amounting to $6,587,755.91. The cash position of your Company has been affected principally by the redemption of securities of subsidiaries amounting to $484,000 and by refunds to employees of part payment under stock purchase contract of $1,184,000.

Bank Loans

On April 1, 1930, our bank loans amounted to $4,000,000. On January 3, 1931, our bank loans amounted to $100,000 which, on the date of this report has been paid.

Inventories

On December 31, 1929, inventories amounted to $22,080,580.62. On April 1, 1930, inventories amounted to $25,130,469.45. On January 3, 1931, inventories amounted to $19,937,671.61.

Earnings

Report was made to you on September 2, 1930, for the first half of 1930, of an operating loss of $76,890.62, against which there was an offset of accrued earnings of affiliated company of $341,492.28 resulting in net earnings of $264,601.65, or $ .1228 a share on the 1,795,536 6/20 shares of common stock outstanding on June 30, 1930, after providing for preferred dividends. No increase in the number of shares outstanding has been made during the last half of 1930, except that caused by the distribution of stock dividend of 1% in October, 1930.

The attached consolidated income account, as of January 3, 1931, shows a net operating profit of $1,505,580.08 to which there is added accrued earnings of affiliated companies of $662,667.40 resulting in net earnings for the year 1930 of $2,168,247.48 or $1.1491 per share on the 1,813,486 6/20 shares of common stock outstanding after providing for preferred dividends.

No report to the shareholders for the year 1930 will be complete if it omits a reference to the Board of Directors, the officials and the executive and general personnel of the Company. During a period of wide and serious economic depression, after an almost complete change of officials, during distressing adjustments of financial statements, when radical changes of policies and discarding of traditional methods were being accomplished, the personnel of the Kroger Company, consisting of over 20,000 individuals, showed adaptability, intelligence, courage and loyalty, which under the conditions was as remarkable as it was admirable.

I join with every other shareholder in expressing appreciation and gratitude for the splendid spirit of our personnel.

We wish to keep in as close touch as possible with our shareholders. We welcome suggestions, communications and inquiries.

Respectfully submitted, Albert H. Morrill, President.

[fol. 464] The Kroger Grocery and Baking Company and Subsidiary Companies

Consolidated Balance Sheet, January 3, 1931

Assets

Current:		
Cash in banks and on hand		$6,587,755.91
Accounts and notes receivable, net of allowance for those doubtful of collection:		
Customers	$777,960.51	
Employees	106,510.98	
Claims, advances, etc.	328,431.61	
		1,212,903.10
Inventories of merchandise, at cost or market, whichever the lower		19,937,671.61
Cash surrender value of life insurance		23,296.70
Prepaid insurance, rent, taxes, etc.		754,767.68
Accrued accounts receivable not due		245,719.46
Total Current Assets		28,762,114.46

Investments at ledger value:		
Stock of affiliated company, not included in consolidation	7,654,498.65	
Other stocks, bonds, mortgage notes and accrued interest	297,327.93	
		7,951,826.58
Common stock of Company purchased and held by trustee for sale to employees (28,850 shares)		251,719.91
Land, buildings and equipment, and leasehold improvements at ledger values, net of allowance for depreciation		23,313,235.34
Store and general supplies and deferred charges to future operations		501,664.15
		$60,780,560.44

[fol. 465] Liabilities

Current:		
Notes Payable:		
Banks	$100,000.00	
Affiliated company	800,000.00	
Other notes and acceptances	37,485.67	
		$937,485.67
Accounts payable, vendors, etc.		6,260,123.58
Accrued expenses, taxes, etc		1,016,513.74
Provisions for Federal income taxes		242,696.88
Dividends payable		1,943.09
Employees deposits on subscriptions to unissued common stock		719,834.16
Total current liabilities		9,178,597.12
Funded debt, subsidiary companies		678,500.00
Preferred stocks of subsidiary companies		1,001,500.00
Reserves for uninsured losses, etc.		634,038.49
		11,492,635.61

Capital and surplus

Preferred capital stock:			
First preferred 6 pct. par $100 outstanding	$81,400.00		
Second preferred, 7 pct. par $100 outstanding	62,100.00		
		143,500.00	
Common capital stock without par value:			
(Authorized, 3,000,000 shares)	Shares		
Issued	1,830,878 6/20		
Less in treasury	17,392		
Outstanding	1,813,486 6/20	32,963,276.30	
Paid in surplus		1,094,961.69	
Earned surplus as annexed		15,086,186.84	
			49,287,924.83
			$60,780,560.44

We have audited the accounts of The Kroger Grocery and Baking Company and subsidiary companies for the period from January 1, 1930 to January 3, 1931, and we certify that in our opinion the accompanying balance sheet and surplus and income accounts set forth correctly the financial position of the consolidated companies at January 3, 1931, and the results of their operations for the fiscal period ended that date.

Lybrand, Ross Bros. & Montgomery, Accountants and Auditors.

February 7, 1931.

[fol. 466] The Kroger Grocery and Baking Company and Subsidiary Companies

Consolidated Earned Surplus, for the Period from January 1, 1930, to January 3, 1931

Earned surplus, January 1, 1930, as reported			$14,980.524.40
Add:			
Federal income taxes applicable to prior periods		$215,218.19	
Unexpended surplus appropriated for stock dividend		15,772.54	
		$230,990.73	
Deduct:			
Deficits of subsidiary companies January 1, 1930	$56,037.51		
Sundry surplus charges applicable to prior periods	57,513.41		
		113,550.92	
			117,439.81
Adjusted surplus, January 1, 1930			15,097,964.21
Profit for the fiscal period			2,168,247.48
			17,266,211.69
Cash dividends paid or payable		1,882,165.78	
Disbursements incident to the payment to stock-holders of cash in lieu of certificates for fractional shares of dividend stock, losses incurred in settlement of litigation, and sundry surplus charges		97,859.07	
Reserve for rent losses, acquired by purchase of other chains in former years and since closed due to duplication		200,000.00	
			2,180,024.85
			$15,086,186.84

[fols. 467-471] The Kroger Grocery and Baking Company and Subsidiary Companies

Consolidated Income Account, for the Period from January 1, 1930, to January 3, 1931

Net Sales		$267,094,345.26
Cost of sales		208,198,837.28
		58,895,507.98
Operating expenses	$52,306,000.25	
Administration expenses	1,604,924.77	
		53,910,925.02
Profit from operations before allowance for depreciation		4,984,582.96
Net accrued earnings of subsidiary companies for the fiscal year		662,667.40

	5,647,250.36
Allowance for depreciation	3,192,819.84
Profit before interest and Federal taxes	2,454,430.52
Interest paid net	60,183.04
	2,394,247.48
Federal income tax, estimated	226,000.00
Net profit for period	2,168,247.48

(Here follows photolithograph of Letter of James O. McKinsey and Company, side folios 472-474)

JAMES O. McKINSEY AND COMPANY
BOARD OF TRADE BUILDING
CHICAGO

January 10, 1931.

Mr. Albert H. Morrill, President
Kroger Grocery and Baking Company,
Cincinnati, Ohio.

Dear Mr. Morrill:

During the past six months I have had an opportunity to observe various changes in management which have been made in your Company. I think the most important improvements which have been made since your election as President can be summarized as follows:

1. The morale of the organization has been greatly improved. I have detected a very great change during the last few months in the attitude of these employees. They now have a real loyalty for the Company and have full confidence in the Management.

2. You have worked out an organization for your Company which is in harmony with modern tendencies and have clearly defined the responsibilities of your various executives, which I think will promote cooperation among those in positions of responsibility.

3. You have improved the personnel of your

JAMES O. McKINSEY AND COMPANY
BOARD OF TRADE BUILDING
CHICAGO

January 10, 1931.

Mr. Albert H. Morrill, President
Kroger Grocery and Baking Company,
Cincinnati, Ohio.

Dear Mr. Morrill:

During the past six months I have had an opportunity to observe various changes in management which have been made in your Company. I think the most important improvements which have been made since your election as President can be summarized as follows:

1. The morale of the organization has been greatly improved. I have detected a very great change during the last few months in the attitude of these employees. They now have a real loyalty for the Company and have full confidence in the Management.

2. You have worked out an organization for your Company which is in harmony with modern tendencies and have clearly defined the responsibilities of your various executives, which I think will promote cooperation among those in positions of responsibility.

3. You have improved the personnel of your organization to a very considerable degree in two ways:

4. You have established efficient methods of controlling your activities. Most important of these is the budget plan which becomes effective as of January first. I am sure your budget program will give you an effective means of guiding and controlling the activities of the Company as a whole, so that all members of the organization can work together in the carrying out of a definite, well coordinated program.

5. You have established better methods and procedures for the performance of activities and this will promote efficiency and economy. For example, your accounting methods have been entirely revised so that you may have effective control over your activities and accurate information for the use of executives.

I feel sure that a continuation of the program on which you have been working during the past few months will bring very decided benefits to your Company during the year 1931.

Sincerely yours,

JOM-R

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[fol. 475-377] EXHIBIT (MORRILL)

Annual Report for the Year Ending January 2, 1932

The Kroger Grocery & Baking Company, Cincinnati, Ohio

[fol. 478] February 10, 1932.

To the Shareholders of The Kroger Grocery & Baking Company:

The annual report submitted herein for the fiscal year beginning January 4, 1931, and ending January 2, 1932, is the first made since the adoption of the thirteen period (four weeks each) year. In the future, better comparisons between sales, earnings, commodity prices and other figures with corresponding previous periods can be made than heretofore.

The difficult year of 1931 had its effect on your company. Earnings for the first six periods were satisfactory, but during the last seven periods earnings declined with sales, and in this decline dollar sales kept almost identical pace with general economic conditions. Despite the decline in sales and earnings during these last seven periods, 1931 as compared to 1930 showed an increase in earnings per share, material improvement in current ratio, cash and United States Government securities, ratio of cash and United States Government securities to total current liabilities and net working capital and a reduction in merchandise inventories, as is shown graphically on the opposite page.

Capital Structure

On January 3, 1931, your company had outstanding non-callable preferred stock amounting to $143,500.00, and common stock consisting of 1,813,486-6/20 shares of no-par common stock. On January 2, 1932, the number of preferred and common shares remained the same, although on the former date the common shares were distributed among 16,945 shareholders, and on the latter date among 18,856 shareholders, an increase of 1,911 shareholders, or 11% during the year.

Personnel

Because of the importance to us of personnel, we sought to avoid a horizontal wage cut throughout the company, and instead have undertaken a salary and wage expense adjustment, which went into effect, in its completed form, on February 1, 1932. Its accomplishment required effort and care, but we believe the consideration and individual attention given to every person and operation affected, has been more than justified by the response from the personnel.

Training courses for executives and employees, particularly supervisors, store managers and meat managers, initiated in 1930, have been continued and expanded.

The duties of almost every important executive position in the operating department of your company, are discharged by men with long experience with the Kroger Company or in the grocery business generally. The record of the 39 chief operating executives shows they have been with the Kroger Company an average of 10 years, the longest service being 33 years, and have had an average of 15 years' experience in the grocery business, the longest being 33 years. It is a guarantee for the future that the grocery and merchandising operations are in experienced hands.

Since April 1, 1930, the effort and time involved in organizing, coordinating and gaining the cooperation of our personnel has been great. There is still much to be done, but the progress towards our objective has been substantial and it has been particularly in evidence during the last six months, when times have been difficult.

Directors and Officials

We regret to report that during the last year, Mr. B. H. Kroger, founder of the business and a member of the Board since the establishment of the corporation, asked to be relieved of his duties as Director. While Mr. Kroger had not been active in the business for a decade or more, his rugged and picturesque personality, his unyielding honesty of purpose and high sense of business ethics, his vigor and keen insight, continued to exercise an influence on all of the company's affairs with which he came in contact. His resignation is a loss to the company, which is in part recouped by the election of Mr. B. H. Kroger, Jr., as his successor.

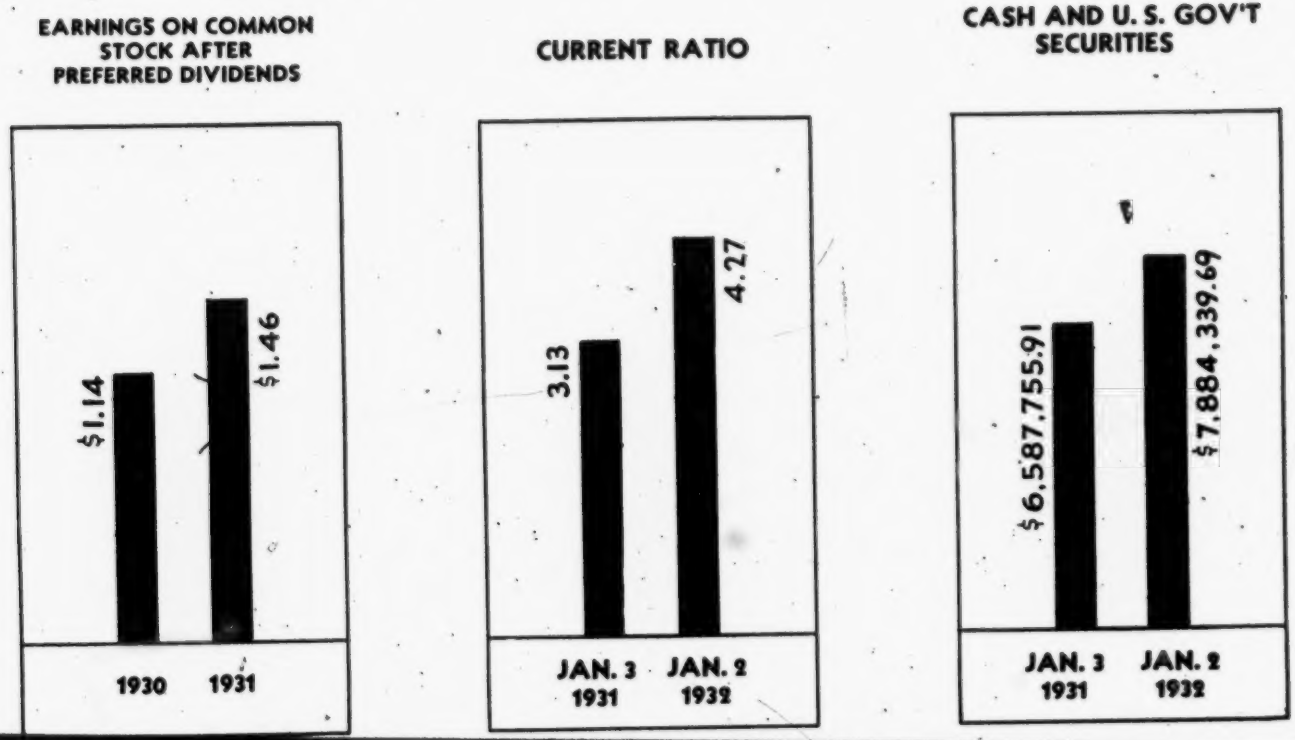
Mr. George D. Crabbs, Director, resigned during the year because of pressure of other business, and was succeeded by Mr. Walter A. Draper, President of The Cincinnati Street Railway Company.

Mr. M. McClatchey, Director, resigned during the year.

Mr. Otto Armleder, of Cincinnati, who has a large financial and sentimental interest in the company, was elected to the Directorate.

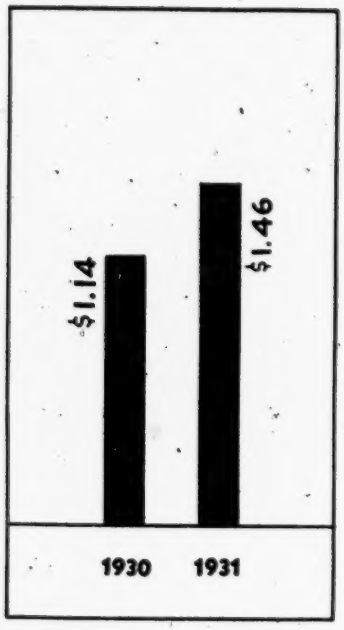
(Here follows photolithograph, 1 drawing, side folio 479.)

COMPARISON OF FINANCIAL POSITION JANUARY 3, 1931, AND JANUARY 2, 1932

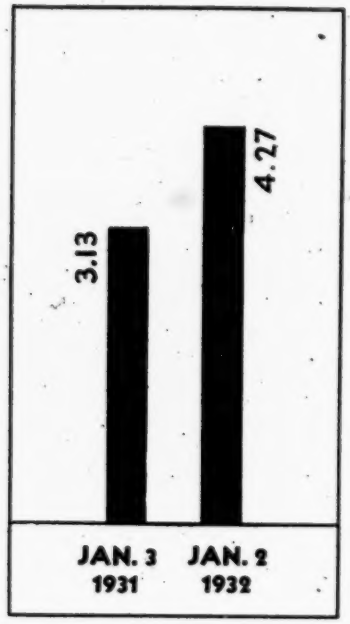


COMPARISON OF FINANCIAL POSITION JANUARY 3, 1931, AND JANUARY 2, 1932

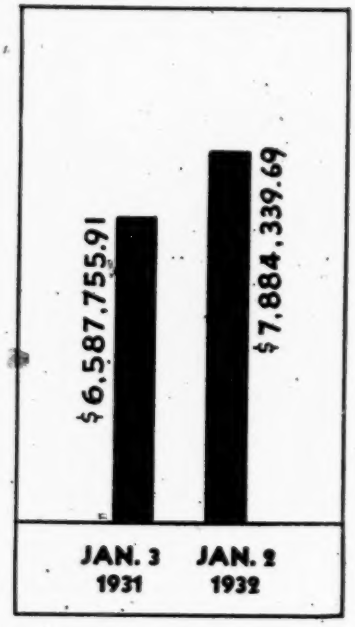
EARNINGS ON COMMON STOCK AFTER PREFERRED DIVIDENDS



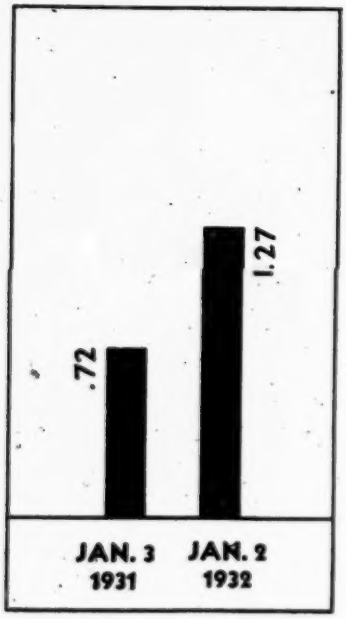
CURRENT RATIO



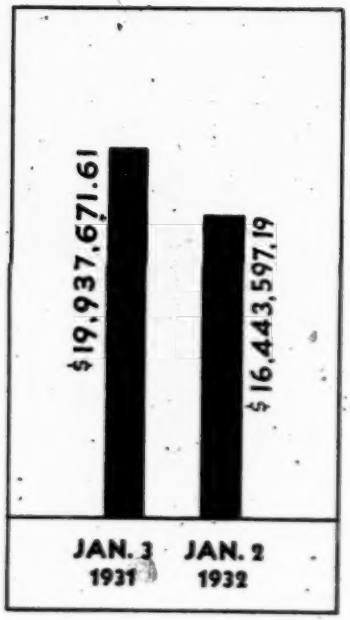
CASH AND U. S. GOV'T SECURITIES



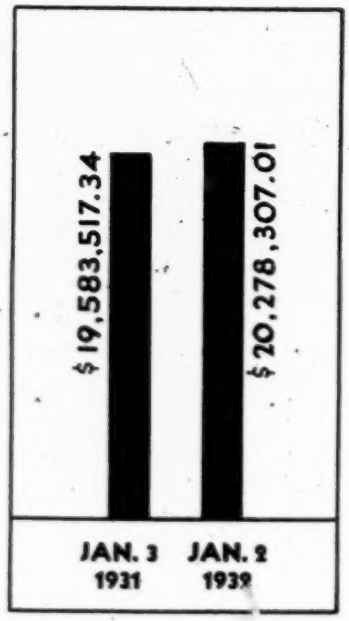
RATIO OF CASH AND U. S. GOV'T SECURITIES TO TOTAL CURRENT LIABILITIES



INVENTORIES



NET WORKING CAPITAL



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[fol. 480] Mr. J. B. Bonham, Director and Vice President, resigned during the year, to accept a position with another company.

All of the Directors not officials, have shown keen interest and activity in and about the affairs of the company. It is difficult to adequately express appreciation for the work and help that each of them has generously given.

Sales

For the fiscal year 1930 (52 weeks and 4 days), dollar sales amounted to $267,094,345.26.

For the fiscal year 1931 (four days less than 1930) dollar sales amounted to $244,371,147.17.

This represented a decline in dollar sales of 7% (allowing for difference in length of year), as compared to a decline from 1930 to 1931 of 17% in retail food prices (Bureau of Labor Statistics, U. S. Department of Labor).

The average number of stores in operation in 1931 as compared to 1930 showed a decline of 6%, while the average sales per store per week for 1931 ($941) as compared to 1930 ($954) showed a decline of only 1%.

It is instructive to note that while our sales per store per week for 1931 declined an average of $13 as compared to 1930, the commodity price decline in 1931 amounted to $162 per store per week as compared to 1930. Evidently there were more customers coming into and more merchandise going out of our stores in 1931 than in 1930.

The chart on the opposite page will show how closely the sales of your company followed the index of Industrial Production, prepared by the Federal Reserve Board.

Decline in sales beginning in May and continuing until August was thought to be the usual seasonal one, augmented by unusually hot weather. Failure of sales to recover in September and October indicated a permanent decline.

Analysis of our sales figures shows that this decline was due to three major causes; a general retail food price decline of 17%; the severity of the depression in five large industrial centers where we do about one-third of our total business; an unprecedented crop and consequent low prices in the territory we serve, of fruits and vegetables, which in the past have constituted a large percentage of our sales.

Shareholders can judge from these facts what the sales and earnings of the company will be when industrial conditions improve.

Earnings

The attached consolidated income account as of January 2, 1932, shows a net operating profit of $2,155,670.68, to which there is added earnings of affiliated companies of $575,457.39, resulting in net earnings for the fiscal year of 1931 of $2,731,128.07, or $1.463 per share on the 1,813,486-6/20 shares of common stock outstanding, after providing for preferred dividends.

This compares to operating profit for 1930 of $1,505,-580.08, to which was added accrued earnings of affiliated companies amounting to $662,667.40, which resulted in net earnings for the year 1930 of $2,168,247.48, or $1.1491 per share on the same number of shares.

Decline in earnings during the last seven periods compared to the first six periods resulted directly from the unexpected decline in sales during the latter period. It was impossible to control and reduce expenses in the company's far flung operations before decline in sales had affected earnings.

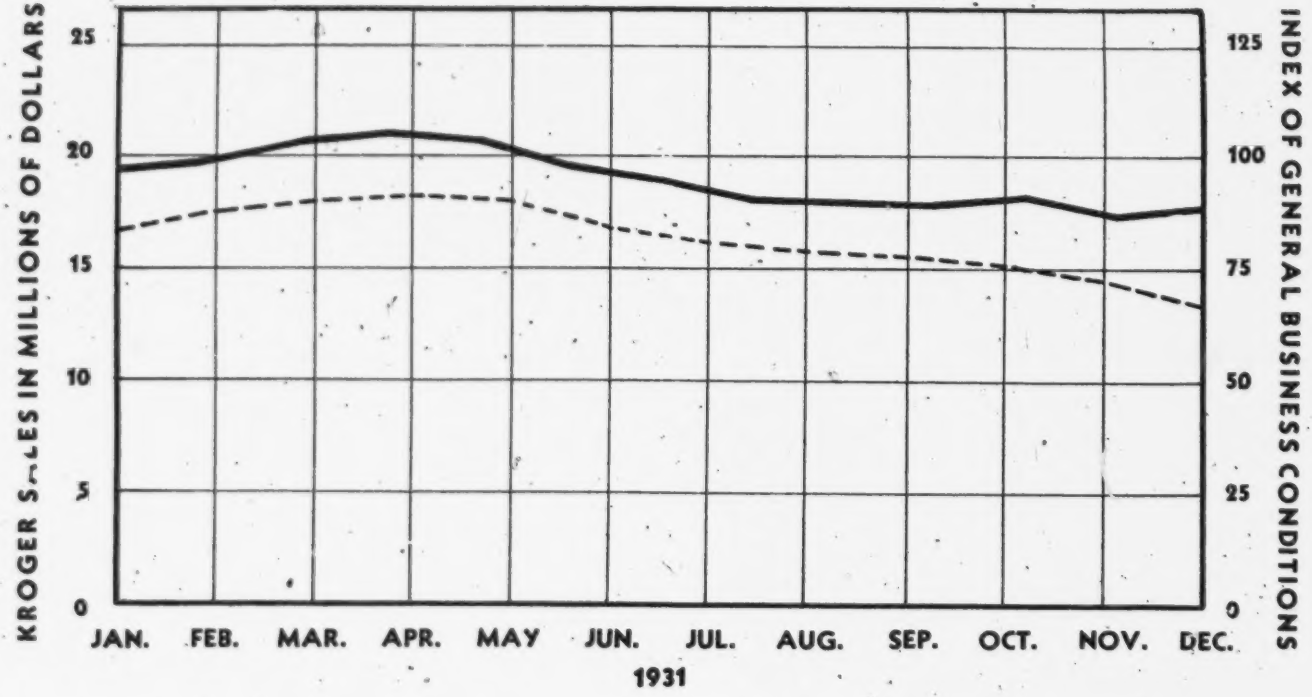
However, noticeable improvement was made in certain parts of our teritory. During 1928 and 1929, under former management, your company acquired fourteen new units in territory where previously it had very small or no operations. Nine of these acquisitions have operated at a large annual loss since their purchase. In 1931, these nine units operated at a loss 48% less than that of 1930. This reduction in loss was accomplished by the application of improved methods and management and should result ultimately in profitable operations.

Expenses

Reference has been made above to the policy adopted of effecting reduction in expenses by wage adjustments rather than by horizontal cuts. This plan of wage adjustments has been followed throughout the entire company except in General Offices, where a horizontal cut ranging from 5 to

(Here follows photolithograph, 1 drawing, side folio 481.)

COMPARISON OF KROGER SALES WITH GENERAL BUSINESS CONDITIONS



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Sales of The Kroger Grocery & Baking Company by four-week periods, in millions of dollars.

------ General business conditions as reflected by the index of industrial production prepared by the Federal Reserve Board. Average industrial production for 1923-1925=100.

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[fol. 482] 30%, adjusted however, to particular conditions and circumstances, went into effect on February 1, 1932.

The Engineering Department, through the year, has established systems of warehousing, manufacturing and automotive transportation control which have been entirely lacking in the past. When completed they should give us an expense control over activities involving the expenditure of many millions of dollars. The same department is installing systems and standards for manufacturing methods, equipment and store construction, which have and will decrease the cost of these activities.

Efforts, during 1931, to reduce rentals have resulted in total annual reductions of $364,872.00. Savings on rentals of existing leases for the year 1931 and future years, accomplished by the Real Estate Department, aggregate $418,-733.00. In many cases where the former rental was continued, additional space or improvements by the owner were obtained without the payment of additional rent.

Surplus

As a precautionary measure, your Board has set aside out of surplus $300,000.00 to cover any probable losses which may occur from the disposal of investments of subsidiary companies, although it is not their intention to dispose of these investments at the present time.

Cash Position

On January 3, 1931, your company had cash amounting to $6,587,755.91. On January 2, 1932, it had cash and United States Government securities amounting to $7,884,339.69.

During 1931 your company refunded on employees' stock subscription deposits $700,726.74, reduced funded debt of subsidiaries by $135,500.00, redeemed Preferred Stock of subsidiaries to the extent of $73,850.00, making a total of $910,076.74 taken out of cash for these purposes.

Loans

On January 3, 1931, your company owed banks $100,000 and affiliated companies $800,000. On January 2, 1932, your company had no loans.

During the year 1931, in view of the general economic situation, every effort was made to control our deposits.

With this in mind, the Division of Finance and Accounts reduced the number of our depositories from 1,508 banks on January 3, 1931, to 1,044 banks on January 2, 1932, a reduction of 464 banks, or 31%, thus giving us a better control of our cash.

Depreciation

The higher depreciation rates adopted during 1930 and applied to that year have been maintained during 1931. These rates are liberal and will be continued unless actual experience proves them to be excessive.

Accounting, Auditing, Budgetary Control

The Accounting Department, reorganized by change of personnel, system and methods in 1930, has been further perfected and its methods improved.

An Auditing Department was establisher during 1931 which has reduced the cost of the services of our certified public accountants, and will furnish more prompt and adequate service to our branches and departments than could otherwise be obtained.

We are confident that our facilities for recording, reporting and checking the operations of the company are now second to none possessed by any company.

The installation and application of a more adequate and accurate cost accounting system for our factories has been completed and will be installed during the year 1932.

During 1931, a special Property Department was established, and is now engaged in a careful study and appraisal of all property and equipment. By the close of the present year our records will be complete and accurate with all property soundly valued.

The Budgetary System, installed during the early months of 1931, by which the future is judged and actual performance is checked against promised performance, has become a permanent policy and has proven its worth.

A Department of Statistics, Methods and Standards was established during 1931. It has improved many of our procedures, methods and forms by simplification and consolidation, and furnishes the officers and executives with adequate sales trends, comparisons of value and other figures.

[fol. 483] Stock Contracts

During 1920, the Board set aside, subject to the order of the President, a number of shares of your company's stock to be used for employees' stock contracts. During thr following decade, the number of these shares increased enormously, due to stock dividends. Contracts covering these shares were made during the years 1920 to 1930 with various employees, for various amounts, at various prices. The contracts varied in terms, conditions and bases for calculation and lacked uniformity. No adequate records of them were kept on the books of the company.

Since April 1, 1930 there have matured 42 of these contracts, under which executives had the option to demand payment to them of an aggregate of $543,034.15. Since April 1, 1930, the contracts so maturing have all been discharged and the contracts still in force call for the delivery of stock, which is in hand out of the shares set aside in 1920.

Another class of stock contracts allowed the employee to leave on deposit with the company from time to time sums not to exceed 15% of his wages, as part payment on a fixed purchase price. On April 1, 1930, there had been deposited by employees $1,638,106.55, but no stock had been provided for delivery to employees. Since that date the market price has been lower than the various purchase prices named in this class of contracts.

From April 1, 1930, to January 2, 1932, we had returned to the employees $1,618,999.13, with interest, on such stock purchase deposits, leaving a balance due employees of only $19,107.42.

Complete accounts of both stock contract groups have been set up, audited, and certified by Lybrand, Ross Bros. & Montgomery.

Since April 1, 1930, when the present management was installed, there has been paid or returned to executives and employees under these two classes of contracts an aggregate of $2,162,033.28.

Operations

No radical departures have been made during 1931 in operating policies and methods. Every effort has been made to adjust the policies to rapidly changing conditions and to improve and modernize existing methods of operating and merchandising.

A Display Department was established during the closing periods of 1931. In the past, the arrangement of merchandise in store windows and in stores, the preparation and hanging of window and store signs, has been a source of large but uncontrolled expense, and lacked uniformity. It was carried on by different departments and different branches, with many duplications. All store display has been centered in the new department, where the expense can be controlled and new and up-to-date standards and methods, adjusted to the needs of each branch and type of stores, may be evolved. New methods thus far evolved have been put into effect with surprising rapidity and constitute a complete departure from, and we hope a marked improvement in, food chain display methods.

Store Maintenance, Expansion, Closing

On January 2, 1932, there were 4,884 stores in operation, as against 5,165 stores on January 3, 1931, a decrease of 281 stores, or 5%.

The average number of stores in operation during the fiscal year 1931 was 4,980, as compared to 5,302 in 1930, or an average decrease of 6%, which stores showed an average decline in dollar sales per store per week of 1%, as compared to a decline of 17% in retail commodity prices.

On January 2, 1932, there were in operation 2,869 meat markets as compared to 2,990 on January 3, 1931, a decrease of 121, or 4%. The average number of meat markets in operation for the year 1931 was 2,889 as compared to 3,033 in 1930, a decline of 5%.

During 1931 there were 874 stores remodeled and 156 new stores opened, making a total of 1,030 new and remodeled stores, or 21% of the total in operation at the close of the year. This extensive remodeling program was necessary because our stores in many localities had been neglected and a progressive policy required that they be brought up to date.

The 1932 remodeling program contemplates careful consideration of each separate store and its individual situation, remodeling to be undertaken only when it is determined to be clearly advisable.

[fol. 484] Effective January 2, 1932, a Department of Store Construction was established, which will determine

and control store standards and plans and expenditures for remodeling.

During 1930 there was opened a new type of complete food market in Cincinnati, known as the Government Square Store. Similar markets, conforming in size and equipment to the size of the urban centers which they serve, have been established in Columbus, Ohio; Cleveland, Ohio; St. Louis, Chicago, Toledo, Charleston, W. Va.; Ashland, Kentucky; Staunton and Waynesboro, Virginia, and two additional markets in Cincinnati. The net earnings of these units have justified the investment.

On the date of the last annual report we had established grocery departments in the stores of Sears, Roebuck & Company in Cincinnati, Chicago and Minneapolis. Since then we have established grocery departments in Sears, Roebuck stores as follows: two in Detroit; two in St. Louis; one in Indianapolis; one in Kansas City; and one in Memphis.

Armored Car Service

This service, operated in connection with a specially designed safe installed in each store, was established during 1931 for collection of store cash.

In the first two periods of 1931, before this system had been established, our average per period cash losses from hold-ups were $4,763.50, against which no insurance could be obtained. During the last nine periods of 1931, after the establishment of this service, our average per period cash losses amounted to $1,069.00, which represents a savings per year of $48,028.50. The system has more than justified the expenditure for its establishment.

Active Subsidiaries

Piggly Wiggly Corporation, which licenses operators to use its methods of merchandising, trademarks, patents, and labels, 99% of whose outstanding stock is owned by your company, has completed a modernization of its store layouts and methods during the past year, and these are being installed by many operators in many of their stores.

Several new and important patents for use in the Piggly Wiggly system have been evolved and patents applied for during the year.

The corporation had in operation on December 31, 1930, 2,767 licensed stores, and on December 31, 1931, 2,558 licensed stores. The decline in number of stores is due, in a degree, to the combining of smaller stores into larger units by some of our operators, and by the merger of two of our largest operators, which resulted in closing a number of stores because of duplication.

Due to an aggressive policy of promotion adopted during the past year, there were 33 new contracts signed with established and experienced operators since January 1, 1931, requiring the opening of 1,261 new stores during a period of years. Of this number 21 new contracts, calling for the opening of 1,211 stores over a period of years, have been signed since July 1, 1931. The terms of two other contracts have been agreed upon, one in a foreign country, and contracts are ready for signature.

The development of the last year and particularly of the last six months is in marked contrast to the two years preceding 1931, when the number of stores called for by new contracts was negligible, and is evidence of the value of the Piggly Wiggly method of merchandising.

Wesco Foods Company, a produce buying operation, the establishment of which was reported last year, is making satisfactory progress.

An "Institutional Business" corporation has recently been organized for the purpose of securing outlets for our merchandise, particularly those of our own manufacture, by selling to institutions that consume large quantities of food products.

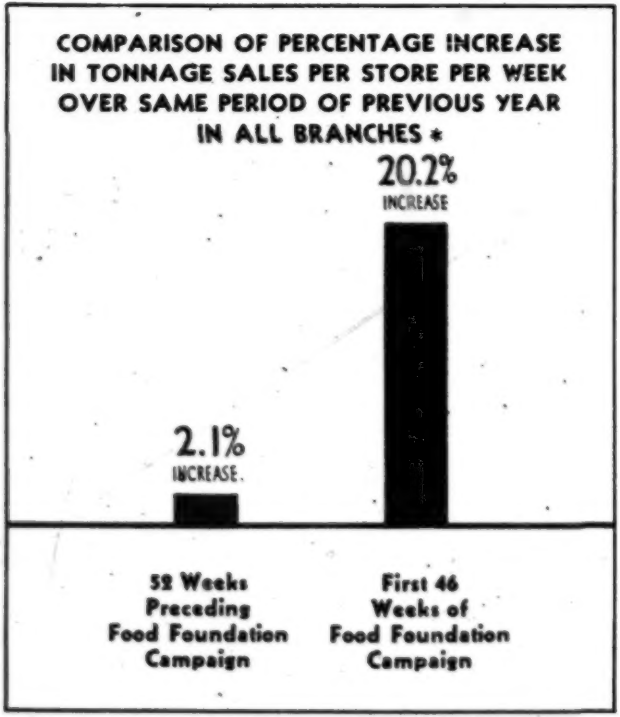
Kroger Food Foundation

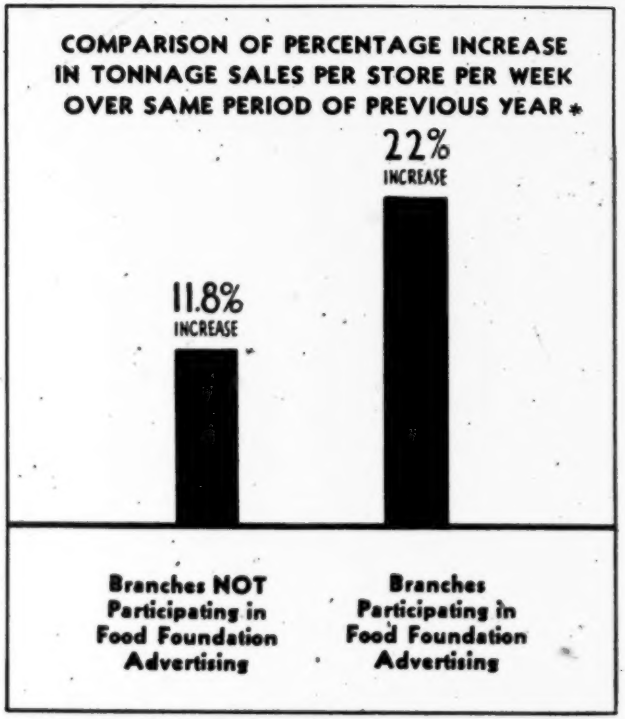
Report was made to you last year of the establishment of an institution devoted to the development of standards of food, quality and content, the inspection of merchandise purchased by Kroger, the enforcement of conformity with these standards and to the assistance of the housewife in home dietetics and nutrition problems.

(Here follows photolithograph, 1 drawing, side folio 485.)

RESULT OF FOOD FOUNDATION ADVERTISING

The Kroger Food Foundation campaign ran during the calendar year 1931, beginning with the issues of January 17 and January 18.





*Every month the Bureau of Labor Statistics of United States Department of Labor compiles an index of

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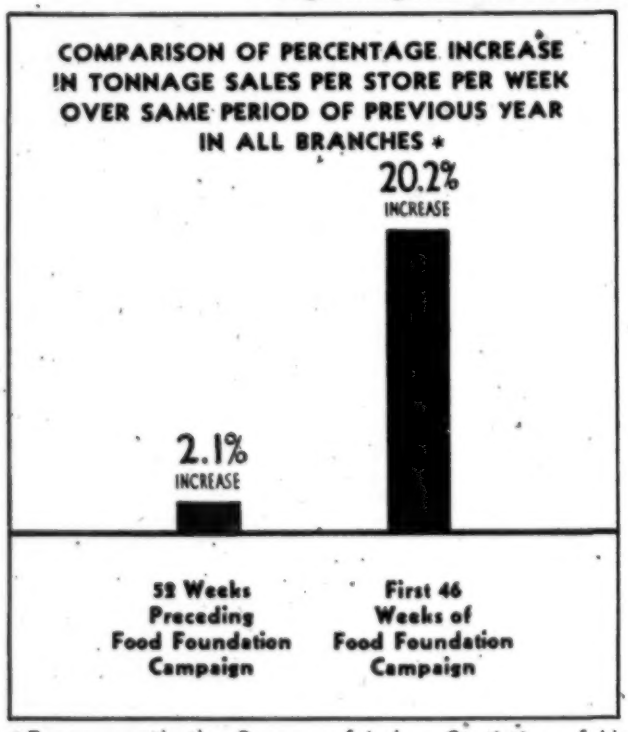
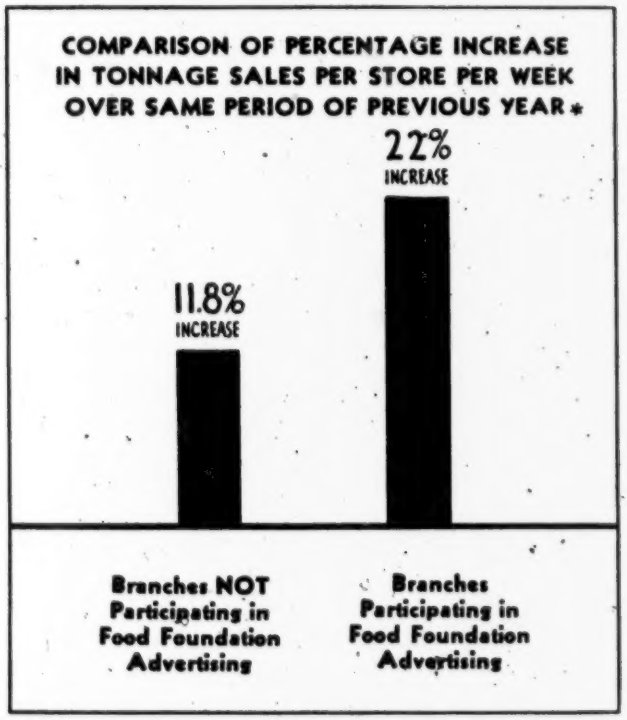
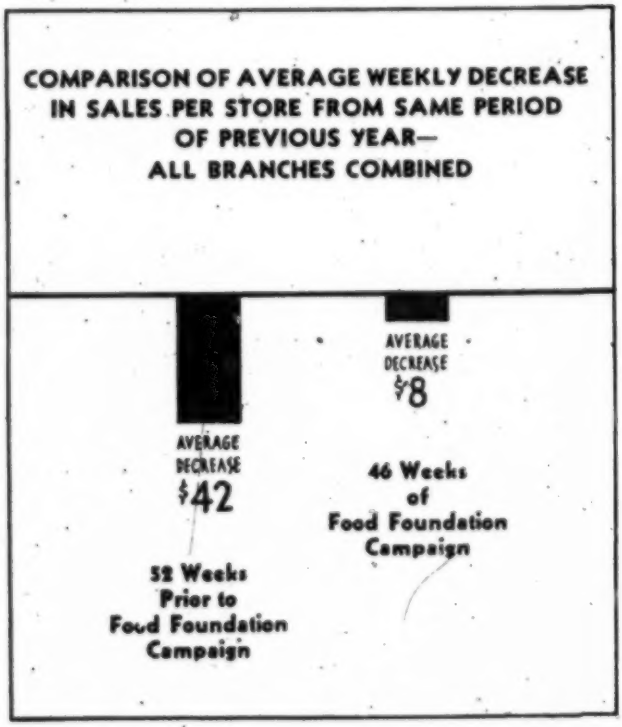
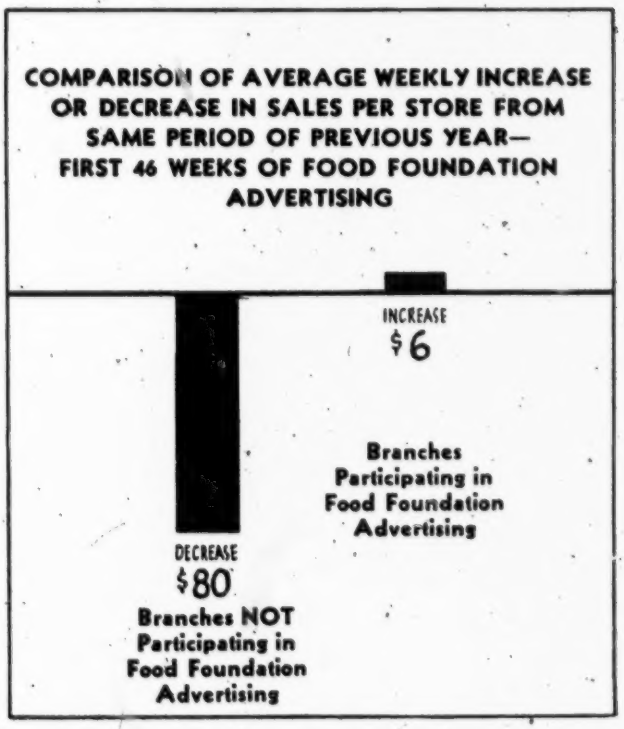




*Every month the Bureau of Labor Statistics of United States Department of Labor compiles an index of retail food prices based on the prices of 42 articles of food (weighted according to their consumption) in retail stores of 51 cities.

Kroger's dollar sales in each month were divided by this index of retail food prices to obtain an estimate of tonnage sales. For instance, if the index drops from 110 to 100, it is evident that a dollar will buy 10% more food—if the index drops from 125 to 100, a dollar will buy 25% more food.





The story of the Foundation is told to the public through rotogravure advertisements in the Sunday papers pub- [fol. 486] lished in those localities where we operate under the Kroger name. Some of our branches, for good will purposes, still retain the name of predecessor companies. The graphs on the preceding page indicate the relative sales records in the Kroger branches where Foundation advertising has been used and the non-Kroger branches where Foundation advertising has not been used.

Permanent headquarters of the Foundation have recently been completed, located over the Government Square Store in Cincinnati. Thus under one roof is established a model institution for the examination, improvement and sale of food products of every sort and by every method, a complete scientific and practical laboratory for testing and demonstration, the like of which exists nowhere else.

The outstanding accomplishments of the Foundation since its establishment have been the preparation of tested recipes, now appearing on an entirely new set of modernized labels of foods of our own manufacture; the preparation of practical cost budgets, with menus for every meal, over 10,000,000 of which have been distributed through our stores ond 21,647 delivered by mail to housewives and institutions which have requested copies; the establishment of a bread formula in accordance with which an unusual loaf is being produced; and research, in cooperation with Frigidaire Corporation, on meat refrigeration methods. The results of this research have not yet been put into actual operation, but there is indicated a great improvement in the methods of the preservation of meats in stores.

Public Relations

A department of Public Relations has been established during the past year and operates under the direction of a Vice President.

Its aim is to promote a better understanding between the company and the communities it serves. It operates on the principle that the business of your company is successful in any community in direct proportion to the welfare of that community and the good will the community bears to the company. Hence the company should support that community in its civic and industrial life in the same measure as

would any local industry. The department has worked out a system of contributions to local civic affairs, based on the proportion of the company's business done in a community, and the contribution made by local industries of similar size.

Your company is now a member of the Chamber of Commerce or similar institution in practically every center where it does business, and its Branch Managers are encouraged to become active in civic affairs.

Anti-Chain Store Legislation

Our 18,856 shareholders are deeply concerned as to whether discriminatory legislation, aimed at curtailing and hampering the chains, constitutes a serious threat.

During the past three years, your President has been in close touch with anti-chain activities throughout the United States and since May, 1930, when he became President of the National Chain Store Association, has been called upon to appear before Legislatures and their committees, and to attend many conferences involving legislative policies and legal actions.

Anti-chain agitation is made vocal and cohesive by a militant minority which, moved by purely selfish interests, desires to hamper a competitor which it has neither the ability or industry to meet. Its activities, in most cases, take the form of demands for discriminatory and unfair legislation against the chains. The demands are listened to with complacence by the Legislatures or City Councils, because they suggest an easy, new and supposedly popular method of raising more revenue. But in the great majority of people there is no opposition to the chains. Their pro-chain attitude is best evidenced by their increasing patronage. However, this favorable majority is non-vocal and inactive and the legislator imagines that the selfish minority is the voice of the disinterested majority.

Anti-chain store legislation does threaten the chains' narrow margin of profit and the price to the consumer now furnished by the chains. This threat can be avoided if the chains will bring to the legislators the actual facts regarding the benefits conferred on the communities by the chains. Wherever legislators have been informed, they have had the intelligence and honesty to acknowledge the facts and refuse to hamper or harm a great distributing agency, which

saves the people of the community many millions each year. [fol. 487] The facts regarding the chains and the public favor in which they are held by a majority of the people can only be brought to legislators by actual communications. Our shareholders and those of every other chain can protect their interests in an entirely proper way by keeping themselves informed as to any threatened anti-chain legislation, either in their municipal council or in their state legislatures, and protesting against this discriminatory and unsound legislation.

Quarterly Reports of Earnings

In the past, semi-annual reports of earnings have been issued by your company. The Board of Directors has in the past felt that the publication of quarterly reports would cause wide fluctuations in the price of your company's stock. The Board has and will continue to give careful consideration to this question of more frequent reports to the shareholders.

The management, since April 1, 1930, has believed that the future of your company lay in being something other than just another grocery chain. To make your company "different," it must appeal to the consuming public as a food distributor which gives high-class service and superior quality of merchandise, but this policy will be and has been modified to conform to the present economic conditions.

You shareholders own this company. Its officers and executives bear the same relation to you as a trustee bears to a beneficiary. The obligations incident to this relationship are fully realized by all officers and executives. Their every act has this premise as a basis. The best evidence of this is the loyalty and devotion shown to your President, to whose guidance you have entrusted the affairs of your company.

The courage, ability and initiative of the entire personnel has been remarkable and consistent, and this in an industrial situation the like of which has never been encountered before in the lives of any of them.

Respectfully submitted, Albert H. Morrill, President.

[fol. 488] The Kroger Grocery and Baking Company and Subsidiary Companies
Consolidated Balance Sheet, January 2, 1932

Assets

Current:		
Cash in banks and on hand		$5,524,652.19
United States Government securities, at cost (market value, $2,227,500)		2,359,687.50
Accounts and notes receivable, net of allowances for those doubtful of collection:		
Customers	$584,567.81	
Employees	92,270.81	
Claims, advances, etc.	467,626.65	
		1,144,465.27
Inventories of merchandise, at cost or market, whichever the lower		16,443,597.19
Cash surrender value of life insurance		26,273.50
Prepaid insurance, rent, taxes, etc.		711,754.48
Accrued accounts receivable, not due		263,847.10
Total current assets		$26,474,277.23
Deferred claims receivable, net of allowance for losses		122,689.09
Investments, at ledger values:		
Stock of affiliated company not included in consolidation, at cost, and undistributed accrued earnings	$7,687,274.26	
Other stocks, bonds, mortgage notes and accrued interest	306,514.63	
		7,993,788.89
Common stock of company purchased and held by trustees for sale to employees (15,891 shares)		267,546.78
Land, buildings, equipment and leasehold improvements, at ledger values, net of allowance for depreciation		22,914,685.29
Store and general supplies and deferred charges to future operations		487,155.78
		$58,260,143.06

[fol. 489] Liabilities

Current:	
Accounts payable, vendors, etc.	$4,744,918.78
Accrued expenses, taxes, etc.	1,103,115.17
Provision for Federal income taxes	327,742.10
Dividends payable	1,086.75
Employees' deposits on subscriptions to unissued common stock	19,107.42
Total current liabilities	6,195,970.22
Funded debt of subsidiary companies	543,000.00
Preferred stocks of subsidiary companies	927,650.00
Reserves for uninsured losses, etc.	837,679.02
	$8,504,299.24

Capital and Surplus

Preferred Capital Stock:			
First preferred, 6% par $100 outstanding	$81,400.00		
Second preferred, 7% par $100 outstanding	62,100.00		
		$143,500.00	
Common Capital Stock without par value: (Authorized 3,000,000 shares)			
	Shares		
Issued	1,830,878 6/20		
Less, in Treasury (subject to purchase option expiring June 30, 1932)	17,392		
Outstanding	1,813,486 6/20	32,963,276.30	
Paid in surplus		1,094,961.69	
Earned surplus, as annexed		15,554,105.83	
			49,755,843.82
			$58,260,143.06

We have audited the accounts of The Kroger Grocery & Baking Company and subsidiary companies for the period from January 4, 1931, to January 2, 1932, and we certify that in our opinion the accompanying balance sheet and surplus and income accounts set forth correctly the financial position of the consolidated companies at January 2, 1932, and the results of their operations for the fiscal period ended that date.

Lybrand, Ross Bros. & Montgomery, Accountants and Auditors.

February 6 1932.

[fol. 490] The Kroger Grocery & Baking Company and Subsidiary Companies

Consolidated Earned Surplus for the Period from January 4 1931, to January 2, 1932

Balance, January 4, 1931		$15,086,186.84
Deduct, sundry surplus charges applicable to prior periods		71,740.95
Adjusted surplus, January 4, 1931		$15,014,445.89
Net income for the fiscal period, as annexed		2,731,128.07
		$17,745,573.96
Cash dividends paid	$1,891,468.13	
Allowance for probable decline in value of investments of subsidiary companies	300,000.00	
		2,191,468.13
Balance, January 2, 1932		$15,554,105.83

[fols. 491–497] The Kroger Grocery & Baking Company and Subsidiary Companies

Consolidated Income Account for the Period from January 4, 1931, to January 2, 1932

Net sales		$244,371,147.17
Cost of sales		187,021,394.47
		57,349,752.70
Operating expenses, excluding depreciation	$49,737,478.03	
Administration expenses	2,064,342.26	
		51,801,820.29
Profit from operations before allowance for depreciation		5,547,932.41
Net accrued earnings of sibsidiary companies for the fiscal year		575,457.39
		6,123,389.80
Allowance for depreciation		3,148,207.66
Profit before interest and Federal taxes		2,975,182.14
Interest earned, net of interest paid		51,816.22
		3,026,998.36
Federal income tax, estimated		295,870.29
Net profit for period		$2,731,128.07

[fols. 498–500] EXHIBIT (MORRILL)

The Kroger Grocery & Baking Company, Cincinnati, Ohio

Annual Report for the Fiscal Year 1932, Ending December 31, 1932

[fol. 501] February 10, 1933.

To the Shareholders of The Kroger Grocery & Baking Company:

The annual report herewith submitted is for the fiscal year beginning January 3, 1932, and ending December 31, 1932, (thirteen periods—four weeks each).

The past year has been devoted largely to consolidating our position and improving our activities previously initiated, rather than undertaking new ones. Again in 1932, as in 1931, economic distress and unemployment increased and sales of your company declined as compared to the previous year. But sales declines were less, relatively, than the shrinkage in business generally and the increase in unemployment. For the second successive year, your company showed improvement in current ratio, cash and United States Government and Municipal bonds, ratio of cash and United States Government and Municipal bonds to current liabilities, inventories, net working capital, aggregate expenses, percent earned on invested capital, profit before income from subsidiaries and net income per common share (refer to graphs on page 13).

Capital Structure

By reference to the Balance Sheet it will be seen there have been no changes in Capital Structure during 1932, except that 2,395 shares of common stock, heretofore held in trust for employees (the deposit against said shares, $19,107.42, having been returned to the subscribing employees with interest) has been returned to the Treasury.

Personnel

No additional general wage adjustments have been made since that effective February 1, 1932, reported in the last annual report.

Voluntary group insurance has been contracted for and made available to all employees during the year and is now in force.

Turnover in personnel, a serious defect in the organization several years ago, showed a marked decrease in 1932.

We do not guarantee any minimum number of weeks of employment to our personnel, but we have actually given to all of our employees fifty-two weeks continuous employment during 1932 and believe we can continue to do so during 1933.

Directors and Officials

Mr. Alvin E. Dodd, formerly Vice President and Director, resigned during the year, and Mr. G. A. Ginter, long associated with the company's legal counsel, was elected to

the Board. The constant interest of directors not active in the company's operations and their generous assistance in the solution of its problems, has been continued during the past year and has been of great value to the company.

Sales

Dollar sales for the fiscal year 1932 (52 weeks) amounted to $213,159,742.69, and for the fiscal year 1931 (52 weeks) amounted to $244,371,147.17, a decline in dollar sales of 12.77% as compared to a decline of 15.8% in retail food prices (Bureau of Labor Statistics, U. S. Department of Labor).

During 1932, the average number of stores in operation showed a decline of 3.3%, and the average sales per store showed a decline of 9.9%, as compared to 1931.

Our sales decline from 1931 to 1932 was less than that of any other sizeable chain, with one exception.

Earnings

The attached consolidated income account, as of December 31, 1932, shows a profit from operations and other income, excluding income from subsidiary sources and Federal income taxes, of $2,762,812.83, to which there is added earnings of affiliated companies of $331,974.03, resulting in net earnings after Federal income taxes for the fiscal year of 1932 of $2,740,867.44, or $1.4758 per share on 1,811,091 6/20 shares of common stock, after providing for preferred dividends.

The fiscal year 1931 showed a profit from operations and other income, excluding income from subsidiary sources and Federal income taxes, of $2,451,540.97, to which was added [fol. 502] earnings of affiliated companies of $575,457.39, resulting in net earnings after Federal income taxes for 1931 of $2,731,128.07, or $1.463 per share on the 1,813,486 6/20 shares of common stock then outstanding, after preferred dividends.

Expenses

Our total operating and administration expenses, including depreciation, during 1931 amounted to $54,950,027.95, and in 1932 amounted to $49,152,361.13, or a decrease of $5,797,666.82, or 10.55%.

Inventories

Material reduction in dollar inventories was made, as shown by the graph on page 13.

Inquiries are occasionally made regarding the time at which we take our inventory adjustments, made necessary by declining food commodity prices. Our adjustments of merchandise inventories are taken currently each period throughout the year and charged against each period's operations.

Cash Position

Comparison of cash position on January 2, 1932, as compared to December 31, 1932, is shown on graph on page 13.

During 1932 your company refunded on employees' stock subscriptions $19,107.42, redeemed funded debts and preferred stock of subsidiaries amounting to $205,250.00, representing in the aggregate $224,357.42 taken out of cash.

Loans

On December 31, 1932 your company had no loans.

Surplus

It became apparent to the management that the stated value of the company's fixed assets need revision. Facts supporting this view were submitted to the Board of Directors early in 1932, and a Committee of the Board was appointed, consisting of members not active in the business, fully to consider this matter, and to recommend adjustments and write-offs, if any, which should be made in the carrying value of our fixed assets.

During the year this Committee studied and investigated the values of our various fixed assets, with the assistance of the company's Engineering Department, its Real Estate Department, its Auditing Department, and outside appraisers, and discussed the matter at length with the various officers and executives of the company.

This Committee reported to the Board of Directors its findings of facts and conclusions, in which it recommended that there be charged off:

$3,200,000.00 as a reduction in value of land and buildings
1,568,700.67 as a reduction of leasehold improvements
400,000.00 as a reduction of equipment account for surplus and idle equipment
600,000.00 as a reduction of equipment account for obsolescence of store equipment.

$5,768,700.67 Total.

The Committee also recommended that such part of these write-offs as could properly be charged against paid in surplus be charged against that account to the extent of the sum now therein, to-wit, $1,094,961.69, and that the balance be charged against earned surplus. Subsequently our public accountants determined that of this sum $464,264.61 could properly be charged to paid in surplus.

The Committee recommended against taking action at this time, to create additional capital surplus or paid in surplus by stating the value of its common stock in terms of par value, and charging the write-off entirely against capital surplus or paid in surplus. It considered a write-off against earned surplus at this time as the more conservative course and one that is possible because there will be ample earned surplus for the needs of the company after charging such write-off to earned surplus.

The Committee also recommended that $400,000.00 be taken out of earned surplus and credited to a "Reserve for Rents on Closed Stores, not yet due, Account," against which will be charged future payments of net rentals on stores closed or in the process of closing prior to January 1, 1933.

The Board approved the report and ordered the adjustments and write-offs and the creation of the reserve as recommended by the Committee. This has been accomplished as of December 31, 1932, and the attached consolidated balance sheet has given effect to these adjustments.

[fol. 503] Depreciation

During 1932 we applied the same liberal depreciation rates as during 1931.

Merchandising and Operations

No material changes have been made in the policies and methods of these activities during 1932, although the organization has been clarified and systematized, and is in a better position to formulate and execute plans than ever before. A Coffee, Tea and Spice Buying Office was established in New York City during 1932, under an executive of long experience with these commodities. It has proven its value.

Comparison of number of stores and number of meat markets in operation on January 2, 1932, as compared to

December 31, 1932 is shown on page 12. During 1932 there were 108 stores remodelled and 116 new stores opened, most of the latter being of the large market type. All store remodelling and the leasing and opening of new stores is undertaken only after thorough investigation and careful analysis.

The grocery departments in the stores of Sears, Roebuck & Co. have been materially improved physically, in volume and in profits.

It is to be remembered that the modern trend is towards larger stores, doing a greater volume, and that the number of stores does not represent the actual growth or decline of the business as accurately as it did in previous years.

In 1932 we established three adequate and efficient warehouses in branches where such facilities had been lacking in the past, in Oklahoma City, warehouse built and owned by the company and in Pittsburgh and Kansas City, warehouses in leased buildings.

Active Subsidiaries

The income from the Piggly Wiggly Corporation, 99% of the outstanding stock of which is owned by your company, is dependent upon the sales of the companies or individuals operating under its licenses. A decline of your company's receipts from this source has been due largely to a decline in the sales and in part to a decline in the number of stores maintained by operators.

On December 31, 1931, there were in operation under the Piggly Wiggly license, 2,558 stores, and on December 31, 1932, 2,143 stores. During the year 1932 contracts have been signed with fourteen additional operators, requiring the ultimate opening of 189 new stores.

Kroger Food Foundation

In the last two Annual Reports, information has been given you regarding the establishment and progress of the Kroger Food Foundation, a unique method of maintaining our quality and promoting good will and sales.

During the last year a substantial change in the policy of this activity has been made, due in part to the necessity of adjusting our expenditures to changed conditions. The practical laboratory facilities of the Foundation have been

extended and now all merchandise bought by the company is tested as to quality and quantity before acceptance. Uniformity and excellence of merchandising, manufactured and packed by ourselves and others, is thus assured to a decree not generally found. The Foundation maintains a Housewives' Advisory Service, which is conducted through personal conferences, correspondence and cooking school demonstrations, the latter conducted in the larger towns and cities throughout our territory. The calls on this service, by personal calls at the Foundation's Headquarters, by letters and by attendance at the sessions of the cooking schools, have been in excess of our capacity to handle. Through this method and the formation of Home Makers' Reference Committees, in our territory, we are building a fundamental and lasting good will and confidence with the housewives whom we serve.

Public Relations

This important department has been expanded and improved during the last year. The expense of this work in both its maintenance and the company's contributions to community activities is large, but through the years it will make adequate returns.

Taxation and Hostile Legislation

With our midsummer dividend check I enclosed a few paragraphs on the huge taxes now collected by governmental agencies, national, county and city, which in the aggregate constitute today one-quarter of the national income.

The burden of taxation which your company was obliged to absorb or had to pass on to the consumer directly and indirectly amounted to a sum approximately five times the dividends we paid to our stockholders.

[fol. 504] The avalanche of editorial and personal criticism of governmental expenditures in evidence during recent months has at least made tax spending authorities economy-conscious, but no material reductions have actually been put into effect. It will require continued active pressure by you and every other taxpayer to accomplish any real economies in public expenditures.

Your company is maintaining the number of its employees at substantially the same figure as it did when its dollar business was twenty-five percent better than during last year; it is distributing food of the highest quality at a nominal ratio of net profit to sales; it is greatly benefiting the body politic by cutting the cost of food distribution. Nevertheless half a hundred municipalities and states are endeavoring to collect discriminatory and occasionally confiscatory taxes from your company and other food chains, thus increasing the burden of taxation and ultimately increasing the cost of food to consumers. Unreasonable taxation of motor truck transportation, which does not in any way compete with the business of the railroads, is threatened and has actually been put into effect here, there and elsewhere.

Fair treatment to the chains, fair taxes on its operations and governmental economy generally can only by accomplished by active and continuous expression of public opinion. Your expression of opinion, made wherever possible, will materially assist in protecting your investment and compelling governmental economy.

All of the personnel of the company appreciate the confidence the shareholders place in them when entrusting to them the management of your investment. They will continue to treat the discharge of their duties as the discharge of a trust. They have shown the qualities of real merchants and operators during 1932 and I give to them full credit and appreciation for whatever accomplishments have been obtained. They go into 1933 better organized, more confident, more militant and more harmonious than at any other time since my connection with the company.

Respectfully submitted, Albert H. Morrill, President.

The Kroger Grocery and Baking Company and Subsidiary Companies

Consolidated Balance Sheets, December 31, 1932, and January 2, 1932

Assets	December 31, 1932 (1932)	January 2, 1932 (1931)
Current:		
Cash in bank and on hand	$9,160,672.26	$5,524,652.19
United States Government securities, at cost; par value of securities held in escrow, $227,500 (market value 1932, $2,584,900; 1931, $2,227,500)	2,532,573.85	2,359,687.50
County and municipal bonds, at cost (market value, $346,900)	342,135.00	.....
Notes and accounts receivable, net of allowance for those doubtful of collection:		
Customers, including welfare associations and relief agencies	1,185,363.52	584,567.81
Employees	41,555.02	92,270.81
Claims, advances, etc.	488,663.36	467,626.65
	1,715,581.90	1,144,465.27
Inventories of merchandise, at the lower of cost or market	14,589,421.25	16,443,597.19
Cash surrender value of life insurance	29,229.70	26,273.50
Prepaid insurance, rent, taxes, etc.	274,224.29	711,754.48
Accrued accounts receivable, not due	298,154.33	263,847.10
Total current assets	28,941,992.58	26,474,277.23
Deferred claims receivable, net of allowance for losses	27,210.86	122,689.09
Investments, at ledger values:		
Stock and notes of affiliated company, not included in consolidation:		
Capital stock, at cost: (includes undistributed accrued earnings in 1931)	6,063,338.63	7,687,274.26
Notes receivable	400,000.00	.....
Other stocks, bonds, mortgage notes and accrued interest	117,306.85	306,514.63
	6,580,645.48	7,993,788.89
Common stock of company held by trustee for sale to employees (24,088 shares in 1932; 15,891 shares in 1931)	202,515.97	267,546.78
Land, buildings, equipment and leasehold improvements, at ledger value, net of allowance for depreciation (1932 after adjustments set forth in attached surplus account)	16,892,181.74	22,914,685.29
Store and general supplies and deferred charges to future operations	357,564.55	487,155.78
	$53,002,111.18	$58,260,143.06

[fol. 506]

Liabilities	December 31, 1932 (1932)		January 2, 1932 (1931)	
Current:				
Accounts payable, vendors, etc		$4,357,238.09		$4,744,918.78
Accrued expenses, taxes, etc		1,244,951.80		1,103,115.17
Provision for Federal income taxes		416,528.17		327,742.10
Dividends payable		2,307.75		1,086.75
Employees' deposits on subscriptions to unissued common stock		.....		19,107.42
Total current liabilities		6,021,025.81		6,195,970.22
Funded debt of subsidiary companies		465,000.00		543,000.00
Preferred stocks of subsidiary companies		800,400.00		927,650.00
Provision for rentals on closed stores, not yet due		426,259.67		.....
		7,712,685.48		7,666,620.22
Capital and surplus				
Preferred capital stock outstanding:				
First preferred, 6 pct. par $100	$81,400.00		$81,400.00	
Second preferred, 7 pct. par $100	62,100.00		62,100.00	
		143,500.00		143,500.00
Common capital stock without par value: (Authorized 3,000,000 shares)				
	Shares		Shares	
Issued	1,830,878 6/20		1,830,878 6/20	
Less, in treasury (17,392 shares subject to purchase option)	19,787		17,392	
Outstanding	1,811,091 6/20	32,919,398.70	1,813,486 6/20	32,963,276.30
Paid in surplus, as annexed		630,697.08		1,094,961.69
Earned surplus appropriated for contingent uninsured losses		803,646.63		837,679.02
Earned surplus, as annexed		10,792,183.29		15,554,105.83
		45,289,425.70		50,593,522.84
		$53,002,111.18		$58,260,143.06

The Board of Directors, The Kroger Grocery & Baking Company, Cincinnati, Ohio:

We have examined the accounts of The Kroger Grocery & Baking Company and Subsidiary Companies, as at December 31, 1932, and we certify that, in our opinion, the foregoing balance sheet and the accompanying surplus and income accounts set forth the financial condition of the consolidated companies as at December 31, 1932, and the results of their operations for the fiscal period then ended.

Lybrand, Ross Bros. & Montgomery, Accountants and Auditors.

February 6, 1933.

[fol. 507]

The Kroger Grocery & Baking Company and Subsidiary Companies

Consolidated Capital Surplus Account for Fiscal Period Ended December 31, 1932

Balance, January 2, 1932	$1,094,961.69
For reduction in values of certain land and buildings acquired from other companies in prior years to more nearly reflect their present values. These properties were in part excess facilities or were inadequate for company purposes	464,264.61
Balance, December 31, 1932	$630,697.08

Consolidated Earned Surplus Account for the Period from January 4, 1931, to December 31, 1932

Balance, January 4, 1931		$15,086,186.84
Deduct, Sundry debits applicable to prior periods		71,740.95
Adjusted surplus, January 4, 1931		15,014,445.89
Net income for the fiscal period ended January 2, 1932		2,731,128.07
		17,745,573.96
Deduct:		
Allowance for probable decline in value of investments of subsidiary companies	$300,000.00	
Cash dividends paid in the fiscal period ended January 2, 1932	1,891,468.13	
		2,191,468.13
Surplus, January 2, 1932		15,554,105.83
Add:		
Sundry adjustments applicable to prior periods, net	79,084.43	
Restoration to surplus of provision made January 2, 1932 for probable decline in value of investments of subsidiary companies (actual loss deducted below)	300,000.00	
		379,084.43
Net income for the fiscal period ended December 31, 1932		2,740,867.44
		18,674,057.70
Deduct:		
Cash dividends paid in the fiscal period ended December 31, 1932	1,879,693.11	
Provision for rents of closed stores (not yet due)	400,000.00	
Adjustment of certain property values to more nearly reflect their present value:		
Reduction of ledger value of land and buildings	$2,735,735.39	
Leasehold improvements to December 31, 1932, written off	1,568,700.67	
Special reserve for surplus and idle equipment	400,000.00	
Special reserve for obsolescence of store equipment	600,000.00	
	5,304,436.06	
Loss on sale of investments of subsidiary companies	297,745.24	
		7,881,874.41
Earned surplus, December 31, 1932		$10,792,183.29

[fol. 508] The Kroger Grocery & Baking Company and Subsidiary Companies

Consolidated Income Account for the Periods from January 3, 1932, to December 31, 1932, and from January 4, 1931, to January 2, 1932

	Fiscal period ended December 31, 1932	Fiscal period ended January 2, 1932
Net sales	$213,159,742.69	$244,371,147.17
Cost of sales	161,395,561.69	187,021,394.47
	51,764,181.00	57,349,752.70
Operating expenses, excluding depreciation	44,307,918.53	49,737,478.03
Administration expenses	1,660,477.65	2,064,342.26
	45,968,396.18	51,801,820.29
Profit from operations before allowance for depreciation	5,795,784.82	5,547,932.41
Allowance for depreciation	3,183,964.95	3,148,207.66
	2,611,819.87	2,399,724.75
Interest earned, net of interest paid	150,992.96	51,816.22
Profit from operations and other income, excluding income from subsidiary sources, and Federal income taxes	2,762,812.83	2,451,540.97
Net accrued earnings of subsidiary companies for fiscal years (1932 includes dividends received $299,778.03)	331,974.03	575,457.39
	3,094,786.86	3,026,998.36
Federal income taxes, estimated	353,919.42	295,870.29
Net income	$2,740,867.44	$2,731,128.07

[fol. 509] The Kroger Grocery & Baking Company and Subsidiary Companies

A Comparison by Years of Significant Statistics Reflecting Changes in Company Operations

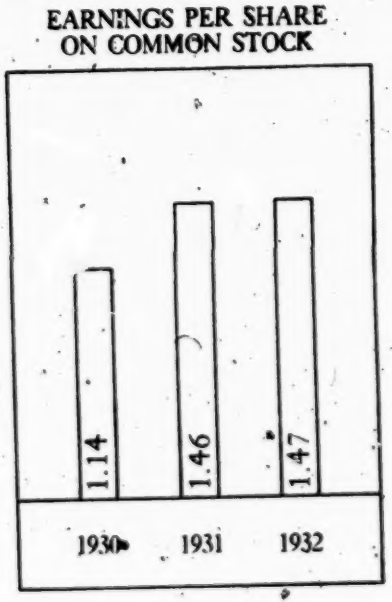
	1930	1931	1932
Final Net Profit per Common Share	$1.14	$1.46	$1.47
Cash Dividend Paid per Common Share	$1.00	$1.00	$1.00
Number of Shares of Common Stock Outstanding at end of year	1,813,486 6/20	1,813,486 6/20	1,811,091 6/20
Number of Shareholders at end of year	16,945	18,856	20,680
Average Sales per Store per Week	$954	$941	$848
Index of Average Dollar Sales per Store per Week (Base 1929 =100)	95.1	93.8	84.5
Index of Dollar Sales (Base 1929 =100)	93.2	85.3	74.4
Index of Retail Food Prices compiled by U. S. Bureau of Labor Statistics (Base 1929=100)	93.9	77.4	65.2

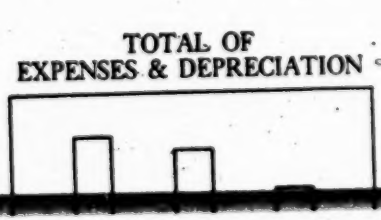
A Comparison by Years of Significant Statistics Reflecting Changes in Company Operations—Continued

	1930	1931	1932
Indicated Tonnage Sales (Base 1929=100)	99.3	110.2	114.1
Indicated Tonnage Sales per Store (Base 1929=100)	101.3	121.2	129.6
Indicated Commodity Price Decline from Previous Year, in Dollar Sales per Store per Week	$62	$200	$159
Number of Grocery Stores in operation at end of year	5,165	4,884	4,737
Number of Meat Markets in operation at end of year	2,990	2,869	2,845
Average number of Grocery Stores operated during year	5,302	4,980	4,816
Average number of Meat Markets operated during year	3,033	2,889	2,887
Number of Licensed Piggly Wiggly Stores in operation at end of year	2,767	2,558	2,143

(Here follow photolithographs, 1 drawing, side folios 510-513.)

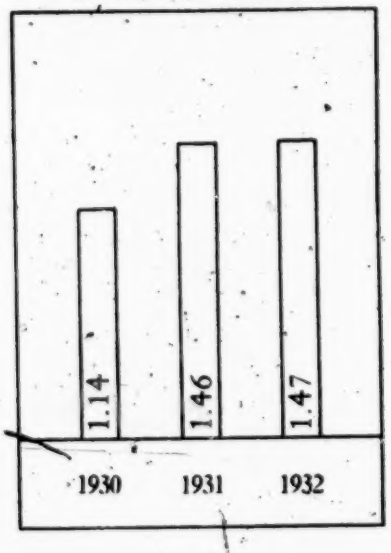
The Kroger Grocery & Baking Company and Subsidiary Companies



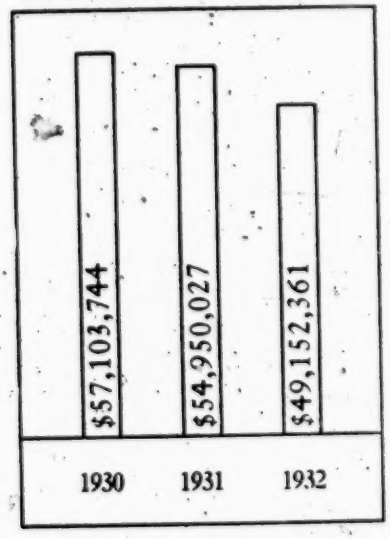


The Kroger Grocery & Baking Company and Subsidiary Companies

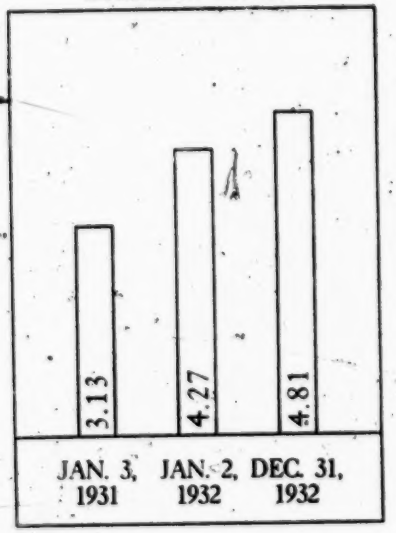
EARNINGS PER SHARE ON COMMON STOCK



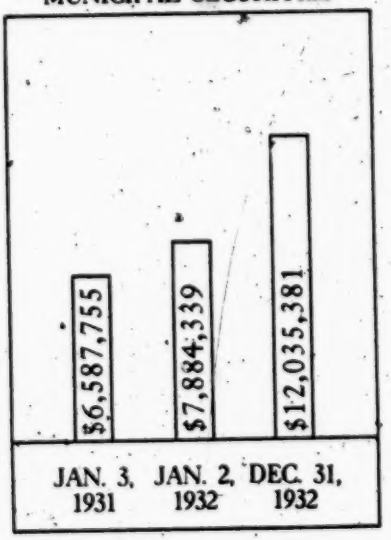
TOTAL OF EXPENSES & DEPRECIATION



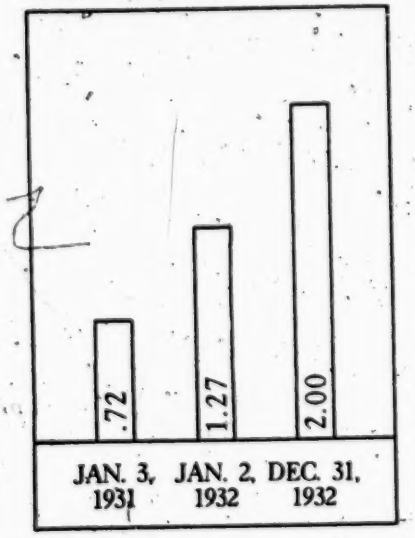
CURRENT RATIO



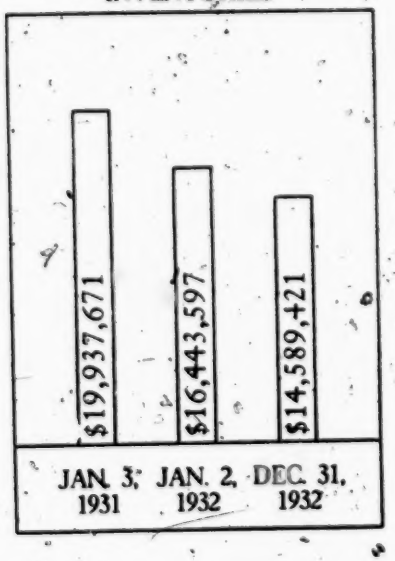
ASH, U. S. GOV'T & MUNICIPAL SECURITIES



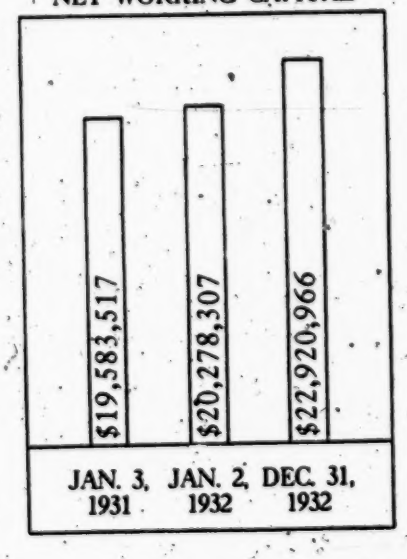
RATIO OF CASH, U. S. GOV'T & MUNICIPAL SECURITIES TO TOTAL CURRENT LIABILITIES



INVENTORIES



NET WORKING CAPITAL



[fol. 514] Harry W. Schacter.

HARRY W. SCHACTER, called for the plaintiff, testified as follows:

He lives at 1200 Castlewood Ave., Louisville, Kentucky. He is President of The Kaufman-Straus Company of Louisville. This is a department store dealing in all kinds of goods, located on Fourth Street between Walnut and Liberty. It occupies a five store building. Its annual sales exceed one million dollars. The business is fifty-four years old and it is one of the largest and oldest department stores in Louisville.

From September, 1925, to April, 1927, the witness was connected with the American Retailers Association of New York at the central office of the organization. This was a group of 17 department stores located all over the United States, having annual sales of approximately one hundred twenty-five million dollars. Some of the stores in this group were Bloomingsale in New York, Lansburgh in Washington, Gilchrist in Boston, Wieboldt in Chicago, Boston Store of Milwaukee, and others.

In April, 1927, the witness became assistant to the general manager of Herman Straus & Sons Company of Louisville. In April, 1929 he was made general manager, holding this position until March 1, 1932, at which time he became President of Kaufman-Straus Company.

Witness has made a study of retailing ever since he went with the American Retailers Association. One of the main functions at the central office in New York was intensive research into the theory and practice of retailing. Witness has written approximately fifty articles that have been published in various magazines dealing with retailing questions. Most of these articles were published in magazines called "Retailing," "Women's Wear," and "Dry Goods Economist." His most recent article was on merchant cooperation and this comprised about one-third of the entire issue of "Retailing," issued Feb. 13, 1933. The program [fol. 515] proposed by him was sponsored by the editor as a national program. In December, 1930, Harper Brothers published a book written by the witness called "Profitable Department Store Management." In this book the witness discussed the problems of merchandising, advertising, store

management and control and other items applying to retail and department store management.

Witness has made a study of the nation-wide phase of retailing. He has also studied reports of the Harvard Bureau of Business Research over a period of four or five years. Other authentic sources of information in connection with retailing are the National Retail Dry Goods Association reports and various other publications, such as "Women's Wear" and "Fairchild Directory."

Witness is a member of the board of directors of the Louisville Retail Merchants Association and is also a member of the Kentucky Retail Merchants Association. He is familiar in a general way with the larger merchandising operations in the State of Kentucky. The National Retail Dry Goods Association has asked him to deliver an address at their mid-year convention in June and witness believes himself to be qualified to give expert opinion as to the conduct of retail merchandising on a large scale and a small scale and the economics pertaining to retail merchandising.

The witness has made a study of the gross sales tax in Kentucky and is familiar in a general way with the taxing process. He has also made a study of the retail sales taxes, as they are commonly known in the United States.

He does not consider the Kentucky Gross Sales Tax to be a real sales tax. A real sales tax applies to all merchants alike. The Kentucky law proposes to place a heavy burden of taxation on those who do a large volume of business and it practically exempts from taxation those who do a small volume. The number doing the small volume constitute the vast majority. As a result, it operates as a penalty on a [fol. 516] few merchants. The witness estimated that in Louisville there would probably be not more than three or four stores, other than food stores, doing a business over one million dollars, and he doubted if there were any more in Kentucky, but there might possibly be one or two. He estimated the number of retail merchants, other than food and dry goods, who do a business in excess of $400,000 to be somewhere between twenty and thirty.

Witness has studied the affidavits led by the three professors, namely Henry M. Waldradt, James R. Martin and Clyde William Phelps. The figures given in these affidavits, witness testified, were principally for the year 1929. Where they were not drawn for that year, they were for 1927 and

1928, but they all stopped at the end of 1929. The changes that have taken place since 1929 were of so cataclysmic a nature that it was utterly impossible to base anything on what happened in 1927, 1928 and 1929. Those years were not a criterion upon which to base a reasonable opinion. The country during that period was emersed in a tremendous inflation, bubbling over with expansion. The basis since the events occurring in October, 1929, is tremendously different and witness did not believe that we would ever see the day when we would get back to the level of 1929. The years 1927, 1928 and 1929 were entirely abnormal in every respect and this was so when they are compared with either the years preceding or following them. For this reason, the three year period mentioned is not a normal basis for present day profits, values or sales. Witness did not believe that there is any difference in opinion between economists or retailers on this point.

Since October, 1929, there has been a decrease in the amount of sales, this being true in every field of merchan- [fol. 517] dising. The relationship of profits or earnings to sales and the return on invested capital has also declined.

Witness stated that from his examination of the affidavits and exhibits attached to the testimony of Professors Waldradt, Martin and Phelps, he found that the heart of their whole contention was that net profits increased as sales increased. Witness stated that that might be correct theoretically but all the supporting facts and figures from actual experience of department stores indicated that there was no relationship; some stores with a smaller volume making a higher net profit than some with a larger volume.

The attention of the witness was then called to Exhibit 12 of Professor Martin's deposition and he was asked to point out in the long list of stores included in that exhibit, any department store operating in Kentucky which had a sales volume in excess of five million dollars. Witness replied that there was no department store in the State of Kentucky that had this volume of sales. The Stewart Dry Goods Company of Louisville had the largest volume. The maximum in the other large department stores would be from one to two million dollars.

Witness's attention was then called to the table with respect to the alleged increase of profits as sales increased from $400,000 to $1,000,000. He stated that Professor Mar-

tin considered only the average figures and from these average figures drew the conclusion that as volume went up the per cent of net profit went up. Witness stated that when the figures were examined closely they showed that average covered a multitude of sins. As an example, they actually indicate that some stores in the lower bracket of volume have a larger per cent of net profit to sales than other stores with a larger volume of sales. The result is that the deduction of Professor Martin, taken from the average*m* does not give a true picture. The true picture, the witness stated, which is proven by the figures, is that the per cent of net profit does not have any definite bear- [fol. 518] ing to the percentage of volume. A store with a larger volume of sales can have a smaller amount of profit than another store with a smaller volume of sales. The prime factor is the difference in management. As an example, the witness stated that he would cite the fact that the Emporium of San Francisco did twenty million dollars worth of sales in 1932 and was third in sales in that year, yet it was eighth on the list when the per cent of net profits to sales was figured. Actually, the Emporium, although it had a vast volume of sales, greater than anyone had in the State of Kentucky, lost one and one-half per cent on its sales. In the same year, Lazarus of Columbus, the eleventh store in amount of sales, was third in the per cent of net profits. The figures which he was giving, the witness stated, were taken from "Retailing" of May 1, 1933, giving the comparative results of a group of large department stores from the year 1926 up to 1933. These figures are also published in a report of "Fairchild Publications."

The same year, 1932, Burdine's of Miami, Florida, was eighteenth on the list according to sales but sixth as to per cent of profit to sales. Burdine's had a volume of three million dollars as against twenty million dollars for the Emporium, and yet the latter lost one and one-half per cent and Burdine's made a profit of approximately 1%.

In 1931 Bamburger of Newark had sales of thirty-five million dollars and ranked second in amount of sales and yet in regard to profits, it ranks seventh and was preceded by a number of stores with smaller sales. All of these other stores with smaller sales made a larger per cent of net profits than Bamburger.

The same year, 1931, Lazarus of Columbus again was eleventh in order of sales and yet was third in the order of profit. The Outlet Company of Providence, R. I., was first in per cent of net profit but ranked fourteenth in volume of sales.

[fol. 519] In 1930 Filene's of Boston, with sales of forty-five million dollars ranked first in sales but sixth in per cent of profit on sales. That year Bamburger of Newark ranked second in sales and yet was fifteenth in per cent of profit. Bamburger's sales for 1930 were approximately 36 million dollars, or about ten times the amount of the largest sales in Kentucky, but nevertheless its profits were .7%. The same year Lazarus was twelfth in sales and fourth in per cent of profit. Rike Kumler Company of Dayton was nineteenth in sales and third in per cent of profits. The Outlet Company of Providence, one of the best managed stores in the country, was first in per cent of profit although sixteenth on the list of actual amount of sales. There were fifteen stores that had a bigger volume of sales than the Outlet Company but all of them had a smaller per cent of profit. This indicates that so far as the larger stores are concerned, there is no relation between volume of sales and the per cent of profit to sales. The basic factor in determining the per cent of profit a business makes is management. It does not depend on volume of sales. There are a number of stores with one-half the volume of other stores who make twice the profit of other stores. There is one case in Pennsylvania where, on a volume of $500,000 of sales, the store made over $150,000.00 of profit, or 10% to sales, yet Kaufman Straus Company lost approximately 3½% on the amount of sales and other stores in Louisville lost more than that in 1932.

The figures for stores having sales in excess of five million dollars are referred to because they are used by Professor Martin. However, they are not applicable to Kentucky because no merchant has a volume as large as that. Figures which are applicable are for stores having sales of less than $150,000 and those grouped from $150,000 to $300,000; $300,000 to $500,000; $500,000 to $750,000; and $750,000 to $1,000,000. The reports gotten out by the [fol. 520] Harvard Bureau of Business Research defined various groups in this way. The 1932 figures show that

the net loss in stores doing less than $150,000 a year was 10.3%. Stores doing a volume of $150,000 to $300,000 showed a loss of 8.7%. Stores doing a business from $300,000 to $500,000, at a 6.2% loss. Stores doing a business of $500,000 to $750,000 had a loss of 8.2%, as against the lower group which only lost 6.2%. In other words, although they increased their volume of business, they lost 2% more than the merchant with a smaller volume. Stores having sales from $750,000 to $1,000,000 showed a loss of 9.5%, which was more than the $500,000 to $750,000 group and more than the $300,000 to $500,000 group. Stores having sales from one to two million dollars lost 6.8%, which figure was higher than the group doing business from $300,000 to $500,000, although it was less than the two preceding groups. In the two million to four million dollar class the loss was 7.8%. In other words, they lost one per cent more than the store doing from one to — million dollars worth of business.

Table referred to was thereupon introduced and marked "Schacter Exhibit 1."

The results of the research of Harvard University shows that there is no relationship between the percentage of gain to net worth and increase of sales. Stores doing less than $150,000 worth of business lost 12.2% of their net worth. Stores doing $150,000 to $300,000 lost 9% of their net worth. Stores doing business from $300,000 to $500,000 lost 5% of their net worth. Stores doing a business of $500,000 to $750,000 lost 10% of their net worth, which was twice as much as stores doing a business of from $300,000 to $500,000. Stores doing a volume of $750,000 to $1,000,000 lost 6% of their net worth, or one per cent more than stores that had a volume of only $300,000 to $500,000. Stores doing a business of $1,000,000 to $2,000,000 lost 4% of their net worth, and yet stores doing a business of $2,000,000 to $4,000,000 lost 6.7% of their net worth. The loss in these stores was larger than the loss in stores having a smaller volume. This was true as to [fol. 521] the stores having a sales volume of $1,000,000 to $2,000,000, stores with a sales volume of $750,000 to $1,000,000, and stores with a volume of $300,000 to $500,000. This indicates clearly that there is no definite relationship between percentage of net profit to sales or per-

centage of gain to net worth and sales. Management in both cases is the primary factor.

The same results are reached by examining the figures for 1930 and 1931.

Professor Martin uses Table 34, appearing on page 45 of Bulletin 78 of the Bureau of Research of Harvard University as an indication that there is an increase in the percentage of profit to sales as sales increase. He files part of this table as Martin Exhibit No. 1. However, there is an important omission. Professor Martin again quotes average figures and leaves out the interquartile ranges quoted in this table. For example, the increase in percentage of net worth of stores doing less than a million is 8.9%, whereas in stores doing over a million dollars in sales, the increase in net worth is 15.5%. Professor Martin omits the very important figure of interquartile ranges. For stores under a million dollars, the range is 3.20% to 20.75%. For stores doing over a million dollars worth of sales the interquartile range goes from 10.64% up to 20.35%. That would indicate that there were some stores in the less than one million dollar group that had increased their net worth 20.75%, whereas there were some stores in the over one million dollar class that had a net increase of only 10.64%. The witness here stated that when he referred to increase in net worth he meant the gain in net worth. As a result, the figures used by Professor Martin cover up the important factor that there were some stores in the less than one million dollar group that had twice the gain in net worth as compared with stores in the more than one million dollar group. This proves the opposite of what Professor Martin was trying to prove in this case.

[fol. 522] The best showing in the smaller group is 20.75%. In the larger group the best showing is 20.35%. In other words, the best store of the smaller group had a better showing than the best store in the larger group.

There was thereupon offered in evidence Table 34, appearing on page 44 of Bulletin 78 of the Bureau of Business Research of Harvard University, which was marked "Schacter Exhibit 2."

Witness stated that this exhibit was the same exhibit as had been introduced by Professor Martin and marked Martin Exhibit 1, except that the latter had omitted the important inter-quartile figures.

Attention of the witness was then called to Martin Exhibits 4 and 5 and to page 8 of Bulletin 83 of the Bureau of Business Research of Harvard University on the operating results of department stores in 1929. His attention was also called to pages 20 and 28 of the same bulletin. The witness thereupon testified that the percentage of gain to net worth, according to Professor Martin's figures, indicated that he again used the average figures all the way down the line and omitted the inter-quartile ranges. For stores doing less than $500,000 Martin showed a percentage of gain to net worth of 5.7%. For stores doing $500,000 to $2,000,000 of business he showed a percentage of gain to net worth of 7.5% and for stores having sales in excess of $2,000,000 he showed a percentage of gain to net worth of 8.5%. He used these figures to prove his point regarding the increase in percentage of gain to net worth as sales increased, but he omitted the inter-quartile ranges in reaching his conclusions. When the inter-quartile ranges are considered, it appears that for stores doing a business of less than $500,000 the percentage of gain to net worth ranges from .84% to 11.17%; for stores doing a business of $500,000 to $2,000,000 the range is 2.88% to 12.17%; stores doing a business of $2,000,000 or over show a range of [fol. 523] 4.23% to 13.02%. The top range for stores doing less than $500,000 showed 11.17% gain. This compares with a gain of only 2.88% for some stores in the next higher bracket. In other words, some stores doing less than $500,000 of business had a four times better showing than some stores in the $500,000 to $2,000,000 group and three times a better showing than some stores which did better than $2,000,000 worth of sales. Witness stated that this led him to conclude that increase in sales volume is no criterion whatever as to what the increase in net gain to net worth will be.

Thereupon, pages 8, 20 and 28 of the Bulletin No. 78 of the Bureau of Business Research of the Harvard University were introduced in evidence and marked "Shacter Exhibits 3, 4 and 5."

Witness stated that there has been a very steady drop in the percentage of profit to sales made by larger scale retail merchants engaged in department store business during the five or six years preceding the time of giving his testi-

mony. In 1926 the average was approximately 3% of profits to sales; in 1930 there was an average of loss of .55%; in 1932 there was an average loss of 6.4% to sales.

The policy prevailing throughout the United States so far as retail merchandise department stores are concerned, is to get as large a volume as possible with a small percentage of profit, allowing the volume to produce the net profit. During the years 1930, 1931 and 1932 the average profit for department stores that had made a profit was from 1 to 3% for the best stores. Most of them had lost money. The Hahn Department Stores, on a volume of $90,000,000 worth of sales in 1931, lost $209,000. Hahn Department Stores is a group of department stores all over the country, consisting of 29 stores, the largest one being in Boston. The closest store to Louisville, was Rollmans at Cincinnati. Hahn had operated stores in St. Paul, Akron, and a number of other cities. In 1932 Hahn Department Stores, with a volume of $70,000,000 of sales lost $3,700,000.

[fol. 524] In 1931 Marshall-Field & Company of Chicago lost $5,000,000 on a volume of $114,000,000, and in the year 1932, on a volume of $70,000,000 they lost close to $8,000,000.

Arnold Constable, Fifth Avenue, New York, did a volume of $6,300,000 in 1932 and lost $239,000. In 1931 their volume was $9,000,000 and they had a profit of $161,000. In 1930 the volume was $12,000,000 and there was a loss of $562,000. In 1929 they lost $528,000 on a volume of $12,229,000.

Crowley-Milner Company of Detroit, Michigan, had a volume of $22,500,000 in 1930. Their volume in 1931 and 1932 was not given but it must have been somewhere between $15,000,000 and $21,000,000. In 1931 they lost $579,000 and in 1932 they lost $2,227,000.

Kaufmann Department Stores of Pittsburgh, one of the finest department stores in the country, had a volume of $22,900,000, and a profit of $648,000 in 1931. In 1932 they had a volume of $16,000,000 and lost $555,000.

Mandel Bros. of Chicago, in 1930 had a volume of $25,000,000 and losses of $867,000. In 1931 they had a volume of $19,600,000 any they lost $371,000. In 1932 the volume was $14,800,000 and they lost $578,000. During the same years there were stores who had a smaller volume of business and made money. For example, the Emporium of San Fran-

cisco lost $294,000 on a volume of $20,000,000, whereas Burdine's of Miami, Florida, on a volume of $3,000,000 made $26,700 in the same year. There were some small department stores having sales under a million dollars that made money.

The Kentucky Gross Sales Tax would add to the heavy loss that stores selling more than a million dollars worth of merchandise are bearing, and would impair their capital by the amount of the tax. Stores making an average profit for the years 1930 to 1932 inclusive, would be required to pay from one-third to their entire profit. They would not be able to pass the tax on to the consuming public because [fol. 525] the units of merchandise for the most part are small. When an article sells for fifty cents and a 1% tax is imposed, the one-half cent cannot be charged a customer, because the article cannot be sold for fifty and one-half cents. Furthermore, they will not be able to compete with stores doing a similar business which are not taxed. Kaufman Straus has a shoe department in its store. There are two dozen shoe departments in Louisville, all of them doing less than $400,000 worth of business a year, and they all pay practically no tax. If Kaufman Straus passes the tax on to the consumer, it would not be able to meet the competition of the other stores. The same is true of hosiery. There are a dozen hosiery stores on Fourth Street doing a small business, and in the ready-to-wear field there are perhaps thirty to forty shops that would practically not be effected by the tax. Kaufman Straus would be subject to a tax, but it could not pass the tax on to the consumer because it could not compete with these other stores unless it kept its prices in line. Some of these other stores do a larger business than the particular department in Kaufman Straus. For example, the shoe department of Kaufman Straus might do a business of $50,000, and competing shoe stores might have a business of $75,000, yet the tax on sales for Kaufman Straus shoe department would be nearly twenty times as large as that imposed upon the competitors. However, Kaufman Straus could not afford to pass the tax on to its customers unless the other stores charged as much as it did.

The witness' attention was then called to Martin Exhibit No. 12 and to the concerns listed therein. He stated that he believed the percentage of profit to sales of the Great At-

lantic and Pacific Tea Company was somewhere between one to two per cent.

Both J. C. Penny Company and S. S. Kresge Company, listed in the exhibit, did business in the State of Kentucky. The witness did not know whether American Stores did business in this State.

[fol. 526] Gimbel Brothers, one of the concerns listed, had a volume of $98,000,000 in 1931 and losses of $1,800,000. In 1932 they had a volume of $72,000,000 and losses of approximately $4,500,000.

Federated Department Stores, Hahn Department Stores, and May Department Stores, all of which were listed on the exhibits, did not do any business in Kentucky. The last named had a volume of $93,000,000 in 1931 and made a profit of $2,197,000; in 1932 they had a volume of $72,500,000 and made $948,000. The witness stated that this is considered to be one of the best managed stores in America. However, the tax would have taken two-thirds of the profits made by this concern.

Both Liggett Brothers and United Cigar Stores Company did business in the State of Kentucky, and both were listed on Exhibit 12. They were both in the hands of a receiver.

W. T. Grant, listed on exhibit 12, is a 25¢ to $1.00 store, one of the best in America. In 1931 they did a volume of $75,500,000 and made a profit of $2,100,000. In 1932 the volume was $73,000,000 and the profit was $1,500,000. It was one of the best of its kind and only showed a percent of profit of 2.6%.

City Stores did business in Kentucky, Kaufman-Straus being a subsidiary. In 1930 City Stores had a volume of $47,000,000, and a profit of $475,000. In 1931 they had a volume of $35,600,000 and a loss of approximately $2,300,000. In 1932 the loss was $1,800,000 on a volume of $29,500,000. The City Stores subsidiary in Louisville, Kaufman Straus, lost approximately $170,000 in 1931. The witness took over the store March 1, 1932, and for that year the store lost $50,000 or $120,000 less than in 1931. The actual operating loss for 1932 was $9,000 the rest being depreciation.

The witness here states that the figures he was giving were taken from "Retailing" of May 1, 1933, and also from "Fairchild's Financial Report" for May 1933. They are [fol. 527] compiled by these publications from the financial

statements as published by the various companies and are considered reliable statistical data. In every case they report the statements which are certified to by reputable accountants.

Mercantile Stores have one store in Louisville, this being J. Bacon and Company, which lost money. National Bellas Hess was in the hands of a receiver. Walgreen Drug Company operated in Louisville but the witness had no information regarding them. McCrory Stores, a five and ten cent store, operate in Louisville and are in the hands of a receiver. The same is true of Schulte Retail Stores. Fashion Park and F. W. Grant are in the hands of receivers. The last named operates in Kentucky. Child's Restaurant operates in Kentucky and has been through the process of reorganization. Bohack's, a grocery chain, does not operate in Kentucky. J. J. Newberry have a store in Louisville. In 1931 on sales of $31,000,000 they made a profit of $1,000,000; in 1932 on a sales volume of $33,000,000 they made $819,000. They are considered excellent operators and show a 2-½% profit in 1932. Shattuck does not operate in Kentucky. Interstate Department Stores have gone through reorganization, the founder of the company having severed his connections with it. In 1931 they had sales of $25,000,000 and a profit of $547,000. In 1932 they had sales of $22,000,000 and a loss of $600,000. The Dominion Stores do not operate in Louisville. McLellan do operate in Kentucky and in 1931 they had a volume of $22,000,000 and profits of $360,000, or 1.6%. Hartman Corporation is a furniture chain which was in the hands of a receiver and has just been sold at auction. Consolidated Retail Stores have had a complete reorganization, having had losses so drastic that they had to go out of business and change their name. Lerner's are doing business in Kentucky. They are asking for reductions from a number of their landlords and [fol. 528] are threatening bankruptcy if they do not secure the reductions. In 1931 they had a volume of $26,000,000, a profit of $379,000, or 1.4% on sales. Bryant is in bad shape. Their volume for the fiscal year ending May 31, 1931 was $17,700,000, with profits of $227,000. For the years 1931 and 1932 they had a volume of $13,000,000 and losses of $156,000. Neisner operate in Kentucky. In 1930 they had a volume of $16,000,000 and a profit of $330,000. In 1931 their volume was the same, but they lost $639,000. In 1932 their volume was $14,000,000 and they lost $46,800.

Best and Company, Reliable Stores, National Grocery Company, do not operate in Kentucky. The same is true of Ludwig, Bauman & Company and Magnin.

American Department Stores had a volume of $3,300,000 in 1930 on which they suffered a loss of $84,000. In 1931 their volume was $1,700,000 and their losses $168,000. The volume in 1932 is not given. They lost $248,000.

Mangel Stores operate in Kentucky. A receiver was applied for recently and they effected a reorganization and secured a substantial reduction in rentals. Feltman & Curme are in the hands of their bankers. Loft, Inc. is an eastern chain in reorganization. Southern Department Stores operated five stores, two in Louisville, one in Nashville, 1 in Evansville and one in Birmingham. They closed the Louisville store of John C. Lewis and Company and the Birmingham Store. They are losing money.

Sally Frocks operate in Louisville. They are in the hands of a receiver.

(Here follow photolithographs, Schachter Exhibits 1–5, side folis 529–536.)

SCHACTER EXHIBIT 1

Table 2. Operating Results of Department Stores by Sales Volume Groups: 1932

(Common Figures; Net Sales = 100%, except where noted)

Items	Sales Volume Groups (000 omitted)									
	Less than $150	$150–300	$300–500	$500–750	$750–1,000	$1,000–2,000	$2,000–4,000	$4,000–10,000	$10,000–20,000	$20,000 or more
Number of Reports	78	70	45	33	24	65	45	47	15	6
Aggregate Sales (in millions)	$7	$17	$18	$21	$21	$96	$165	$287	$213	$223
Typical Net Sales (in thousands)	$80	$210	$395	$610	$890	$1,375	$2,650	$5,750	$14,000	$32,000
Index of Change in Sales (1932/1931)	74.8	74.5	75.5	77.0	76.5	77.0	77.7	77.2	76.1	77.5
Population of City (in thousands)	10	25	40	70	95	125	350	500	1,700	2,500
Total Merchandise Costs (Net)	73.0%	72.8%	69.0%	69.1%	69.7%	68.0%	67.3%	67.4%	65.8%	65.1%
Gross Margin	26.1	27.2	31.0	30.9	30.3	32.0	32.7	32.6	34.2	34.9
Total Pay Roll	19.3%	18.4%	19.5%	19.9%	19.9%	19.1%	18.5%	18.7%	18.6%	18.2%
Real Estate Costs (See Appendix, page 55)	4.6	4.6	4.2	4.9	5.9	5.3	6.3	6.45	6.8	7.7
Newspaper Advertising	•	2.1	2.5	3.35	•	3.3	4.0	4.0	3.45	•
Direct Advertising	•	0.2†	0.25†	0.15†	•	0.1	0.3	0.3	0.15	•
Other Advertising	•	0.3†	0.35†	0.25†	•	0.3	0.3	0.2	0.2	•
Total Advertising (subtotal)	2.5	(2.6)	(3.1)	(3.75)	3.75	(3.7)	(4.6)	(4.5)	(3.8)	3.3
Taxes (except on real estate and income)	0.8	0.75	0.7	0.65	0.55	0.55	0.5	0.4	0.35	0.4
Interest (except on real estate)	3.4	3.1	2.6	2.55	2.5	2.6	2.6	2.4	2.2	2.2
Supplies	0.85	1.05	1.25	1.4	1.5	1.6	1.8	1.8	1.7	1.8
Service Purchased	1.15	1.25	1.3	1.4	1.2	1.1	1.15	1.05	0.8	0.8
Unclassified: Losses from Bad Debts	0.4	0.55	0.45	0.5	0.6	0.65	0.7	0.65	0.7	0.85
Other	0.75	0.6	0.7	0.9	0.85	0.65	0.95	0.75	0.85	1.0
Travelling	0.1	0.25	0.45	0.25	0.25	0.45	0.5	0.45	0.2	0.2

Table 2. Operating Results of Department Stores by Sales Volume Groups: 1932

(Common Figures; Net Sales = 100%, except where noted)

Items	Sales Volume Groups (000 omitted)									
	Less than $150	$150–300	$300–500	$500–750	$750–1,000	$1,000–2,000	$2,000–4,000	$4,000–10,000	$10,000–20,000	$20,000 or more
Number of Reports	78	70	45	33	24	65	45	47	15	6
Aggregate Sales (in millions)	$7	$17	$18	$21	$21	$96	$165	$287	$213	$223
Typical Net Sales (in thousands)	$80	$210	$395	$610	$890	$1,375	$2,650	$5,750	$14,000	$32,000
Index of Change in Sales (1932/1931)	74.8	74.5	75.5	77.0	76.5	77.0	77.7	77.2	76.1	77.5
Population of City (in thousands)	10	25	40	70	95	125	350	500	1,700	2,500
Total Merchandise Costs (Net)	73.9%	72.8%	69.0%	69.1%	69.7%	68.0%	67.3%	67.4%	65.8%	65.1%
GROSS MARGIN	26.1	27.2	31.0	30.9	30.3	32.0	32.7	32.6	34.2	34.9
Total Pay Roll	19.3%	18.4%	19.5%	19.9%	19.9%	19.1%	18.5%	18.7%	18.6%	18.2%
Real Estate Costs (See Appendix, page 55)	4.6	4.6	4.2	4.9	5.9	5.3	6.3	6.45	6.8	7.7
Newspaper Advertising	*	2.1	2.5	3.35	*	3.3	4.0	4.0	3.45	*
Direct Advertising	*	0.2†	0.25†	0.15†	*	0.1	0.3	0.3	0.15	*
Other Advertising	*	0.3†	0.35†	0.25†	*	0.3	0.3	0.2	0.2	*
Total Advertising (subtotal)	2.5	(2.6)	(3.1)	(3.75)	3.75	(3.7)	(4.6)	(4.5)	(3.8)	3.3
Taxes (except on real estate and income)	0.8	0.75	0.7	0.65	0.55	0.55	0.5	0.4	0.35	0.4
Interest (except on real estate)	3.4	3.1	2.6	2.55	2.5	2.6	2.6	2.4	2.2	2.2
Supplies	0.85	1.05	1.25	1.4	1.5	1.6	1.8	1.8	1.7	1.8
Service Purchased	1.15	1.25	1.3	1.4	1.2	1.1	1.15	1.05	0.8	0.8
Unclassified: Losses from Bad Debts	0.4	0.55	0.45	0.5	0.6	0.65	0.7	0.65	0.7	0.85
Other	0.75	0.6	0.7	0.9	0.85	0.65	0.95	0.75	0.85	1.0
Travelling	0.3	0.35	0.45	0.35	0.35	0.45	0.5	0.45	0.3	0.3
Communication	0.45	0.55	0.6	0.6	0.6	0.6	0.6	0.6	0.55	0.5
Repairs	0.15†	0.2	0.25	0.3	0.3	0.3	0.3	0.3	0.3	0.35
Insurance (except on real estate)	0.7	0.6	0.6	0.45	0.4	0.4	0.4	0.3	0.3	0.3
Depreciation (except on real estate)	0.9	1.0	0.9	0.9	0.9	1.15	1.0	1.05	1.25	1.35
Professional Services (See Appendix, page 56)	0.15†	0.3†	0.6	0.55	0.5	0.65	0.6	0.6	0.6	0.55
TOTAL EXPENSE	36.4%	35.9%	37.2%	39.1%	39.8%	38.8%	40.5%	40.0%	39.1%	39.6%
NET PROFIT OR LOSS	L. 10.3%	L. 8.7%	L. 6.2%	L. 8.2%	L. 9.5%	L. 6.8%	L. 7.8%	L. 7.4%	L. 3.9%	L. 4.7%
Net Other Income (including interest on capital owned)	3.6	3.3	3.6	3.2	5.0	4.2	4.0	4.4	3.8	4.2
NET GAIN:										
Percentage of Net Sales	L. 6.7%	L. 5.4%	L. 2.6%	L. 5.0%	L. 4.5%	L. 2.6%	L. 3.8%	L. 3.0%	L. 1.1%	L. 0.5%
Percentage of Net Worth	L. 12.2	L. 9.0	L. 5.0	L. 10.0	L. 6.0	L. 4.0	L. 6.7	L. 3.5	L. 0.8	*
Rate of Stock-turn (times a year): Based on Beginning and Ending Inventories	2.0	2.5	3.2	3.5	3.4	3.6	4.0	4.3	4.5	5.7
Returns and Allowances	2.0%†	5.0%†	6.4%†	6.4%†	6.5%†	8.0%	10.7%	11.9%	13.3%	16.0%
Initial Mark-up (percentage of original retail value): On Net Cost Delivered	35.2	37.2	39.3	39.4	38.4	39.3	40.4	40.5	41.9	41.8
Mark-downs	*	*	*	11.2†	9.8	8.7	9.3	9.8	10.0	8.5
Discounts to Employees and Others	*	*	*	0.45†	0.4†	0.5†	0.5†	0.55	0.6	0.7
Stock Shortages (total for year)	*	*	*	1.65	1.4	1.8	1.6	1.65	1.8	1.8
Total Retail Reductions	13.5%†	15.0%†	13.0%	13.3%	11.6%	11.0%	11.4%	12.0%	12.4%	11.0%
Sales per Square Foot of Total Space	$8.00†	$9.00†	$11.00†	$12.50†	$10.50	$12.30†	$12.80	$15.50	$16.00	$20.00†
Real Estate Costs per Square Foot of Total Space	.40†	.40†	.45†	.60†	.60	.65†	.80	1.00	1.10	*
Sales/Total Employees	$5,700†	$6,000†	$5,700†	$5,500†	$5,000†	$5,300	$5,800	$6,000	$6,300	$7,100†
% Cash and C. O. D. Sales	62.0%†	55.0%†	58.0%†	49.5%†	†50.25%	46.5%†	48.4%	46.7%	48.5%	56.3%
% Charge and Installment Sales	38.0†	45.0†	42.0†	50.5†	49.75†	53.5†	51.6	53.3	51.5	43.7
% of Firms Earning Some Net Profit	6.4%	0.0%	8.9%	0.0%	0.0%	0.9%	0.0%	6.4%	0.0%	16.7%
% of Firms Earning Some Net Gain	11.5	11.4	26.7	15.2	12.5	26.2	23.4	36.2	40.0	33.3

* Data not available.
† Figures for this item were given on less than 75% of the reports used.

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SCHACTER EXHIBIT 2

Table 34. Operating Results of 64 Specialty Stores Reporting for 1928, Net Sales = 100%

	Net Sales less than $1,000,000			Net Sales over $1,000,000		
	Common Figures	Interquartile Range† (Middle 50% of Items) From	To	Common Figures	Interquartile Range† (Middle 50% of Items) From	To
Number of Firms	36			28		
Aggregate Sales	$14,779,030			$156,865,993		
Typical Net Sales	400,000	$185,000	$625,000	3,250,000	$2,700,000	$4,500,000
Total Merchandise Costs	67.2%	65.62%	69.88%	64.7%	63.52%	65.97%
Gross Margin	32.8	30.64	34.38	35.3	34.03	36.48
*Functional Division of Salaries and Wages:**						
Executive				1.45%	0.96%	1.65%
Other Administrative				0.6	0.43	0.67
Office				1.65	1.31	1.75
Occupancy	Data insufficient for inclusion in tabulations			0.85	0.65	0.99
Publicity				0.7	0.58	0.75
Buying				3.25	2.48	3.57
Receiving, Marking, and Stock-room				0.3	0.21	0.35
Direct Selling				5.15	4.76	5.56
Managers and Assistants				0.45	0.28	0.66
Indirect Selling				1.2	0.72	1.59
Delivery				0.5	0.27	0.65
Total Salaries and Wages	15.5%	13.50%	17.78%	16.1%	14.85%	16.57%
Rentals	4.8	3.54	6.65	3.85	2.56	4.99
Advertising	3.4	2.66	4.49	3.85	2.90	4.65
Taxes	0.35	0.11	0.53	0.4	0.27	0.55
Interest	2.1	1.54	2.70	1.8	1.43	2.38
Supplies	1.0	0.73	1.36	1.5	1.32	1.59
Service Purchased	0.85	0.46	1.29	0.65	0.46	0.85
Unclassified	0.8	0.47	1.15	1.05	0.70	1.24
Travelling	0.7	0.36	0.99	0.65	0.48	0.77
Communication	0.4	0.24	0.47	0.35	0.28	0.39
Repairs	0.2	0.10	0.31	0.25	0.15	0.42
Insurance	0.5	0.31	0.64	0.4	0.21	0.52
Depreciation:						
Losses from Bad Debts	0.35	0.13	0.53	0.35	0.15	0.56
Other Depreciation	0.7	0.52	1.13	0.8	0.65	0.92
Professional Services	0.25	0.15	0.47	0.3	0.22	0.42
Total Expense	31.9%	28.93%	33.91%	32.3%	30.39%	33.70%
*Expenses by Functional Groups:**						
Total Administrative and General				7.4%	6.50%	7.88%
Total Occupancy				6.1	5.46	6.69
Total Publicity	Data insufficient for inclusion in tabulations			5.7	4.72	6.57
Total Buying				4.5	3.21	5.01
Total General Selling				7.7	7.10	8.38
Total Delivery				0.9	0.63	1.14
Total Expense	31.9%	28.93%	33.91%	32.3%	30.39%	33.70%
Net Profit	0.9%	*Loss 0.73%*	2.91%	3.0%	2.08%	5.16%
Total Net Gain:						
Percentage of Net Sales	2.8%	0.93%	5.25%	5.8%	4.56%	8.08%
Percentage of Net Worth	8.9%	3.20%	20.75%	15.5%	10.64%	20.35%
Rate of Stock-turn (times a year):						
Based on beginning and ending inventories	3.9	2.63	5.52	5.9	4.65	7.15
Based on monthly inventories	4.0	3.07	5.03	4.6	3.65	6.14
Returns and Allowances	8.2%	5.74%	11.40%	14.3%	10.53%	17.31%

†Neither the high nor the low figures, of course, are all for any one firm; consequently, they cannot be totalled.

*Percentages for these items were based on 23 reports; data on the other reports were not in sufficient detail to permit their use.

SCHACTER EXHIBIT 3

Table 3. Typical Operating Results of Department Stores with Net Sales of $2,000,000 or More: 1929

(Net Sales = 100%)

Item No.		Common Figures	Interquartile Range[1] (Middle 50% of Items)		Grouped According to Sales Volume		
					Net Sales		
			From	To	$2,000,000–$3,999,000	$4,000,000–$9,999,000	$10,000,000 or more
	Number of Reports[1]	133			58	46	29
1	Aggregate Sales (in thousands)	$1,190,523			$197,398	$317,051	$676,074
2	Typical Net Sales (in thousands)	$5,200	$3,000	$9,000	$2,800	$6,000	$18,500
3	Index of Change in Sales	101.2	97.42	105.39	100.9	100.6	102.4
4	Size of City	300,000	140,000	632,000	130,000	360,000	900,000
5	Net Profit or Loss	0.8%	*Loss 1.47%*	3.03%	0.3%	0.9%	1.6%
6	Total Merchandise Costs	66.4%	65.11%	68.04%	67.1%	66.3%	65.6%
7	GROSS MARGIN	33.6	31.96	34.89	32.9	33.7	34.4
8	Total Pay Roll	16.8%	15.62%	17.60%	16.6%	16.7%	17.0%
9	Fixed Plant and Equipment Costs[4]	4.9	4.06	5.67	4.9	4.7	5.1
10	Advertising	3.45	2.70	4.19	3.4	3.6	3.3
11	Taxes[4]	0.3	0.23	0.48	0.35	0.35	0.3
12	Interest[4]	2.0	1.66	2.36	2.1	2.1	1.85
13	Supplies	1.65	1.33	1.91	1.5	1.75	1.7
14	Service Purchased	0.65	0.46	0.99	0.75	0.7	0.5
15	Unclassified: Losses from Bad Debts	0.3	0.15	0.41	0.3	0.3	0.25
16	Unclassified: Other[5]	0.85	0.61	1.04	0.8	0.8	0.85
17	Travelling	0.45	0.30	0.58	0.5	0.45	0.35
18	Communication	0.35	0.28	0.41	0.35	0.35	0.35
19	Repairs[4]	0.35	0.22	0.48	0.3	0.3	0.5
20	Insurance[4]	0.25	0.19	0.34	0.25	0.25	0.2
21	Depreciation[4]	0.1	0.05	0.12	0.1	0.1[6]	0.1
22	Professional Services[5]	0.4	0.22	0.57	0.4	0.35	0.45
23	TOTAL EXPENSE	32.8%	30.91%	34.76%	32.6%	32.8%	32.8%
24	NET PROFIT OR LOSS	0.8%	*Loss 1.47%*	3.03%	0.3%	0.9%	1.6%
25	Net Other Income	3.4	2.71	4.38	3.4	3.0	3.7
26	NET GAIN: Percentage of Net Sales	4.2%	1.63%	6.58%	3.7%	3.9%	5.3%
27	NET GAIN: Percentage of Net Worth	8.5%	4.23%	13.02%	7.6%	8.1%	11.3%
	Rate of Stock-turn (times a year)						
28	Based on Beginning and Ending Inventories	4.2	3.46	4.94	3.9	4.0	4.6
29	Based on Monthly Inventories	3.6	2.92	4.22	3.3	3.6	4.0
30	Returns and Allowances	10.5%	8.18%	13.40%	8.5%	10.6%	14.0%
31	Mark-downs	6.6	5.85	7.64	6.7	6.6	6.6
32	Inward Freight, Express, and Truckage	0.9	0.65	1.20	1.05	0.95	0.65[6]
33	Cash Discounts Received on Purchases of Merchandise	2.7	2.39	3.11	2.5	2.8	3.1
34	Alteration and Workroom Costs	0.65	0.39	1.08	0.75[6]	0.7	0.6

[1] Where chains or stores operating branches submitted separate statements for individual units, each statement was treated here as a separate report. When a report covering more than one unit was submitted, the report was grouped according to the average sales volume per unit.

[2] Neither the high nor the low figures, of course, are all for any one report; consequently they cannot be totalled. For explanation of the Interquartile Range, see Appendix 2, page 57.

[3] Lack of comparable classification data made it impossible to include the entire 133 reports in these groups.

[4] Taxes, Interest, Insurance, and Depreciation on Real Estate and Equipment have been combined with Rental Expense under Fixed Plant and Equipment Costs. The repair figure for 1929 includes the cost of repairs on real estate considered in preceding years as a part of the rental charge. In charging interest for 1929, assets rather than borrowed capital and net worth were used. In effect this included a charge typically amounting to approximately 0.3% of net sales for interest on non-interest bearing liabilities to outside creditors. In comparing these figures with those for preceding years careful attention should be paid to these changes in the definition of the items. See also pages 57–59.

[5] The item, Professional Services, has been expanded to include membership, dues, and fees in buying associations and in domestic and foreign buying offices, amounts previously included under Unclassified Expense. In order to secure comparability between firms that provide their own offices and those which use the services of other agencies, tenancy charges on buying offices have been included in the professional service item.

[6] Amounts were entered for this item on less than 75% of the reports used in the division.

Table 3. — (*Continued*)

Grouped According to Sales Increase or Decrease (1928–29)[1]			Grouped According to Size of City[2]			Grouped According to Rate of Profit or Loss[3]				
Index of Change in Sales			Population			Net Loss		Net Profit		
Less than 100.0	100.0–105.0	105.0 or more	Less than 250,000	250,000–499,000	500,000 or more	2.5% or more	Less than 2.5%	Less than 2.5%	2.5% or more	Item No.
44	43	31	59	32	40	25	30	29	41	
$292,253	$331,327	$408,638	$211,895	$251,025	$690,680	$141,891	$216,000	$258,316	$531,871	1
$4,800	$5,700	$5,200	$3,000	$5,900	$11,000	$4,500	$4,000	$5,000	$6,600	2
95.7	101.6	109.0	101.2	102.0	101.2	99.3	99.5	101.7	102.9	3
300,000	250,000	350,000	100,000	310,000	800,000	300,000	250,000	225,000	350,000	4
Loss 0.3%	1.9%	0.8%	0.5%	0.8%	1.2%	*Loss 3.7%*	*Loss 1.0%*	1.4%	3.8%	5
67.0%	66.5%	65.8%	67.3%	66.0%	65.5%	67.8%	67.2%	66.8%	65.3%	6
33.0	33.5	34.2	32.7	34.0	34.5	32.2	32.8	33.2	34.7	7
17.1%	16.6%	16.9%	16.6%	16.9%	16.9%	17.8%	17.1%	16.5%	16.2%	8
4.75	4.7	5.3	4.9	4.95	4.95	5.75	5.0	4.7	4.7	9[4]
3.85	3.0	3.4	3.0	3.75	3.85	4.25	4.0	3.25	2.7	10
0.35	0.3	0.3	0.35	0.35	0.3	0.3	0.3	0.3	0.35	11[4]
2.05	2.05	2.0	2.15	1.95	1.85	2.0	2.05	2.0	1.9	12[4]
1.65	1.6	1.7	1.55	1.75	1.7	1.8	1.6	1.6	1.6	13
0.65	0.65	0.7	0.7	0.65	0.65	0.7	0.75	0.65	0.55	14
0.3	0.25	0.3	0.3	0.3	0.25	0.3	0.3	0.3	0.2	15
0.75	0.8	0.85	0.8	0.75	0.8	0.85	0.75	0.75	0.8	16[5]
0.4	0.4	0.55	0.5	0.5	0.4	0.45	0.5	0.4	0.45	17
0.35	0.35	0.35	0.3	0.35	0.35	0.4	0.35	0.3	0.3	18
0.4	0.3	0.25	0.3	0.35	0.45	0.35	0.3	0.3	0.45	19[4]
0.25	0.2	0.2	0.25	0.25	0.25	0.35	0.25	0.25	0.25	20[4]
0.1	0.05	0.1	0.1	0.05	0.1	0.1	0.1	0.05	0.1	21[4]
0.36	0.35	0.5	0.4	0.35	0.5	0.5	0.45	0.45	0.35	22[6]
33.3%	31.6%	33.4%	32.2%	33.2%	33.3%	35.9%	33.8%	31.8%	30.9%	23
Loss 0.3%	1.9%	0.8%	0.5%	0.8%	1.2%	*Loss 3.7%*	*Loss 1.0%*	1.4%	3.8%	24
3.5	3.3	3.2	3.7	2.9	3.3	2.9	3.4	3.4	3.7	25
3.2%	5.2%	4.0%	4.2%	3.7%	4.5%	*Loss 0.8%*	2.4%	4.8%	7.5%	26
5.9%	10.1%	10.7%	8.7%	6.9%	9.4%	*Loss 1.5%*	5.5%	10.5%	14.3%	27
4.0	4.0	4.5	3.8	4.3	4.7	4.2	4.1	4.3	4.3	28
3.5	3.5	3.7	3.2	3.8	4.0	3.6	3.5	3.6	3.7	29
9.7%	10.1%	11.9%	8.6%[7]	10.8%	13.7%	12.5%	10.4%	9.3%	10.5%	30
6.8	6.5	6.55	6.5	6.85	6.5	6.7	7.2	6.2	6.5	31
0.9	0.9	1.0	1.1	0.95	0.65	0.9	0.9	0.9	0.8	32
2.55	2.75	2.8	2.4	2.9	3.2	2.7	2.7	2.65	2.75	33
0.65	0.95[8]	0.45	0.75[8]	0.6[8]	0.7	0.75	0.5	0.85	0.6[8]	34

SCHACTER EXHIBIT 4

Table 9. Typical Operating Results of Department Stores with Net Sales of from $500,000 to $1,999,000: 1929

(Net Sales = 100%)

Item No.		Common Figures	Interquartile Range[2] (Middle 50% of Items)		Grouped According to Sales Volume		
					Net Sales		
			From	To	$500,000–$749,000	$750,000–$999,000	$1,000,000–$1,999,000
	Number of Reports[1]	168			59	36	73
1	Aggregate Sales (in thousands)	$169,606			$35,825	$32,642	$101,139
2	Typical Net Sales (in thousands)	$910	$650	$1,260	$600	$850	$1,300
3	Index of Change in Sales	98.5	94.34	102.68	98.3	99.0	98.3
4	Size of City	55,000	30,000	113,000	35,000	50,000	75,000
5	Net Profit or Loss	*Loss 0.2%*	*Loss 2.26%*	1.73%	*Loss 0.4%*	*Loss 0.5%*	0.1%
6	Total Merchandise Costs	68.2%	66.38%	69.89%	68.5%	68.2%	67.9%
7	Gross Margin	31.8	30.11	33.12	31.5	31.8	32.1
8	Total Pay Roll	16.6%	15.11%	18.23%	16.9%	16.2%	16.7%
9	Fixed Plant and Equipment Costs[4]	4.5	3.66	5.48	4.5	4.5	4.5
10	Advertising	3.0	2.35	3.62	2.6	3.2	3.2
11	Taxes[4]	0.45	0.27	0.68	0.6	0.45	0.4
12	Interest[4]	2.4	1.93	2.84	2.6	2.45	2.3
13	Supplies	1.3	0.92	1.55	1.0	1.4	1.4
14	Service Purchased	0.85	0.61	1.14	0.85	0.95	0.8
15	Unclassified: Losses from Bad Debts	0.25	0.14	0.43	0.25	0.25	0.25
16	Unclassified: Other[5]	0.8	0.42	1.20	0.7	1.1	0.7
17	Travelling	0.45	0.28	0.64	0.45	0.45	0.45
18	Communication	0.35	0.25	0.44	0.35	0.3	0.35
19	Repairs[4]	0.3	0.18	0.46	0.3	0.3	0.25
20	Insurance[4]	0.4	0.27	0.51	0.45	0.4	0.35
21	Depreciation[4]	0.05[6]	0.04	0.11	0.05[6]	0.05[6]	0.05
22	Professional Services[5]	0.3	0.14	0.54	0.3	0.3	0.3
23	Total Expense	32.0%	28.96%	34.73%	31.9%	32.3%	32.0%
24	Net Profit or Loss	*Loss 0.2%*	*Loss 2.26%*	1.73%	*Loss 0.4%*	*Loss 0.5%*	0.1%
25	Net Other Income	3.3	2.46	4.28	3.6	3.5	3.0
26	Net Gain: Percentage of Net Sales	3.1%	0.71%	5.24%	3.2%	3.0%	3.1%
27	Net Gain: Percentage of Net Worth	7.5%	2.88%	12.17%	6.8%	6.6%	8.4%
	Rate of Stock-turn (times a year)						
28	Based on Beginning and Ending Inventories	3.3	2.66	4.03	2.7	3.4	3.6
29	Based on Monthly Inventories	2.8[6]	2.37	3.38	2.3[6]	3.0	3.0
30	Returns and Allowances	6.8%[6]	4.34%	9.70%	6.1%[6]	7.3%[6]	7.3%
31	Mark-downs	7.2[6]	5.69	9.27	8.8[6]	7.9[6]	6.5[6]
32	Inward Freight, Express, and Truckage	1.0	0.80	1.21	1.1	1.05	0.9
33	Cash Discounts Received on Purchases of Merchandise	2.5	2.20	2.82	2.5	2.5	2.5
34	Alteration and Workroom Costs	0.5[6]	0.20	0.96	0.4[6]	0.6[6]	0.55

[1] Where chains or stores operating branches submitted separate statements for individual units, each statement was treated here as a separate report. When a report covering more than one unit was submitted, the report was grouped according to the average sales volume per unit.

[2] Neither the high nor the low figures, of course, are all for any one report; consequently they cannot be totalled. For explanation of the Interquartile Range, see Appendix 2, page 57.

[3] Lack of comparable classification data made it impossible to include the entire 168 reports in these groups.

[4] Taxes, Interest, Insurance, and Depreciation on Real Estate and Equipment have been combined with Rental Expense under Fixed Plant and Equipment Costs. The repair figure for 1929 includes the cost of repairs on real estate considered in preceding years as a part of the rental charge. In charging interest for 1929, assets rather than borrowed capital and net worth were used. In effect this included a charge typically amounting to approximately 0.3% of net sales for interest on non-interest bearing liabilities to outside creditors. In comparing these figures with those for preceding years careful attention should be paid to these changes in the definition of the items. See also pages 57-59.

[5] The item, Professional Services, has been expanded to include membership, dues, and fees in buying associations and in domestic and foreign buying offices, amounts previously included under Unclassified Expense. In order to secure comparability between firms that provide their own offices and those which use the services of other agencies, tenancy charges on buying offices have been included in the professional service item.

[6] Amounts were entered for this item on less than 75% of the reports used in the division.

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Table 9. — (*Continued*)

Grouped According to Sales Increase or Decrease (1928–29)[1]				Grouped According to Size of City[2]			Grouped According to Rate of Profit or Loss[3]				
Index of Change in Sales				Population			Net Loss		Net Profit		
Less than 95.0	95.0–99.0	100.0–104.9	105.0 or more	Less than 50,000	50,000–99,000	100,000 or more	2.5% or more	Less than 2.5%	Less than 2.5%	2.5% or more	Item No.
41	43	30	22	82	36	47	40	43	44	27	
$40,611	$44,653	$31,214	$22,787	$69,528	$38,426	$58,037	$40,507	$43,957	$43,005	$28,068	1
$900	$940	$1,000	$900	$730	$990	$1,200	$900	$875	$940	$950	2
91.4	97.8	102.5	109.0	98.8	96.5	99.6	93.8	99.4	100.0	101.0	3
50,000	60,000	60,000	55,000	30,000	55,000	150,000	95,000	50,000	50,000	50,000	4
Loss 1.8%	*Loss 0.6%*	0.5%	1.0%	0.5%	*Loss 0.9%*	*Loss 1.0%*	*Loss 4.4%*	*Loss 0.9%*	1.1%	4.1%	5
69.0%	67.9%	68.5%	67.9%	68.5%	67.2%	68.2%	68.5%	68.3%	68.3%	68.1%	6
31.0	32.1	31.5	32.1	31.5	32.8	31.8	31.5	31.7	31.7	31.9	7
16.9%	16.9%	16.2%	16.3%	16.4%	17.8%	16.4%	17.6%	17.2%	16.3%	14.7%	8
4.35	4.6	4.3	4.7	4.25	4.5	5.1	5.55	4.55	4.25	3.85	9[4]
3.0	3.0	2.85	2.9	2.5	3.25	3.6	3.85	2.95	2.55	2.5	10
0.6	0.5	0.4	0.3	0.55	0.45	0.4	0.6	0.4	0.35	0.4	11[4]
2.6	2.45	2.3	2.2	2.5	2.45	2.25	2.7	2.4	2.3	2.1	12[4]
1.3	1.4	1.3	1.2	1.2	1.4	1.35	1.4	1.4	1.3	0.95	13
0.9	0.9	0.8	0.85	0.8	1.05	0.85	0.95	0.9	0.8	0.75	14
0.25	0.25	0.3	0.25	0.25	0.25	0.25	0.35	0.2	0.25	0.25	15
0.85	0.75	0.85	0.8	0.75	0.65	0.85	0.9	0.75	0.8	0.65	16[5]
0.55	0.5	0.35	0.35	0.45	0.5	0.45	0.55	0.45	0.4	0.4	17
0.35	0.4	0.35	0.3	0.35	0.35	0.35	0.35	0.35	0.35	0.3	18
0.3	0.3	0.3	0.25	0.3	0.3	0.25	0.3	0.35	0.25	0.25	19[4]
0.4	0.4	0.4	0.4	0.4	0.35	0.35	0.4	0.35	0.4	0.35	20[4]
0.1[6]	0.05	0.1[6]	0.1[6]	0.05[6]	0.05[6]	0.05	0.05[6]	0.05[6]	0.05[6]	0.05[6]	21[4]
0.35	0.3	0.2	0.2	0.25	0.35	0.3	0.35	0.3	0.25	0.3	22[5]
32.8%	32.7%	31.0%	31.1%	31.0%	33.7%	32.8%	35.9%	32.6%	30.6%	27.8%	23
Loss 1.8%	*Loss 0.6%*	0.5%	1.0%	0.5%	*Loss 0.9%*	*Loss 1.0%*	*Loss 4.4%*	*Loss 0.9%*	1.1%	4.1%	24
3.7	3.3	3.2	3.2	3.5	2.9	3.1	3.4	3.4	3.3	2.6	25
1.9%	2.7%	3.7%	4.2%	4.0%	2.0%	2.1%	*Loss 1.0%*	2.5%	4.4%	6.7%	26
5.2%	6.3%	8.8%	10.2%	8.6%	6.1%	6.8%	*Loss 2.0%*	5.9%	10.4%	18.0%	27
3.0	3.4	3.5	3.5	3.2	3.1	3.6	3.0	3.0	3.5	4.1	28
2.6[6]	2.9	2.8[6]	3.25	2.8[6]	2.7	3.0	2.6	2.6	2.9	3.5[6]	29
Data Insufficient				7.2%[6]	7.5%[6]	5.5%[6]	Data Insufficient				30
Data Insufficient				7.6[6]	7.1[6]	6.7[6]	Data Insufficient				31
0.95%[6]	0.95%	1.0%	1.05%	1.1	1.0	0.85	1.0%[6]	1.0%	1.0%	1.1%	32
2.5	2.65	2.4	2.3	2.5	2.55	2.55	2.5	2.45	2.6	2.5	33
0.4[6]	0.55[6]	0.65[6]	0.5[6]	0.5[6]	0.5[6]	0.5[6]	0.4	0.8[6]	0.6[6]	0.4[6]	34

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SCHACTER EXHIBIT 5

Table 14. Typical Operating Results of Department Stores with Net Sales of less than $500,000: 1929

(Net Sales = 100%)

Item No.		Common Figures	Interquartile Range[2] (Middle 50% of Items)		Grouped According to Sales Volume		
					Net Sales		
			From	To	Less than $150,000	$150,000–$299,000	$300,000–$499,000
1	Number of Reports[1]	226			59	83	84
	Aggregate Sales (in thousands)	$59,137			$7,916	$18,640	$32,581
2	Typical Net Sales (in thousands)	$230	$150	$350	$94	$200	$380
3	Index of Change in Sales	99.1	93.89	103.49	98.3	99.3	99.4
4	Size of City	15,000	6,000	25,000	5,000	10,000	25,000
5	Net Profit or Loss	*Loss 1.0%*	*Loss 3.14%*	1.46%	*Loss 0.9%*	*Loss 1.1%*	*Loss 0.8%*
6	Total Merchandise Costs	70.7%	68.24%	73.16%	71.1%	71.3%	69.8%
7	GROSS MARGIN	29.3	26.82	31.76	28.9	28.7	30.2
8	Total Pay Roll	16.1%	13.76%	18.03%	15.6%	16.0%	16.6%
9	Fixed Plant and Equipment Costs[4]	3.9	2.80	4.85	3.8	3.6	4.1
10	Advertising	2.4	1.42	3.11	2.0	2.4	2.65
11	Taxes[4]	0.6	0.34	0.88	0.65	0.6	0.6
12	Interest[4]	2.9	2.25	3.39	3.4	2.9	2.6
13	Supplies	0.85	0.54	1.18	0.75	0.85	0.9
14	Service Purchased	0.9	0.61	1.18	0.9	0.9	0.9
15	Unclassified: Losses from Bad Debts	0.3	0.13	0.52	0.4[6]	0.3	0.3
16	Unclassified: Other[5]	0.55	0.25	0.93	0.5	0.55	0.55
17	Travelling	0.4	0.19	0.57	0.3[6]	0.45	0.4
18	Communication	0.35	0.20	0.43	0.35	0.3	0.35
19	Repairs[4]	0.25[6]	0.12	0.40	0.2[6]	0.2[6]	0.25
20	Insurance[4]	0.55	0.36	0.71	0.65	0.5	0.5
21	Depreciation[4]	0.1[6]	0.00	0.14	0.1[6]	0.1[6]	0.1[6]
22	Professional Services[5]	0.15[6]	0.09	0.37	0.2[6]	0.15	0.2[6]
23	TOTAL EXPENSE	30.3%	26.71%	32.97%	29.8%	29.8%	31.0%
24	NET PROFIT OR LOSS	*Loss 1.0%*	*Loss 3.14%*	1.46%	*Loss 0.9%*	*Loss 1.1%*	*Loss 0.8%*
25	Net Other Income	3.3	2.40	4.22	3.9	3.1	3.0
26	NET GAIN: Percentage of Net Sales	2.3%	0.56%	4.65%	3.0%	2.0%	2.2%
27	NET GAIN: Percentage of Net Worth	5.7%	0.84%	11.17%	6.3%	5.0%	6.0%
	Rate of Stock-turn (times a year)						
28	Based on Beginning and Ending Inventories	2.4	1.92	3.00	1.9	2.4	2.8
29	Based on Monthly Inventories	2.0[6]	1.63	2.53	1.8[6]	1.9[6]	2.3[6]
30	Returns and Allowances	2.4%[6]	1.09%	4.24%	1.7%[6]	1.7%[6]	3.5%[6]
31	Mark-downs	7.2[6]	5.09	9.71	Data Insufficient		
32	Inward Freight, Express, and Truckage	1.2	0.91	1.49	1.15%	1.2%	1.15%
33	Cash Discounts Received on Purchases of Merchandise	2.4	1.87	2.89	2.1	2.5	2.4
34	Alteration and Workroom Costs	0.45[6]	0.23	0.71	0.2[6]	0.5[6]	0.5[6]

[1] Where chains or stores operating branches submitted separate statements for individual units, each statement was treated here as a separate report. When a report covering more than one unit was submitted, the report was grouped according to the average sales volume per unit.

[2] Neither the high nor the low figures, of course, are all for any one report; consequently they cannot be totalled. For explanation of the Interquartile Range, see Appendix 2, page 57.

[3] Lack of comparable classification data made it impossible to include the entire 226 reports in these groups.

[4] Taxes, Interest, Insurance, and Depreciation on Real Estate and Equipment have been combined with Rental Expense under Fixed Plant and Equipment Costs. The repair figure for 1929 includes the cost of repairs on real estate considered in preceding years as a part of the rental charge. In charging interest for 1929, assets rather than borrowed capital and net worth were used. In effect this included a charge typically amounting to approximately 0.3% of net sales for interest on non-interest bearing liabilities to outside creditors. In comparing these figures with those for preceding years careful attention should be paid to these changes in the definition of the items. See also pages 57–59.

[5] The item, Professional Services, has been expanded to include memberships, dues, and fees in buying associations and in domestic and foreign buying offices, amounts previously included under Unclassified Expense. In order to secure comparability between firms that provide their own offices and those which use the services of other agencies, tenancy charges on buying offices have been included in the professional service item.

[6] Amounts were entered for this item on less than 75% of the reports used in the division.

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Table 14. — (*Continued*)

Grouped According to Sales Increase or Decrease (1928–29)[3]				Grouped According to Size of City[4]			Grouped According to Rate of Profit or Loss[5]				
Index of Change in Sales				Population			Net Loss		Net Profit		
Less than 95.0	95.0–99.0	100.0–104.9	105.0 or more	Less than 10,000	10,000–24,999	25,000 or more	2.5% or more	Less than 2.5%	Less than 2.5%	2.5% or more	Item No.
49	50	52	29	89	67	54	77	57	50	36	1
$12,005	$12,531	$12,214	$8,577	$16,110	$18,639	$17,303	$20,092	$14,579	$14,144	$8,736	
$220	$225	$210	$285	$160	$270	$330	$220	$230	$260	$200	2
90.3	97.7	102.4	110.2	99.2	99.4	98.6	96.0	100.4	99.8	102.2	3
10,000	15,000	15,000	15,000	5,000	15,000	40,000	15,000	15,000	15,000	10,000	4
Loss 2.4%	*Loss 0.5%*	*Loss 0.2%*	1.0%	*Loss 0.7%*	*Loss 0.6%*	*Loss 1.5%*	*Loss 4.5%*	*Loss 0.9%*	1.2%	4.2%	5
70.0%	71.2%	70.8%	71.4%	71.8%	70.2%	69.5%	71.3%	70.2%	70.5%	70.0%	6
30.0	28.8	29.2	28.6	28.2	29.8	30.5	28.7	29.8	29.5	30.0	7
17.0%	15.9%	16.1%	14.7%	15.8%	16.1%	17.0%	17.4%	16.8%	14.9%	14.0%	8
4.3	3.65	3.6	3.6	3.45	3.9	4.4	4.1	3.8	3.8	3.2	9[6]
2.5	2.25	2.0	2.1	1.7	2.45	3.25	2.75	2.35	2.1	2.05	10
0.75	0.6	0.65	0.45	0.7	0.6	0.5	0.7	0.65	0.55	0.5	11[6]
3.2	2.8	2.8	2.55	3.2	2.75	2.45	3.35	2.75	2.75	2.4	12[6]
1.0	0.8	0.8	0.8	0.8	0.95	0.9	1.05	0.9	0.75	0.75	13
1.0	0.9	0.85	0.75	0.85	0.95	0.[illegible]	1.05	0.9	0.85	0.75	14
0.25	0.35	0.3	0.3	0.35	0.35	0.2	0.3	0.3	0.35	0.25	15
0.6	0.35	0.6	0.8	0.5	0.6	0.6	0.6	0.55	0.6	0.4	16[6]
0.4	0.35	0.4	0.35	0.3	0.45	0.4	0.45	0.45	0.35	0.3	17
0.35	0.3	0.3	0.3	0.3	0.35	0.3	0.35	0.35	0.3	0.3	18
0.2	0.25	0.2	0.3[6]	0.2[6]	0.2[6]	0.3	0.25	0.15[6]	0.25[6]	0.2	19[6]
0.6	0.5	0.55	0.4	0.55	0.5	0.5	0.6	0.5	0.5	0.45	20[6]
0.1[6]	0.05[6]	0.1[6]	0.05[6]	0.05[6]	0.05[6]	0.1[6]	0.05[6]	0.1[6]	0.1[6]	0.05[6]	21[6]
0.15[6]	0.25[6]	0.15[6]	0.15[6]	0.15[6]	0.2[6]	0.2[6]	0.2[6]	0.15[6]	0.15[6]	0.2[6]	22[6]
32.4%	29.3%	29.4%	27.6%	28.9%	30.4%	32.0%	33.2%	30.7%	28.3%	25.8%	23
Loss 2.4%	*Loss 0.5%*	*Loss 0.2%*	1.0%	*Loss 0.7%*	*Loss 0.6%*	*Loss 1.5%*	*Loss 4.5%*	*Loss 0.9%*	1.2%	4.2%	24
3.6	2.9	3.3	2.8	3.7	2.9	3.1	3.6	3.1	2.8	2.8	25
1.2%	2.4%	3.1%	3.8%	3.0%	2.3%	1.6%	*Loss 0.9%*	2.2%	4.0%	7.0%	26
1.7%	5.8%	6.3%	11.7%	5.6%	5.7%	5.7%	*Loss 2.0%*	4.8%	10.5%	16.5%	27
2.0	2.5	2.5	2.8	2.2	2.4	2.8	2.1	2.4	2.5	3.1	28
1.7[6]	2.3[6]	2.1[6]	2.3[6]	1.8[6]	2.0[6]	2.3[6]	1.8[6]	2.1[6]	2.0[6]	2.5[6]	29
Data Insufficient				2.0%[6]	2.6%[6]	3.0%[6]	Data Insufficient				30
Data Insufficient				Data Insufficient			Data Insufficient				31
1.3%	1.15%	1.05%	1.2%	1.2%	1.2%	1.2%	1.2%	1.2%	1.05%	1.25%	32
2.5	2.4	2.45	2.2	2.2	2.6	2.55	2.25	2.4	2.4	2.5	33
0.45[6]	0.35[6]	0.5[6]	0.45[6]	0.35[6]	0.6[6]	0.5[6]	0.4[6]	0.35[6]	0.45[6]	0.6[6]	34

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[fol. 537] AFFIDAVIT OF JAMES W. STITES

STATE OF KENTUCKY,
County of Jefferson, ss:

James W. Stites, being first duly sworn, states:

I have made an examination of the Journals of the 1930 General Assembly of Kentucky for the purpose of ascertaining and transcribing the steps taken in the passage of House Bill No. 111. The Journals had not been printed at the time of my examination but were in the form of typewritten memoranda and, as to stereotype matters, upon printed forms, fixed together in bundles as to each legislative day.

I examined the bundles of memoranda only for the dates shown by the Legislative Digest to have been the days on which steps were taken in the passage of House Bill No. 111.

Both the Senate and House Journals are in the hands of the printers, but I am advised that it is not customary to complete the printing until just before the next Legislature convenes.

I examined the House Journals in the office of the State Journal Company at Frankfort and the Senate Journals in the office of the Gibbs-Inman Printing Company at Louisville.

I have copied every entry that I could find referring to House Bill No. 111.

[fol. 538] House Journals

Under date of January 21, 1930, in the list of bills introduced that day, I found the following entry:

H. B. 111. An act to restrain the unfair competition of chain stores, and in aid of individual merchants in the Commonwealth.
To Committee on Kentucky Statutes.

Under date of February 14, 1930, in a long list of bills, I found the following:

H. B. 111. An act to restrain the unfair competition of chain stores, and in aid of individual merchants in the Commonwealth.

With a Committee Amendment thereto by way of substitute therefor.

* * * * * * *

Said bills were severally read at length the first time and ordered to be placed in the Calendar.

Under date of February 18, 1930, I found the following entry:

* * * * * * *

Mr. Via moved that the Rules be suspended and that a bill entitled:

H. B. 111. An act to restrain the unfair competition of chain stores, and in aid of individual merchants in the Commonwealth.

Be made a Special Order for Wednesday, February 19, at eleven o'clock a. m.

Said motion was agreed to.

On the same date I found in the list of bills given their second reading the following entry:

H. B. 111. An Act to restrain the unfair competition of chain stores, and in aid of individual merchants in the Commonwealth.

[fol. 539] The Constitutional provision as to the second reading of said bills at length being dispensed with, said bills were read the second time by their titles only.

Ordered that said bills be placed in the Orders of the Day.

Under date of February 19, 1930, I found the following entry:

The hour of eleven o'clock a. m. having arrived, that being the hour heretofore set for the Special Order of the Day, the House took up for consideration from the Orders of the Day, said Special Order, to-wit, a bill entitled:

H. B. 111. An Act relating to revenue and taxation, imposing an excise or license tax on merchants, as the word "Merchant" is defined in this Act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing

fines and penalties for the violation of this Act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act.

With a Committee Amendment by way of substitute therefor.

Said bill is as follows, viz:

(Insert 3)

Said substitute is as follows, viz:

(Insert 4)

Mr. Dorman offered the following amendment to said substitute, viz:

"Amend Substitute for H. B. 111 by striking out lines 4, 5, 6 and 7 of page 6, Section 9, of the printed bill the following words: 'General Fund for the specific purpose of liquidating any indebtedness of the Commonwealth until [fol. 540] the said indebtedness is entirely liquidated at which time it shall be credited to the General Fund for the use of the ordinary expenses of the government;' and insert in lieu thereof the following words: 'Board of Charities and Corrections for the specific purpose of repairing, maintaining and constructing permanent improvements for the use of the institutions under the control of said board.'"

Said Amendment was agreed to.

Mr. Gnau moved the Previous Question.

Thereupon the Speaker announced "Shall the main question be now put?"

Which was decided in the affirmative.

Mr. Eimer offered the following Amendment to said Substitute, viz:

"Amend Substitute for H. B. 111 by striking out all of Section 11 on page 7."

Said amendment was disagreed to.

Mr. G. C. Johnson offered the following Amendment to said Substitute, viz:

"Amend Substitute for H. B. 111, page 2, section 2, by striking out line 5 and to the word 'less' inclusive in line 6; and substitute in lieu thereof the following:

'One hundredth of one per cent of the gross sales of ($100,000.00) One Hundred Thousand Dollars or less.'"

Said Amendment was disagreed to.

Mr. Peters offered the following Amendment to said Substitute, viz:

"Amend Substitute for H. B. 111 by striking out all the words appearing in Article 9, page 6, immediately following the word 'government' appearing in line 7 of Article 9 and inserting in lieu thereof the following words 'the remainder of the amounts so collected and received by the Auditor in any fiscal year shall be credited to a fund to be [fol. 541] used for the specific purpose of liquidating any indebtedness of the Commonwealth.'"

Said Amendment was agreed to.

The yeas and nays being required thereon by Messrs. Ardery and Peters, were as follows, viz:

(Insert 5).

The Substitute as offered by the Committee was then adopted as amended.

Ordered that said bill be engrossed and read the third time.

The Constitutional provision as to the third reading of said bill at length being dispensed with and the same being engrossed, said bill was read the third time by its title only and passed.

The yeas and nays being taken thereon in accordance with the provisions of the Constitution, were as follows, viz:

(Insert 6)

Mr. Via offered the following amendment to the title of said bill, viz:

"Amend the title to said bill by striking from the original bill the title thereof and substituting the title of the substitute for the title of the bill which is in words and figures as follows:

(For title see title of substitute in Journal of today ante.)

Said amendment was agreed to.

Resolved that the title thereof be as amended.

Mr. Via moved that the vote by which the bill was passed be reconsidered and that motion lie on the table.

Said last named motion was agreed to.

* * * * * * *

Inserts

No. 3. Printed copy H. B. 111 with title X'd out.

No. 4. Printed copy of H. B. 111 Committee substitute.

[fol. 542] No. 5. Roll Call H. B. 111 to adopt amendment to substitute. Yea, 58; nay, 33.

No. 6. Roll Call H. B. Subst. 111 for Passage. Yea, 84; nay, 4.

Under date of March 7, 1930, I found the following entry:

Mr. Napier of the Committee on Enrollment reported that they had examined and found to be correctly enrolled bills of the following titles, viz:

* * * * * * *

H. B. 111. An Act to restrain unfair competition of chain stores, and in aid of individual merchants in the Commonwealth.

Thereupon all other business was suspended, said bills and resolutions were read at length and compared in open session and found to be correctly enrolled and thereupon the Speaker, in open session and in the presence of the House, affixed his signature thereto.

* * * * * * *

Ordered that the Enrolling Clerk deliver the bills which originated in this House to the Senate.

After a time the Enrolling Clerk of this House delivered the original and enrolled copies of the said bills which originated in this House, duly signed by the President of the Senate into the possession of the Chief Clerk.

Ordered that the Chief Clerk of this House deliver said bills to the Governor.

After a time the Chief Clerk reported that he had discharged this duty.

[fol. 543] Senate Journals

Under date of February 20, 1930, I found the following entry:

A message was received from the House that they had passed the following bills:

H. B. 111. "An Act relating to revenue and taxation, imposing an excise tax on retail merchants as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declar-

ing an emergency to exist, and repealing all laws in conflict with the provisions of this act."

To Committee on Revenue and Taxation.

• • • • • • •

Under date of February 28, 1930, I found the following entry:

Committee Reports

Senator Booles, of the Committee on Revenue and Taxation, to which had been referred Bills of the following title:

"H. B. 111. An Act relating to revenue and taxation, imposing an excise or license tax on retail merchants as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exists, and repealing all laws in conflict with the provisions of this act."

Reported with expression of opinion that same ought to pass.

[fol. 544] Senator White moved that the second reading of the Bills at length be dispensed with, and that said Bills be read by their titles only.

Said motion was unanimously agreed to.

Under date of March 3, 1930, I found the following entry:

Calendar

Senator Chandler moved that the second reading at length of said Bills be dispensed with, and said Bills be read by their titles only.

Said motion was agreed to.

H. B. 111. "An Act relating to revenue and taxation, imposing an excise or license tax on retail merchants as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exists and repealing all laws in conflict with the provisions of this act."

Under date of March 4, 1930, I found the following entry:

H. B. 111. "An Act relating to revenue and taxation, imposing an excise or license tax on retail merchants as

the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administraiton of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exists, and repealing all laws in conflict with the provisions of this act."

Senator Dacher offered the following Amendment:

"Amend House Bill 111 by inserting the word 'cash' between the words 'gross' and 'sales' in lines number 4, 5, [fol. 545] 7, 9, 12, 15, 17, 20 and 22 on page 2 and in lines number 10 and 26 on page 3 of the printed bill, and by adding to said bill as Section 14 thereof the following:

"Section 14. Gross cash sales are hereby defined to be sales made where cash checks or anything of value are exchanged for goods, wares, or merchandise on the day of sale; also goods, wares, or merchandise sold on cash on delivery."

The question being taken thereof, it was decided in the negative, and said Amendment was lost.

Senator Gates Young offered the following Amendment:

"Amend House Bill 111, section two in line six by striking out of the word- 'or less' and inserting in lieu thereof 'in excess of the first $50,000.00.' "

"Further amend by inserting the words 'except those doing an annual gross of $50,000.00 or less' after the word 'Merchant' and before the word 'as' in line one of section three."

The question being taken thereon, it was decided in the negative, and

Said amendment was lost.

Printed

Said bill reads as follows:

(Insert 24)

Ordered that said Bill be read the third time.

Mr. Allie Young moved that the third reading of said bill be by its title only. Said motion was agreed to by a majority of the members elected.

The constitutional provision as to third reading of said bill being dispensed with

Said bill was read the third time and passed.

The yeas and nays being taken on the passage of said bill in accordance with the provision of the Constitution were as follows, viz:

(Insert 25)

[fol. 546] Resolved that the title thereof be as aforesaid.

Mr. Allie Young moved that the vote by which said bill was passed be reconsidered and that said motion lie on the table.

Said motion was agreed to.

(Insert 24)

Copy of printed H. B. 111 in Senate with title X'd out.

(Insert 25)

Roll call showing 27 yea, 11 nay.

After making the above examination of the Journals I obtained the original manuscript of House Bill No. 111 as introduced.

On the outside of the folded manuscript cover the following endorsements appeared:

"H. B. 111. An Act to restrain the unfair competition of chain stores, and in aid of individual merchants in the Commonwealth.

"1/21/30

"Kentucky Statutes.

"2/14/30

"1 read & cal. Committee Sub.

"2/18—2 Read—Ord Day

"2/18—Move Special Order for 2/19 at 11 a. m.

"2/19/30 Passed as per Com. Subst.

"J. D. Via

Fulton & Hickman Counties."

I also obtained the original manuscript copy of the Committee Substitute for House Bill No. 111, and found the following endorsements on the outside of the manuscript cover, with the words lined out as shown in the following quotation:

H. B. 111. "An Act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as [fol. 547] the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the viola-

tion of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act."

In House
Feb. 19, 1930
Passed

Clifford W. Thomas
Chief Clerk of House

In Senate
March 4, 1930
Passed

Attest: Oscar Wicker, Asst. Clerk of Senate.

James W. Stites.

[Duly verified.]

[fol. 548] AFFIDAVIT OF HENRY F. WALRADT

STATE OF KENTUCKY,
County of Jefferson, ss:

Affidavit of Henry F. Walradt in Opposition to Plaintiff's Motion for Interlocutory Decree

Henry F. Walradt, first being duly sworn, says:

I am, and have for the past twenty years been, a resident of Columbus, Ohio. I am now serving in the Ohio State University as Professor of Economics, and have been connected with that institution for the past twenty years.

Immediately preceding that, I had been engaged as a student for eight years in Yale University, first as an undergraduate and then as a graduate student, taking there three degrees: B. A., M. A., and Ph. D. During the last half of 1916 and part of 1917, I was engaged in a taxation study for the Connecticut Chamber of Commerce. From September, 1918, to September, 1919, I was a member of the Research Bureau of the Federal War Trade Board and served as historian. For the last seven or eight years, I have taken an active part in shaping the tax legislation in the State of Ohio, sitting in practically all of the taxation committees of the Sessions of the General Assembly.

I have also served as an advisor for the Ohio Council of Retail Merchants. I am a member of the American Economic Association, American Society of University Professors, and of the National Tax Association. As a member of the National Tax Association, I served last year on the Committee of Motor Vehicle Taxation under the chairmanship of Professor Martin, and I am again serving with this committee for the current year.

While a graduate student in the general field of economics, I specialized in the field of public finance and my thesis was written in that field, and as professor in Ohio State University, I am teaching subjects in the field of public finance.

I have been engaged for several weeks in collecting material to be used in Court in connection with the above-styled case. I have prepared certain charts and tables filed herein. These charts and tables are marked, for identifica-
[fol. 549] tion, Walradt, Exhibit A; Walradt, Exhibit B; Walradt, Exhibit C; Walradt, Exhibit D; Walradt, Exhibit E; Walradt, Exhibit F; Walradt, Exhibit G; Walradt, Exhibit H; Walradt, Exhibit I; and Walradt, Exhibit J. These were prepared by me and are referred to hereinafter by their respective identifying numbers.

It has been my purpose to study the Kentucky Gross Sales Tax with the view of finding whether or not it is unduly discriminatory and confiscatory. Are the rates too sharply progressive, and have there been other taxes which have been as heavy and as sharply progressive?

It is my contention that the Kentucky Gross Sales Tax (Chapter 149, Acts of 1930, pages 475-482) is a tax measure which will provide some much-needed revenue for the State of Kentucky, and that the classification provided in the Act is not unreasonable, but is based on the ability to pay.

The tax is levied upon the gross sales or gross receipts of retail merchants. Gross earnings or gross receipts have long been used by various taxing units in this country as a measure for levying taxes, and taxes upon gross earnings or gross receipts have been upheld by the courts. At the present time the neighboring State of Ohio imposes the following taxes based upon gross earnings:

Steam railroads	4%
Pipe line companies	4%

Express companies	2%
Telegraph	2%
Electric light and power	1.35%
Gas	1.35%
Heating and cooling companies	1.35%
Messenger and signal companies	1.35%
Union depot companies	1.35%
Water transportation	1.35%
Waterworks	1.35%
Sleeping and freight line, or equipment companies	1.35%
Electric railroads	1.2 %

California imposes a 7½% tax on the gross earnings of gas and electric companies and a 7% tax on the gross earnings of railroads. Note that the rates in all these cases exceed the highest rate imposed by the Kentucky Act. In this connection it might be noted that the French have [fol. 550] a 2% sales tax which applies to the sales of retail merchants as well as to other sales. This is in support of the contention that the highest rate of the Kentucky Gross Sales Tax is not unduly high.

The State of Maine has taxed railroads on their gross receipts since 1881. It is interesting to note that from that date on Maine has used progressive rates. The Act of 1881 imposed a tax of ¼ of 1% of the gross receipts of such railroads whose average gross receipts per mile did not exceed $2,250 and this rate was increased by ¼ of 1% for each additional $750 or fraction thereof on the average gross receipts per mile until the maximum rate of 3¼% of the entire gross receipts was reached in the case of railroads where average gross receipts per mile exceeded $11,250. In this case the maximum rate was thirteen times the lowest rate.

In 1907, Maine increased their progressive rates so that the lowest rate was ½ of 1% of the gross receipts of those railroads whose average gross receipts per mile did not exceed $1,500 and increased this rate by ¼ of 1% for each additional $400 or fraction thereof in the average gross receipts per mile until the maximum rate of 5½% of the total gross receipts was reached for those railroads whose average gross receipts per mile exceeded $9,500.

The present method of taxing the gross receipts of railroads used by Maine was adopted in 1927, and is as follows:

	Tax
When net receipts do not exceed 10% of gross receipts	3½% of gross receipts
When net receipts constitute from 10% to 15% of gross receipts	4 % " " "
When net receipts constitute from 15% to 20% of gross receipts	4½% " " "
When net receipts constitute from 20% to 25% of gross receipts	5 % " " "
When net receipts constitute over 25% of gross receipts	5½% " " "

From this table it appears that any railroad whose net earnings were less than 3½% of its gross earnings would be taxed for more than 100% of its net earnings. The fact [fol. 551] that a railroad is operating at an actual loss does not excuse it from paying a tax measured by its gross earnings.

Maine also uses progressive rates in taxing the gross receipts of telegraph and telephone companies (the rates ranging from 1¼ to 6 per cent) and of street railways (the rates ranging from 1¼ to 4 per cent).

The use of progressive rates in connection with a gross sales tax is reasonable since in general the larger the gross sales, the greater will be the net income of the concern making the sales. Ability to pay is measured by the absolute amount of net income received. It matters not from what source the income is received or how large a return is received on the capital invested. An individual or concern receiving a certain amount of net income has by that fact a certain ability to pay taxes and it is now generally agreed that as one's net income increases, his ability to pay taxes increases progressively. It is in accordance with this theory that Wisconsin, since 1911, has levied progressive net income taxes upon both individuals and corporations. If it is true that as the amount of gross sales increases the amount of net income resulting increases, then the use of progressive rates in a gross sales tax is justifiable and reasonable.

The tendency for net income to increase as gross sales increase is sufficient by itself to support the constitutionality of a graduated tax on gross sales, but, if in addition, it can be shown—as some of the other witnesses will endeavor to prove—that there is also a tendency for the actual return on the investment to increase as well as the amount of net income to increase with increased volume of sales, the case for progressive taxes is made still stronger.

There is still another strong argument in favor of progressive rates in connection with a gross sales tax. In those states which depend largely for their local revenues upon the general property tax, it is a well known fact that those concerns which have a large volume of sales with a rapid turnover escape bearing their fair share of the tax burden as compared with those concerns having a much smaller volume of sales and a slow turnover. The average amount of merchandise on hand at any time as compared with the total business done is relatively much smaller for the former than the latter. It is only fair, therefore, that in addition to the general property tax some other form of [fol. 552] tax be devised which will tend to equalize the tax burden between these two groups. In so far as a gross sales tax tends to be larger for concerns having a relatively rapid turnover, such a tax served that purpose.

A comparison of the Kentucky Gross Sales Tax with the Federal Income Tax on the incomes of 1918 throws considerable light upon the question of whether or not the rates of the Kentucky tax are excessive.

Two graphs (Exhibits A and B) are presented showing the rate of increase in the effective rates of the Kentucky Gross Sales Tax as compared with the effective rates of the Federal Income Tax based on incomes of 1918. Let us make clear what is meant by the term "effective rates." In the case of both taxes the rates increase as the amount of the base—i. e., gross sales or net income—increases; but note that the increased rates do not in either case apply to the total base, but only to a certain portion in excess of a given sum up to some larger sum. It is, therefore, necessary to compute the taxes on each of these several portions and then add them in order to ascertain the total tax due. To find the "effective rate" of tax on a given amount of gross sales or net income, it is necessary to divide the total tax due by said amount. This gives the rate of tax which if

applied to the total gross sales or net income would give the tax due. This is known as the "effective rate." A table has been prepared (Exhibit C) which shows how the Kentucky Gross Sales Tax is computed and the effective rates of the tax from $400,000 of gross sales up to $12,000,000 of gross sales.

It is important that the effective rate be constantly kept in mind whenever progressive rates are used, the increased rates applying only to portions of the total sum taxed. It is a natural tendency to think only in the terms of the highest rate applicable, whereas the actual effective rate may be considerably lower. For example, retail merchants who have gross sales in Kentucky of over $1,000,000 are likely to think of the tax on gross sales as a 1% tax. By examining Exhibit C, it is clear that the tax does not reach even ½ of 1% until gross sales amount to $1,390,000, and the tax does not reach ¾ of 1% until the gross sales amount to nearly $2,800,000. In fact, after allowing for the credits permitted by the Act in question, it is improbable that any retail merchant in Kentucky will pay a tax of more than [fol. 553] 82/100 of 1% of his gross sales. In no case will it be possible for the tax to reach a full 1%. Notice that the changes in the effective rate of the tax as the gross sales increase by $100,000 are small, the largest increase being only 632/10,000 of 1% in the case of the increase in gross sales from $1,000,000 to $1,100,000. Notice also the flattening out of the increases after $2,500,000 gross sales. This is shown not only in Exhibit C, but in the graph (Exhibit D) which shows the changes in the effective rates of the Kentucky Gross Sales Tax. The same fact is brought out in Exhibits E, F, and G under the column entitled "Ratio between successive effective rates—Gross Sales."

Exhibit A plots the effective rates of the Kentucky Sales Tax as computed in Exhibit C, in such a way as to show the degree of progression. The steeper the curve the larger the degree of progression. In Exhibit B the rapidity of the progression in the effective rates of the Federal Income Tax levied on 1918 incomes is plotted. By comparing the two graphs which are drawn on the same scale, it will be readily seen that the degree of progression is greater for the Federal Income Tax for the first $500,000. The real comparison between these two taxes should not be made for the same amount of gross sales and net income, but rather

for that amount of net income which might be expected to result from a given amount of gross sales. Such a comparison of resulting taxes and effective rates is made in Exhibits E, F, and G, in which the assumption is made that the net receipts amount to 4, 3, and 2% respectively of the gross sales. These tables show also the degree of progression in the effective rates and the degree of progression in the amount of taxes due for stated amounts of gross sales and the equivalent net incomes.

It will be noted that the increase in the effective rates and in the tax as computed is greater for the Federal Income Tax at first, but that in Exhibits E and F the effective rates and the tax as computed increase at a faster rate in the case of the Gross Sales Tax from $500,000 gross sales until $1,800,000 gross sales in Exhibit E and $1,900,000 in Exhibit F. In Exhibit G the effective rates and the tax as computed increase at a faster rate from $600,000 gross sales until $2,000,000 gross sales. Note, however, that in all three cases from this point on the effective rates and the increase in the tax as computed progress at a higher rate in [fol. 554] the case of the Federal Income Tax than in the case of the Kentucky Gross Sales Tax.

In Exhibit E the actual increase in the tax as computed for each bracket is always larger for the Federal Income Tax; in Exhibit F it is always larger from $1,600,000 gross sales, and in Exhibit E it is always larger for the Federal Income Tax from $4,000,000 gross sales on.

Finally, it should be noted that if the net income amounts to 4% or only 3% of the gross sales, the actual amount of taxes payable under the Federal Income Tax levied on 1918 incomes was always larger than the taxes payable under the Kentucky Gross Sales Tax for the equivalent amount of gross sales. Even if we assume that the average net income made by retail merchants is only 2% of their gross sales, the taxes payable under the aforesaid Federal Income Tax were larger than the taxes payable on the equivalent amount of gross sales under the Kentucky Gross Sales Tax until the gross sales exceed $900,000 and the amount of taxes due under the Federal Income Tax again exceed those due under the Kentucky Gross Sales Tax when the gross sales approach $8,000,000. Thus, even assuming net income amounts to only 2% of gross sales, any individual merchant or partnership doing $8,000,000 or more of business

would have been more heavily taxed under this Federal Income Tax than under the Kentucky Gross Sales Tax. If the percentage of net income to gross sales is 3% or more, as shown above, the taxes payable under this Federal Income Tax would always be higher. Exhibits H, I, and J show graphically the relation between the amounts of taxes due under the two types of taxes being compared in Exhibits E, F, and G.

Summary: The fact that not only have proportional taxes on gross receipts or earnings been levied for years by various taxing divisions in this country, but also graduated taxes on such gross receipts or earnings and that these taxes have been upheld by the courts; the fact that as gross sales increase the tendency is for net income to increase giving to the recipient greater ability to pay taxes and the fact that the Federal Income Tax levied upon the incomes of 1918, although in general increasing at a more rapid rate and reslulting in heavier taxes than is true for the Kentucky Gross Sales Tax, was not thrown out by the courts as unduly discriminatory or confiscatory, lead to the [fol. 555] conclusion that the Kentucky Sales Tax is not unduly discriminatory or confiscatory.

Henry F. Walradt.

STATE OF KENTUCKY,
County of Jefferson, sct.:

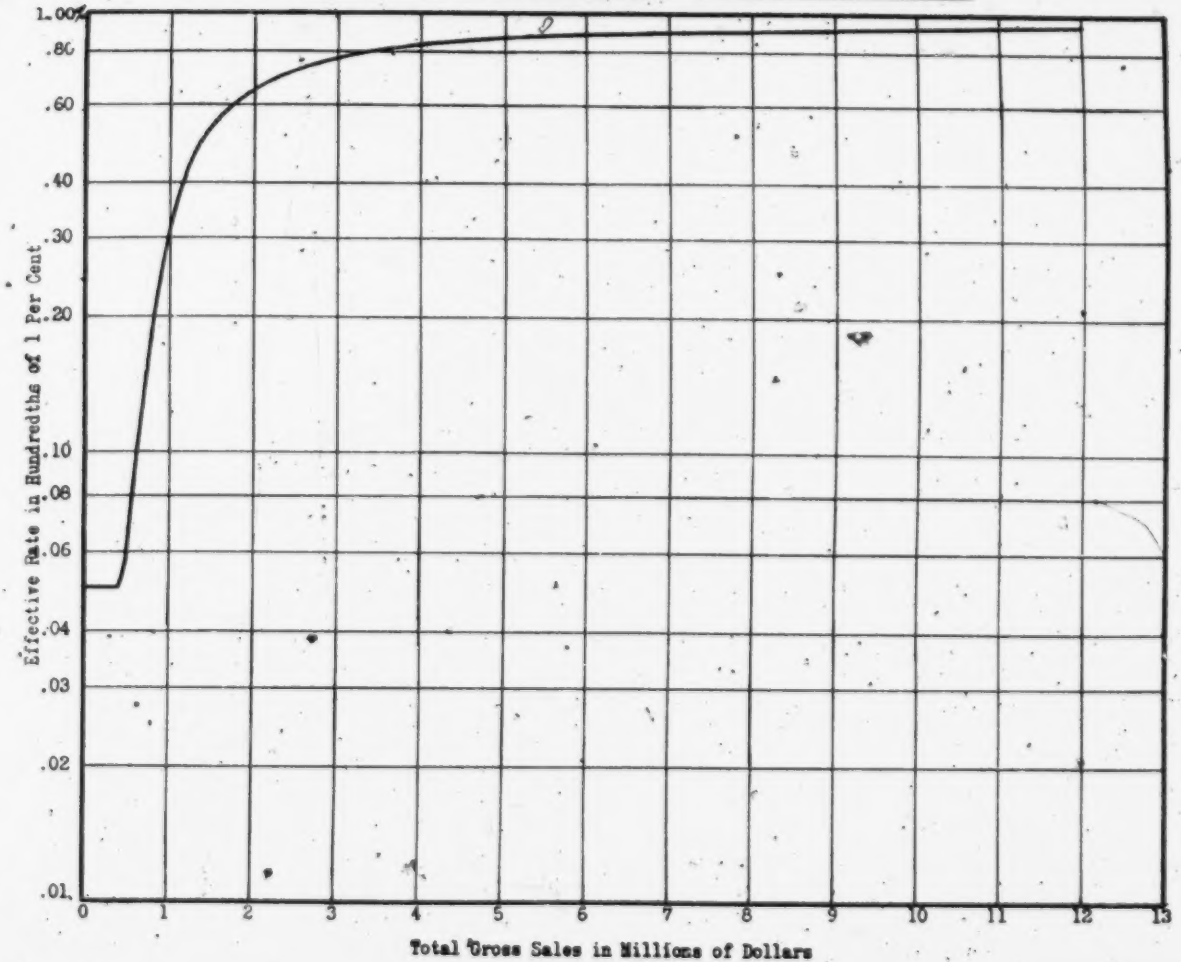
On this the 12 day of February, 1931, personally appeared before me, Henry F. Walradt, who signed the foregoing affidavit in my presence and made oath to the truth of the statements therein contained.

J. Whitcomb Welch, Notary Public, Jefferson Co., Ky. My Commission expires on the 8 day of Feby., 1934.

(Here follow photolithographs of Exhibits A and B to affidavit of Henry F. Walradt, side folios 556 and 557)

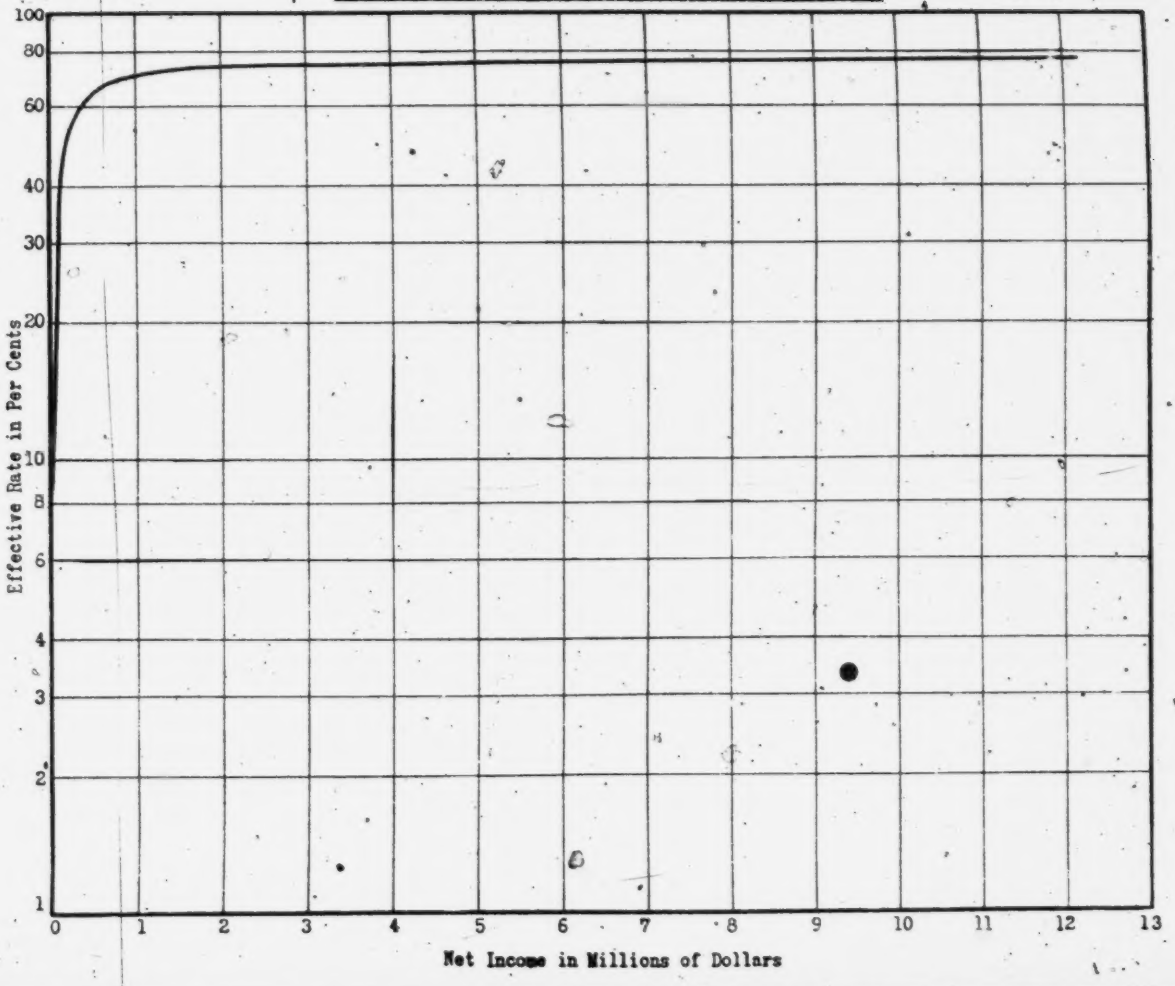
WALRADT—EXHIBIT A.

EFFECTIVE RATE ON TOTAL GROSS SALES OF THE KENTUCKY GROSS SALES TAX



WALRADT—EXHIBIT B.

EFFECTIVE RATE ON NET INCOME OF THE FEDERAL INCOME TAX



[fol. 558]

Appendix

Dr. Walradt Exhibit C

Application of the Kentucky Sales Tax Rates

Fractional parts of gross sales		Rate levied on the fractional part	Total gross sales	Tax on fractional part	Cumulative tax	Effective rate on total gross sales (fraction of 1 per cent)	Increase in effective rate over preceding class (fraction of 1 per cent)
$1—	$400,000.....	1/20 of 1%	$400,000	$200	$200	.05	.....
400,000—	500,000.....	2/20 of 1%	500,000	100	300	.06	100/10,000
500,000—	600,000.....	5/20 of 1%	600,000	250	550	.0917	317/10,000
600,000—	700,000.....	8/20 of 1%	700,000	400	950	.1357	440/10,000
700,000—	800,000.....	11/20 of 1%	800,000	550	1,500	.1875	518/10,000
800,000—	900,000.....	14/20 of 1%	900,000	700	2,200	.2444	569/10,000
900,000—	1,000,000.....	17/20 of 1%	1,000,000	850	3,050	.305	611/10,000
1,000,000—	1,100,000.....	1%	1,100,000	1,000	4,050	.3682	632/10,000*
1,100,000—	1,200,000.....	Do.	1,200,000	Do.	5,050	.4208	526/10,000
1,200,000—	1,300,000.....	"	1,300,000	"	6,050	.4654	446/10,000
1,300,000—	1,400,000.....	"	1,400,000	"	7,050	.5036	382/10,000
1,400,000—	1,500,000.....	"	1,500,000	"	8,050	.5367	331/10,000
1,500,000—	1,600,000.....	"	1,600,000	"	9,050	.5656	289/10,000
1,600,000—	1,700,000.....	"	1,700,000	"	10,050	.5912	256/10,000
1,700,000—	1,800,000.....	"	1,800,000	"	11,050	.6139	227/10,000
1,800,000—	1,900,000.....	"	1,900,000	"	12,050	.6342	203/10,000
1,900,000—	2,000,000.....	"	2,000,000	"	13,050	.6525	183/10,000
2,000,000—	2,100,000.....	"	2,100,000	"	14,050	.6690	165/10,000
2,100,000—	2,200,000.....	"	2,200,000	"	15,050	.6841	151/10,000
2,200,000—	2,300,000.....	"	2,300,000	"	16,050	.6978	137/10,000

* Largest increase in the effective rate of any one class over the effective rate of the preceding class.

[fol. 559] Dr. Walradt EXHIBIT C—Continued.

Fractional parts of gross sales		Rate levied on the fractional part	Total gross sales	Tax on fractional part	Cumulative tax	Effective rate on total gross sales (fraction of 1 per cent)	Increase in effective rate over preceding class (fraction of 1 per cent)
$2,300,000—	2,400,000.....	1%	$2,400,000	$1,000	$17,050	.7104	126/10,000
2,400,000—	2,500,000.....	Do.	2,500,000	Do.	18,050	.722	116/10,000
2,500,000—	2,600,000.....	"	2,600,000	"	19,050	.7327	107/10,000
2,600,000—	2,700,000.....	"	2,700,000	"	20,050	.7426	99/10,000
2,700,000—	2,800,000.....	"	2,800,000	"	21,050	.7518	92/10,000
2,800,000—	2,900,000.....	"	2,900,000	"	22,050	.7603	85/10,000
2,900,000—	3,000,000.....	"	3,000,000	"	23,050	.7683	80/10,000
3,000,000—	3,100,000.....	"	3,100,000	"	24,050	.7758	75/10,000
3,100,000—	3,200,000.....	"	3,200,000	"	25,050	.7828	70/10,000
3,200,000—	3,300,000.....	"	3,300,000	"	26,050	.7894	66/10,000
3,300,000—	3,400,000.....	"	3,400,000	"	27,050	.7956	62/10,000
3,400,000—	3,500,000.....	"	3,500,000	"	28,050	.8014	58/10,000
3,500,000—	3,600,000.....	"	3,600,000	"	29,050	.8069	55/10,000
3,600,000—	3,700,000.....	"	3,700,000	"	30,050	.8122	53/10,000
3,700,000—	3,800,000.....	"	3,800,000	"	31,050	.8171	49/10,000
3,800,000—	3,900,000.....	"	3,900,000	"	32,050	.8218	47/10,000
3,900,000—	4,000,000.....	"	4,000,000	"	33,050	.8263	45/10,000
4,000,000—	4,100,000.....	"	4,100,000	"	34,050	.8305	42/10,000
4,100,000—	4,200,000.....	"	4,200,000	"	35,050	.8345	40/10,000
4,200,000—	4,300,000.....	"	4,300,000	"	36,050	.8384	39/10,000
4,300,000—	4,400,000.....	"	4,400,000	"	37,050	.8420	36/10,000
4,400,000—	4,500,000.....	"	4,500,000	"	38,050	.8456	36/10,000
4,500,000—	4,600,000.....	"	4,600,000	"	39,050	.8489	33/10,000
4,600,000—	4,700,000.....	"	4,700,000	"	40,050	.8521	32/10,000
4,700,000—	4,800,000.....	"	4,800,000	"	41,050	.8552	31/10,000

4,800,000—	4,900,000.....	"	4,900,000	"	42,050	.8582	30/10,000
4,900,000—	5,000,000.....	"	5,000,000	"	43,050	.861	28/10,000

[fol. 560]

5,000,000—	5,100,000.....	"	5,100,000	"	44,050	.8637	27/10,000
5,100,000—	5,200,000.....	"	5,200,000	"	45,050	.8663	26/10,000
5,200,000—	5,300,000.....	"	5,300,000	"	46,050	.8689	26/10,000
5,300,000—	5,400,000.....	"	5,400,000	"	47,050	.8713	24/10,000
5,400,000—	5,500,000.....	"	5,500,000	"	48,050	.8736	23/10,000
5,500,000—	5,600,000.....	"	5,600,000	"	49,050	.8759	23/10,000
5,600,000—	5,700,000.....	"	5,700,000	"	50,050	.8781	22/10,000
5,700,000—	5,800,000.....	"	5,800,000	"	51,050	.8802	21/10,000
5,800,000—	5,900,000.....	"	5,900,000	"	52,050	.8822	20/10,000
5,900,000—	6,000,000.....	"	6,000,000	"	53,050	.8842	20/10,000
6,000,000—	6,100,000.....	"	6,100,000	"	54,050	.8861	19/10,000
6,100,000—	6,200,000.....	"	6,200,000	"	55,050	.8879	18/10,000
6,200,000—	6,300,000.....	"	6,300,000	"	56,060	.8897	18/10,000
6,300,000—	6,400,000.....	"	6,400,000	"	57,050	.8914	17/10,000
6,400,000—	6,500,000.....	"	6,500,000	"	58,050	.8931	17/10,000
6,500,000—	6,600,000.....	"	6,600,000	"	59,050	.8947	16/10,000
6,600,000—	6,700,000.....	"	6,700,000	"	60,050	.8963	16/10,000
6,700,000—	6,800,000.....	"	6,800,000	"	61,050	.8978	15/10,000
6,800,000—	6,900,000.....	"	6,900,000	"	62,050	.8993	15/10,000
6,900,000—	7,000,000.....	"	7,000,000	"	63,050	.9007	14/10,000
7,000,000—	7,100,000.....	"	7,100,000	"	64,050	.9021	14/10,000
7,100,000—	7,200,000.....	"	7,200,000	"	65,050	.9035	14/10,000
7,200,000—	7,300,000.....	"	7,300,000	"	66,050	.9048	13/10,000
7,300,000—	7,400,000.....	"	7,400,000	"	67,050	.90608	13/10,000
7,400,000—	7,500,000.....	"	7,500,000	"	68,050	.90733	13/10,000
7,500,000—	7,600,000.....	"	7,600,000	"	69,050	.90855	12/10,000
7,600,000—	7,700,000.....	"	7,700,000	"	70,050	.9097	12/10,000
7,700,000—	7,800,000.....	"	7,800,000	"	71,050	.9109	12/10,000

Dr. Walradt—EXHIBIT C—Continued.

Fractional parts of gross sales		Rate levied on the fractional part	Total gross sales	Tax on fractional part	Cumulative tax	Effective rate on total gross sales (fraction of 1 per cent)	Increase in effective rate over preceding class (fraction of 1 per cent)
$7,800,000—	7,900,000.....	1%	$7,900,000	$1,000	$72,050	.9120	11/10,000
7,900,000—	8,000,000.....	Do.	8,000,000	Do.	73,050	.9131	11/10,000
[fol. 561]							
8,000,000—	8,100,000.....	"	8,100,000	"	74,050	.9141	11/10,000
8,100,000—	8,200,000.....	"	8,200,000	"	75,050	.91524	10/10,000
8,200,000—	8,300,000.....	"	8,300,000	"	76,050	.91627	10/10,000
8,300,000—	8,400,000.....	"	8,400,000	"	77,050	.91726	10/10,000
8,400,000—	8,500,000.....	"	8,500,000	"	78,050	.91823	10/10,000
8,500,000—	8,600,000.....	"	8,600,000	"	79,050	.9192	10/10,000
8,600,000—	8,700,000.....	"	8,700,000	"	80,050	.9201	9/10,000
8,700,000—	8,800,000.....	"	8,800,000	"	81,050	.9210	9/10,000
8,800,000—	8,900,000.....	"	8,900,000	"	82,050	.9219	9/10,000
8,900,000—	9,000,000.....	"	9,000,000	"	83,050	.92278	9/10,000
9,000,000—	9,100,000.....	"	9,100,000	"	84,050	.92363	9/10,000
9,100,000—	9,200,000.....	"	9,200,000	"	85,050	.92446	8/10,000
9,200,000—	9,300,000.....	"	9,300,000	"	86,050	.92527	8/10,000
9,300,000—	9,400,000.....	"	9,400,000	"	87,050	.92606	8/10,000
9,400,000—	9,500,000.....	"	9,500,000	"	88,050	.92684	8/10,000
9,500,000—	9,600,000.....	"	9,600,000	"	89,050	.92760	8/10,000
9,600,000—	9,700,000.....	"	9,700,000	"	90,050	.92835	8/10,000
9,700,000—	9,800,000.....	"	9,800,000	"	91,050	.92908	7/10,000
9,800,000—	9,900,000.....	"	9,900,000	"	92,050	.92980	7/10,000
9,900,000—	10,000,000.....	"	10,000,000	"	93,050	.9305	7/10,000
10,000,000—	10,100,000.....	"	10,100,000	"	94,050	.93119	7/10,000
10,100,000—	10,200,000	"	10,200,000	"	95,050	.93186	7/10,000
10,200,000—	10,300,000.....	"	10,300,000	"	96,050	.93252	7/10,000

10,300,000— 10,400,000.....	"	10,400,000	"	97,050	.93317	7/10,000
10,400,000— 10,500,000.....	"	10,500,000	"	98,050	.93381	6/10,000

[fols. 562 & 563]

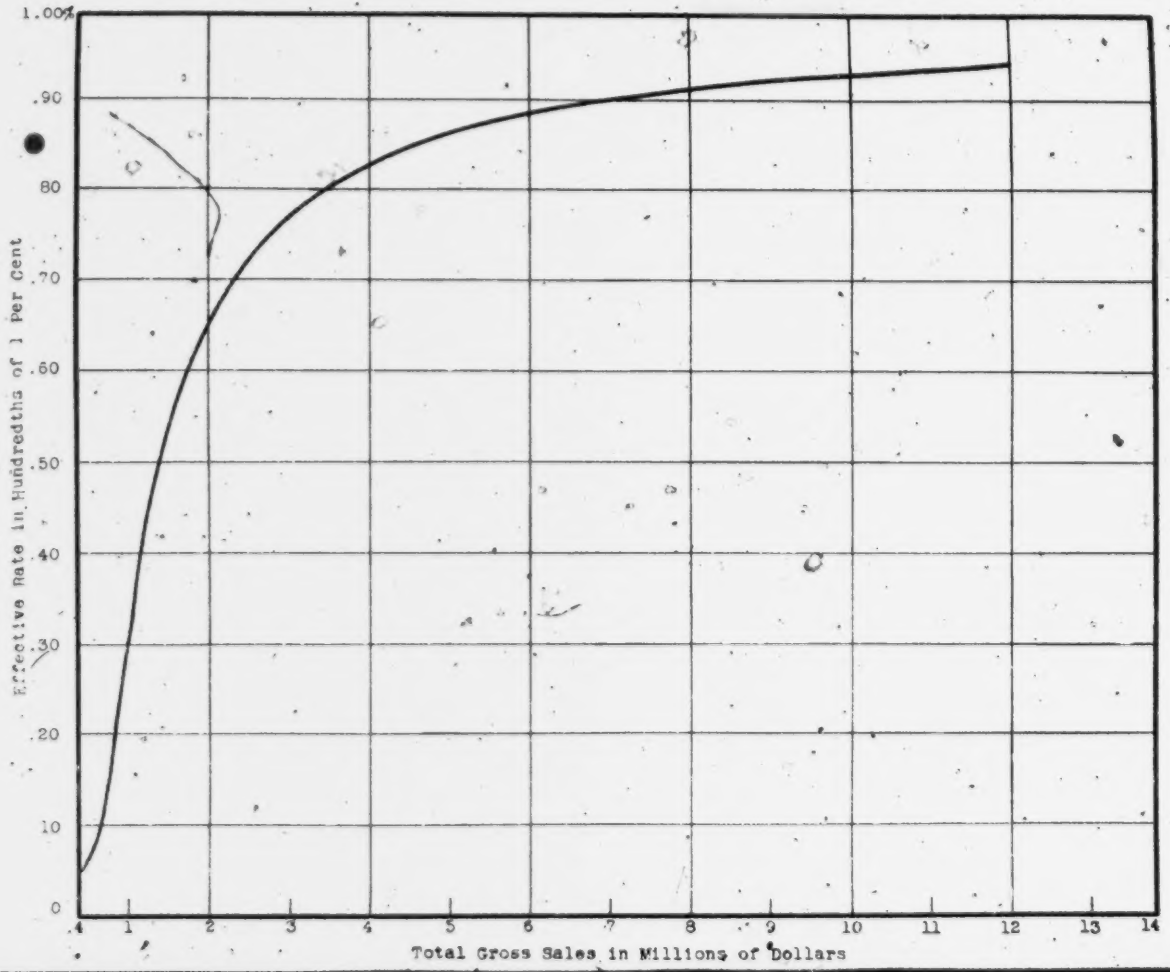
10,500,000— 10,600,000.....	"	10,600,000	"	99,050	.93443	6/10,000
10,600,000— 10,700,000.....	"	10,700,000	"	100,050	.93505	6/10,000
10,700,000— 10,800,000.....	"	10,800,000	"	101,050	.93565	6/10,000
10,800,000— 10,900,000.....	"	10,900,000	"	102,050	.93624	6/10,000
10,900,000— 11,000,000.....	"	11,000,000	"	103,050	.93682	6/10,000
11,000,000— 11,100,000.....	"	11,100,000	"	104,050	.93739	6/10,000
11,100,000— 11,200,000.....	"	11,200,000	"	105,050	.93795	6/10,000
11,200,000— 11,300,000.....	"	11,300,000	"	106,050	.93850	6/10,000
11,300,000— 11,400,000.....	"	11,400,000	"	107,050	.93904	5/10,000
11,400,000— 11,500,000.....	"	11,500,000	"	108,050	.93957	5/10,000
11,500,000— 11,600,000.....	"	11,600,000	"	109,050	.94009	5/10,000
11,600,000— 11,700,000.....	"	11,700,000	"	110,050	.94060	5/10,000
11,700,000— 11,800,000.....	"	11,800,000	"	111,050	.94110	5/10,000
11,800,000— 11,900,000.....	"	11,900,000	"	112,050	.94160	5/10,000
11,900,000— 12,000,000.....	"	12,000,000	"	113,050	.94208	5/10,000

(Here follows photolithograph of Exhibit D to Affidavit of Henry F. Walradt, side folio 564.)

WALRADT - EXHIBIT "D"

WALRADT - EXHIBIT "D"

EFFECTIVE RATE ON TOTAL GROSS SALES OF THE KENTUCKY GROSS SALES TAX



564

4704

[fol. 565] Dr. Walradt—EXHIBIT E

Gross-sales Tax Compared with Federal Income Tax (1918), Assuming Net Income to be 4% of Gross Sales

Gross sales	Net income (4% of gross)	Gross sales tax (total)	Net income tax (total)	Effective rate of gross sales tax (per cent)	Effective rate of net income tax (per cent)	Ratio between successive effective rates		Ratio between successive taxes as computed	
						Gross sales	Net income	Gross sales	Net income
$100,000	$4,000	$50	$120	.05	3.00	.....	.....	.....	.....
200,000	8,000	100	530	.05	6.63−	100.00	221.00	200.00	441.67−
300,000	12,000	150	1,150	.05	9.58+	100.00	144.49+	150.00	216.98+
400,000	16,000	200	1,850	.05	11.56+	100.00	120.67−	133.33+	160.87−
500,000	20,000	300	2,630	.06	13.15	120.00	113.75+	150.00	142.16+
600,000	24,000	550	3,490	.0917	14.54+	152.83+	110.57+	183.33+	132.70−
700,000	28,000	950	4,430	.1357	15.82+	147.98+	108.80+	172.73−	126.93+
800,000	32,000	1,500	5,450	.1875	17.03+	138.17+	107.65−	157.89+	123.02+
900,000	36,000	2,200	6,550	.2444	18.19+	130.35−	106.81+	146.67−	120.18+
1,000,000	40,000	3,050	7,730	.305	19.33−	124.80−	106.27−	138.64−	118.02−
1,100,000	44,000	4,050	8,990	.3682	20.43+	120.72+	105.69+	132.79−	116.30+
1,200,000	48,000	5,050	10,330	.4208	21.52+	114.29−	105.34−	124.69+	114.91−
1,300,000	52,000	6,050	11,750	.4654	22.60−	110.60−	105.02−	119.80+	113.75−
1,400,000	56,000	7,050	13,250	.5036	23.66+	108.23−	104.69+	116.53−	112.77−
1,500,000	60,000	8,050	14,830	.5367	24.72−	106.57+	104.48+	114.18+	111.92+
1,600,000	64,000	9,050	16,490	.5656	25.77−	105.38+	104.25−	112.42+	111.19+
1,700,000	68,000	10,050	18,230	.5912	26.81−	104.53−	104.04−	111.05−	110.55+
1,800,000	72,000	11,050	20,050	.6139	27.85−	103.84−	103.88−	109.95+	109.98+
1,900,000	76,000	12,050	21,950	.6342	28.88+	103.31−	103.70−	109.05−	109.48−
2,000,000	80,000	13,050	23,930	.6525	29.91+	102.89−	103.57−	108.30−	109.02+
2,100,000	84,000	14,050	25,990	.6690	30.94+	102.53−	103.44+	107.66+	108.61−
2,200,000	88,000	15,050	28,130	.6841	31.97−	102.26−	103.33−	107.12−	108.23+

[fol. 566]

Dr. Walradt—Exhibit E—Continued

Gross-sales Tax Compared with Federal Income Tax (1918), Assuming Net Income to be 4% of Gross Sales

Gross sales	Net income (4% of gross)	Gross sales tax (total)	Net income tax (total)	Effective rate of gross sales tax (per cent)	Effective rate of net income tax (per cent)	Ratio between successive effective rates: Gross sales	Ratio between successive effective rates: Net income	Ratio between successive taxes as computed: Gross sales	Ratio between successive taxes as computed: Net income
2,300,000	92,000	16,050	30,350	.6978	32.99−	102.03−	103.19+	106.64+	107.89+
2,400,000	96,000	17,050	32,650	.7104	34.01+	101.81−	103.09	106.23+	107.58−
2,500,000	100,000	18,050	35,030	.7220	35.03	101.63+	103.00−	105.87−	107.29−
3,750,000	150,000	31,000	67,030	.8267	44.69−	114.50+	127.58−	171.75−	191.35+
5,000,000	200,000	43,050	101,030	.8610	50.52−	104.15−	113.05−	138.87+	150.72+
7,500,000	300,000	68,050	173,030	.9073	57.68−	105.38−	114.17+	158.07+	171.27−
10,000,000	400,000	93,050	248,030	.9305	62.01−	102.56−	107.51−	136.74−	143.35−
12,000,000	480,000	113,050	308,030	.94208	64.17+	101.24+	103.48+	121.49+	124.19+
12,500,000	500,000	118,050	323,030	.9444	64.61	100.25−	100.69−	104.42+	104.87−

Dr. Walradt—Exhibit F

Gross-sales Tax Compared with Federal Income Tax (1918), Assuming Net Income to be 3% of Gross Sales

Gross sales	Net income (2% of gross)	Gross sales tax (total)	Net income tax (total)	Effective rate of gross sales tax (per cent)	Effective rate of net income tax (per cent)	Ratio between successive effective rates: Gross sales	Ratio between successive effective rates: Net income	Ratio between successive taxes as computed: Gross sales	Ratio between successive taxes as computed: Net income
$100,000	$3,000	$50	$60	.05	2.00	.....	.....	.....	.....
200,000	6,000	100	250	.05	4.17−	100.00	208.5	200.00	416.67−
300,000	9,000	150	680	.05	7.56−	100.00	181.29+	150.00	272.00
400,000	12,000	200	1,150	.05	9.58+	100.00	126.72−	133.33+	169.12−
500,000	15,000	300	1,670	.06	11.13+	120.00	116.18−	150.00	145.22−
600,000	18,000	550	2,230	.0917	12.39−	152.83+	111.32+	183.33+	133.53+
700,000	21,000	950	2,840	.1357	13.52+	147.98+	109.12+	172.73−	127.35+
800,000	24,000	1,500	3,490	.1875	14.54+	138.17+	107.54+	157.89+	122.89−
900,000	27,000	2,200	4,190	.2444	15.52−	130.35−	106.74+	146.67−	120.06−
1,000,000	30,000	3,050	4,930	.305	16.43+	124.80−	105.86+	138.64−	117.66+

[fol. 567]

1,100,000	33,000	4,050	5,720	.3682	17.33+	120.72+	105.48−	132.79−	116.02+
1,200,000	36,000	5,050	6,550	.4208	18.19+	114.29−	104.96+	124.69+	114.51+
1,300,000	39,000	6,050	7,430	.4654	19.05+	110.60−	104.73−	119.80+	113.44−
1,400,000	42,000	7,050	8,350	.5036	19.88+	108.23−	104.36−	116.53−	112.38+
1,500,000	45,000	8,050	9,320	.5367	20.71+	106.57+	104.18−	114.18+	111.62−
1,600,000	48,000	9,050	10,330	.5656	21.52+	105.38+	103.91+	112.42+	110.84−
1,700,000	51,000	10,050	11,390	.5912	22.33+	104.53−	103.76+	111.05−	110.26+
1,800,000	54,000	11,050	12,490	.6139	23.13−	103.84−	103.58+	109.95+	109.66−
1,900,000	57,000	12,050	13,640	.6342	23.93−	103.31−	103.46−	109.05	109.21−
2,000,000	60,000	13,050	14,830	.6525	24.72−	102.89−	103.30+	108.30−	108.72+
2,100,000	63,000	14,050	16,070	.6690	25.51−	102.53−	103.20−	107.66+	108.36+
2,200,000	66,000	15,050	17,350	.6841	26.29−	102.26−	103.06−	107.12−	107.97−
2,300,000	69,000	16,050	18,680	.6978	27.07+	102.03−	102.97−	106.64+	107.67−
2,400,000	72,000	17,050	20,050	.7104	27.85−	101.81−	102.88+	106.23+	107.33+
2,500,000	75,000	18,050	21,470	.7220	28.63−	101.63+	102.80+	105.87−	107.08+
2,600,000	78,000	19,050	22,930	.7327	29.40−	101.48+	102.69−	105.54	106.80+
2,700,000	81,000	20,050	24,440	.7426	30.17+	101.35+	102.62−	105.25−	106.59−
2,800,000	84,000	21,050	25,990	.7518	30.94+	101.24−	102.55+	104.99−	106.34+
2,900,000	87,000	22,050	27,590	.7603	31.71+	101.13	102.49−	104.75	106.16−
3,000,000	90,000	23,050	29,230	.7683	32.48−	101.05+	102.43−	104.54−	105.94+
3,100,000	93,000	24,050	30,920	.7758	33.25−	100.98−	102.37+	104.34−	105.78+
3,200,000	96,000	25,050	32,650	.7828	34.01+	100.90+	102.29−	104.16−	105.60−
3,300,000	99,000	26,050	34,430	.7894	34.78−	100.84+	102.26+	103.99+	105.45+
3,400,000	102,000	27,050	36,310	.7956	35.60−	100.79−	102.36−	103.84−	105.46+
3,500,000	105,000	28,050	38,230	.8014	36.41−	100.73−	102.28−	103.70−	105.29−
5,000,000	150,000	43,050	67,030	.861	44.69−	107.44−	122.74+	153.48−	175.33+
8,000,000	240,000	73,050	129,830	.9131	54.10	106.05+	121.06−	169.69−	193.69−
10,000,000	300,000	93,050	173,030	.9305	57.68−	101.91−	106.62−	127.38−	133.27+
12,000,000	360,000	113,050	218,030	.94208	60.56+	101.24+	104.99+	121.49+	126.01−
12,500,000	375,000	118,050	229,280	.9444	61.14+	100.25−	100.96−	104.42+	105.16−

Gross-sales Tax Compared with Federal Income Tax (1918), Assuming Net Income to be 2% of Gross Sales

Gross sales	Net income (2% of gross)	Gross sales tax (total)	Net income tax (total)	Effective rate of gross sales tax (per cent)	Effective rate of net income tax (per cent)	Ratio between successive effective rates		Ratio between successive taxes as computed	
						Gross sales	Net income	Gross sales	Net income
$100,000	$2,000	$50	$0	.05	0.	.....	.....	.....	.....
200,000	4,000	100	120	.05	3.00	100.	.....	200.00	.....
300,000	6,000	150	250	.05	4.17	100.	139.00	150.00	283.33+
400,000	8,000	200	530	.05	6.83	100.	161.39+	133.33+	212.00
500,000	10,000	300	830	.06	8.3	120.	121.52+	150.00	156.60+
600,000	12,000	550	1,150	.0917	9.58	152.83+	115.42+	183.33+	138.55+
700,000	14,000	950	1,490	.1357	10.64	147.98+	111.06+	172.73−	129.57−
800,000	16,000	1,500	1,850	.1875	11.56	138.17+	108.65+	157.89+	124.16+
900,000	18,000	2,200	2,230	.2444	12.39	130.35−	107.18+	146.67−	120.54+
1,000,000	20,000	3,050	2,630	.305	13.15	124.80−	106,13+	138.64+	117.94−
1,100,000	22,000	4,050	3,050	.3682	13.86	120.72+	105.40	132.79−	115.97−
1,200,000	24,000	5,050	3,490	.4208	14.54	114.29−	104.91−	124.69+	114.43−
1,300,000	26,000	6,050	3,950	.4654	15.19	110.60−	104.47+	119.80+	113.18+
1,400,000	28,000	7,050	4,430	.5036	15.82	108.23−	104.15−	116.53−	112.15+
1,500,000	30,000	8,050	4,930	.5367	16.43	106.57+	103.86−	114.18+	111.29−
1,600,000	32,000	9,050	5,450	.5656	17.03	105.38+	103.65+	112.42+	110.55−
1,700,000	34,000	10,050	5,990	.5912	17.62	104.53−	103.46+	111.05−	109.91−
1,800,000	36,000	11,050	6,550	.6139	18.19	103.84−	103.23+	109.95+	109.35−
1,900,000	38,000	12,050	7,130	.6342	18.76	103.31−	103.13+	109.05−	108.85+
2,000,000	40,000	13,050	7,730	.6525	19.33	102.89−	103.04−	108.30−	108.42−
2,100,000	42,000	14,050	8,350	.6690	19.88	102.53−	102.84+	107.66+	108.02+
2,200,000	44,000	15,050	8,990	.6841	20.43	102.26−	102.77−	107.12−	107.66+
2,300,000	46,000	16,050	9,650	.6978	20.98	102.03−	102.69+	106.64+	107.34−
2,400,000	48,000	17,050	10,330	.7104	21.52	101.81−	102.57+	106.23+	107.05−
2,500,000	50,000	18,050	11,030	.722	22.06	101.63+	102.51−	105.87−	106.78−

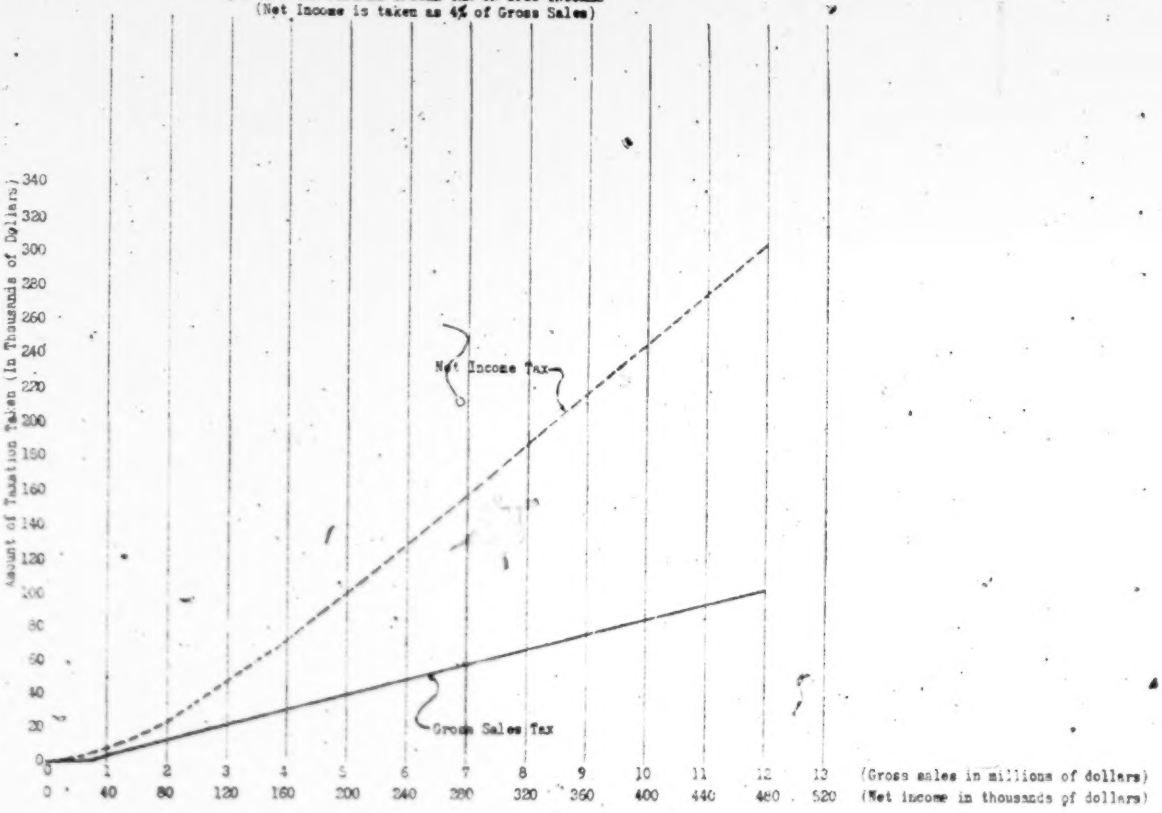
[fols. 569-570]

2,600,000	52,000	19,050	11,750	.7327	22.60	101.48+	102.45−	105.54	106.53−
2,700,000	54,000	20,050	12,490	.7426	23.13	101.35+	102.35−	105.25−	106.30−
2,800,000	56,000	21,050	13,250	.7518	23.66	101.24−	102.29+	104.99−	106.08+
2,900,000	58,000	22,050	14,030	.7603	24.19	101.13	102.24	104.75	105.89−
3,000,000	60,000	23,050	14,830	.7683	24.72	101,05+	102.19	104.54−	105.70+
3,100,000	62,000	24,050	15,650	.7758	25.242	100.98−	102.11+	104.34−	105.53−
3,200,000	64,000	25,050	16,490	.7828	25.766	100.90+	102.08−	104.16−	105.37−
3,300,000	66,000	26,050	17,350	.7894	26.288	100.84+	102.03−	103.39+	105.22−
3,400,000	68,000	27,050	18,230	.7956	26.809	100.79−	101.98+	103.84−	105.07+
3,500,000	70,000	28,050	19,130	.8014	27.329	100.73−	101.94−	103.70−	104.94−
3,600,000	72,000	29,050	20,050	.8069	27.847	100.69−	101.90−	103.57−	104.81−
3,700,000	74,000	30,050	20,990	.8122	28.365	100.66−	101.86	103.44+	104.69−
3,800,000	76,000	31,050	21,950	.8171	28.882	100.60+	101.82+	103.33−	104.57+
3,900,000	78,000	32,050	22,930	.8218	29.397	100.58−	101.78+	103.22	104.46+
4,000,000	80,000	33,050	23,930	.8263	29.913	100.55−	101.76−	103.12	104.36+
4,100,000	82,000	34,050	24,950	.8305	30.427	100.51−	101.72−	103.03−	104.26+
4,200,000	84,000	35,050	25,990	.8345	30.940	100.48+	101.69−	102.94−	104.17−
4,300,000	86,000	36,050	27,050	.8384	31.453	100.47−	101.66−	102.85+	104.08−
4,400,000	88,000	37,050	28,130	.8420	31.966	100.43−	101.63+	102.77+	103.99+
4,500,000	90,000	38,050	29,230	.8456	32.478	100.43−	101.60+	102.70−	103.91+
4,600,000	92,000	39,050	30,350	.8489	32.989	100.39+	101.57+	102.63−	103.83+
4,700,000	94,000	40,050	31,490	.8521	33.5	100.38−	101.55−	102.56+	103.76−
4,800,000	96,000	41,050	32,650	.8552	34.01	100.36+	101.52+	102.50−	103.68+
4,900,000	98,000	42,050	33,830	.8582	34.52	100.35+	101.50−	102.44−	103.61+
5,000,000	100,000	43,050	35,030	.861	35.03	100.33−	101.48−	102.38−	103.55−
7,500,000	150,000	68,050	67,030	.90733	44.69	105.38+	127.58−	158.07+	191.35+
8,000,000	160,000	73,050	73,830	.9131	46.14	100.64−	103.24+	107.35−	110.14+
10,000,000	200,000	93,050	101,030	.9305	50.52	101.91−	109.49+	127.38−	136.84+
12,000,000	240,000	113,050	129,830	.94208	54.10	101.24+	107.09−	121.49+	128.06−
12,500,000	250,000	118,050	137,030	.9444	54.81	100.25−	101.31+	104.42+	105.55−

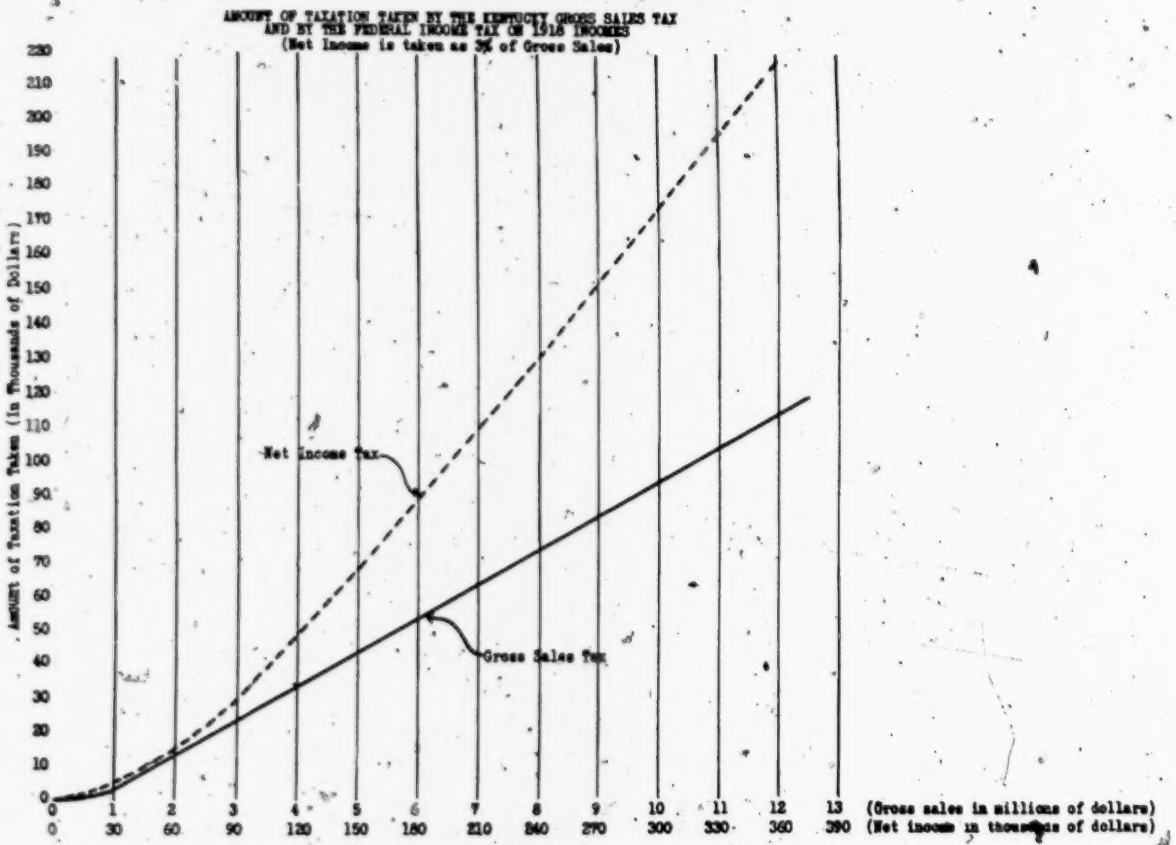
(Here follow photolithographs of Exhibits H, I, and J to affidavit of Herman F. Walradt, side folios 571, 572, 573, 574, and 575.)

WALRADT - EXHIBIT "H"

AMOUNT OF TAXATION TAKEN BY THE KENTUCKY GROSS SALES TAX
AND BY THE FEDERAL INCOME TAX ON 1918 INCOMES
(Net Income is taken as 4% of Gross Sales)



WALRADT - EXHIBIT "I"



572

4763

WALRADT - EXHIBIT "J"

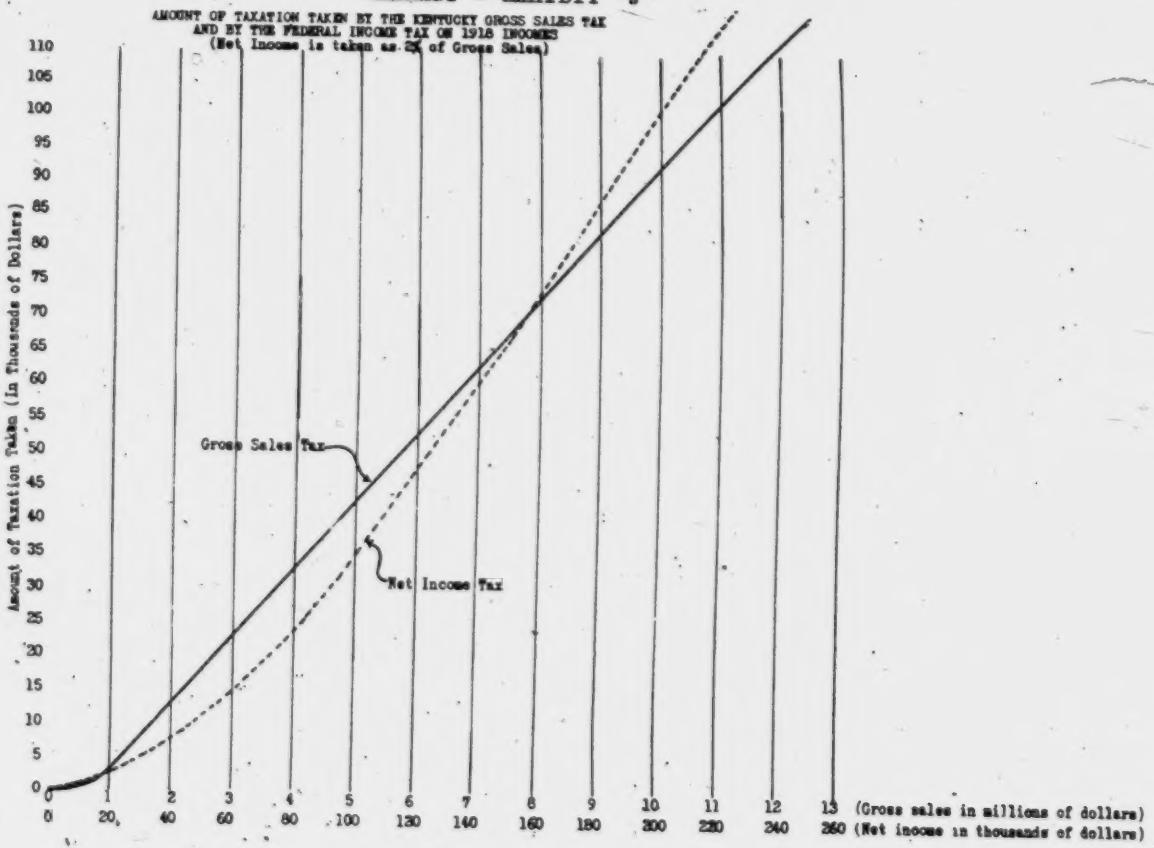
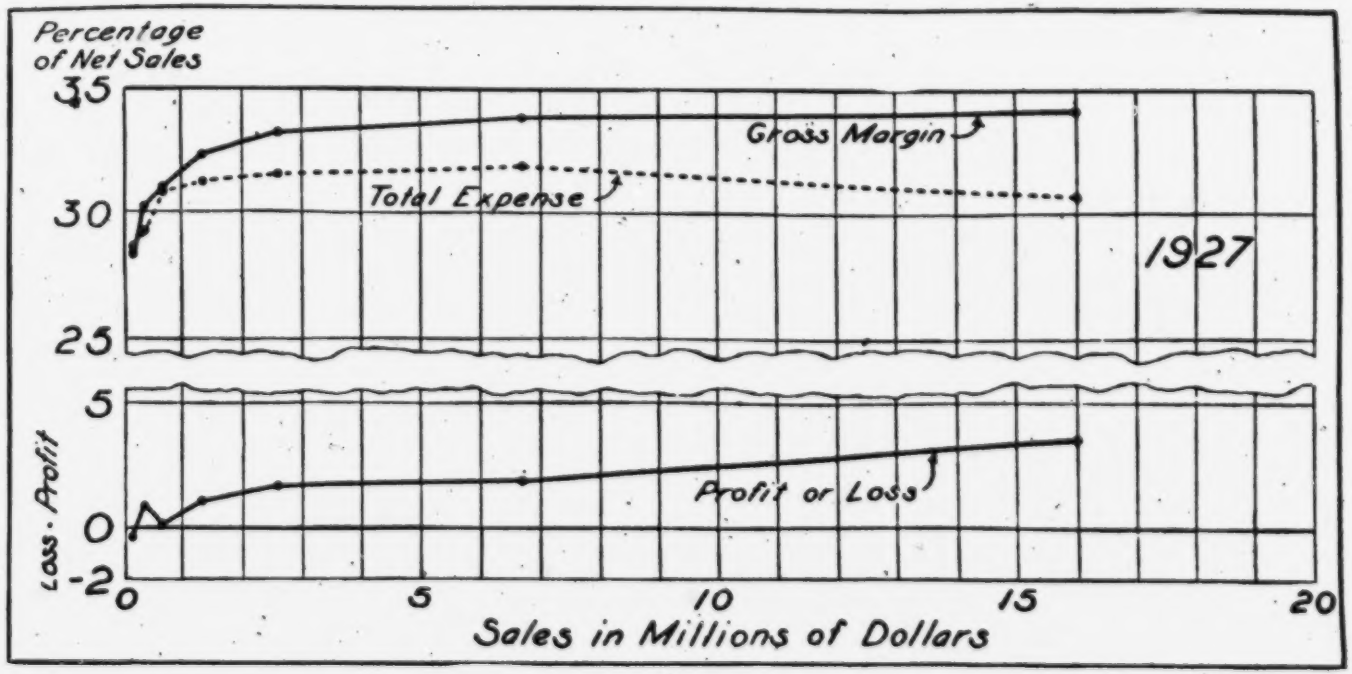
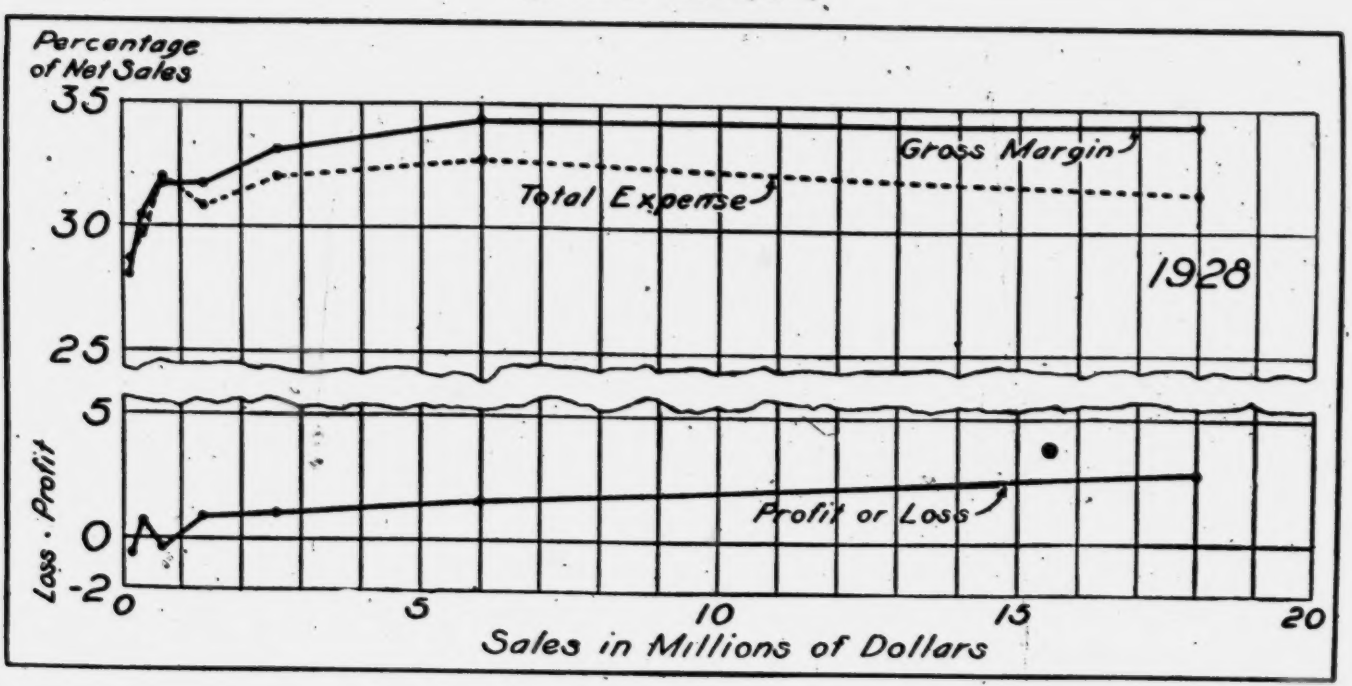


Chart 1. Typical Operating Results as Related to Sales Volume for Seven Groups of Department Stores: 1927

(Based on 508 Reports)



Department Stores: 1928
(Based on 413 Reports)



476E

[fol. 576] AFFIDAVIT OF JAMES W. MARTIN

STATE OF KENTUCKY,
County of Franklin, ss:

Affidavit of James W. Martin in Opposition to Plaintiff's Motion for Interlocutory Decree

James W. Martin, first being duly sworn says:

I am, and have for about two and one-half years been, a resident of Lexington, Kentucky. I am now employed by the University of Kentucky as Profesor of Economics and Director of the Bureau of Business Research in the College of Commerce, and have served in that capacity since I came to Lexington.

Immediately preceding, for four years I was employed as Professor of Economics in Emory University, Atlanta, Georgia; and, while employed by Emory, was a member of the Georgia Manufacturers Association Committee to investigate the tax system of the State of Georgia and its local subdivisions.

Prior to that time, I was for two years an instructor in economics at the University of Chicago, and, while there, served as Assistant to the Chairman of the Highway Finance Committee of the National Tax Association.

My graduate training in Economics comprised one and one-fourth years at George Peabody College and Vanderbilt University, Nashville, Tennessee, and three years, some of which were part-time, at the University of Chicago. This included the summer of 1927, when as a research fellow of the University of Chicago, I was detailed to Washington for investigations in the Library of Congress, Library of the Department of Agriculture, and other Washington libraries. I am a bachelor of arts and a master of arts.

I am a member of the American Economic Association; American Academy of Political Science; (English) Royal Economic Society; the National Municipal League; the National Tax Association; and the Tax Research Foundation. As a member of the National Tax Association, I have served for the current and last preceding year as Chairman of the Committee on Motor Vehicle Taxation; and I am President of the Tax Research Foundation, a non-profit

corporation engaged in investigating State, local, Federal, and foreign tax systems.

[fol. 577] Since 1923, I have been engaged in tax investigations among the most important of the results of which are a number of papers published largely by the National Municipal League, The National Tax Association, and the Social Science Research Council on Highway Finance, and the methods of research in Highway Finance. Other articles include an investigation of the possibilities of income taxation in Kentucky, two or three investigations of recent trends in taxation in the Southern States, certain papers on the recent economic development of Kentucky, several papers on tax administration, and an analysis of the State Tax System of Kentucky, now being published by the Tax Research Foundation.

I have been engaged for several weeks in the collection of certain statistical data to be used in Court in the above styled case. I have prepared certain charts and exhibits filed herewith. These charts and exhibits are marked for identification, Martin Exhibit No. 1, Martin Exhibit No. 2, Martin Exhibit No. 3, Martin Exhibit No. 4, Martin Exhibit No. 5, Martin Exhibit No. 6, Martin Exhibit No. 7, Martin Exhibit No. 8, Martin Exhibit No. 9, Martin Exhibit No. 10, Martin Exhibit No. 11, Martin Exhibit No. 12, Martin Exhibit No. 13, and No. 13a, Martin Exhibit No. 14, Martin Exhibit No. 15, and Martin Exhibit No. 16, respectively. They were either prepared by me or under my personal supervision and direction, and are referred to hereinafter by their respective identifying numbers.

It has been my purpose to examine the operation of the Kentucky gross sales tax to determine the answer to five questions.

1. What are the actual rates? Are they, or are they not, the same as the plaintiffs imply in their petition?

2. What do operating statistics indicate with respect to the relative efficiency of cooperation as compared with actual consolidation in the retail field? To state this question differently, is it actually possible for retailers by voluntary cooperation to secure the advantages of large-scale operation to the same extent that they may be secured by retailers actually operating on a large scale?

3. Do large retailers actually have more or less taxable capacity than small ones? The answer to this question [fol. 578] should throw some light on the economic justification for the graduated scale of rates prescribed in Chapter 149, Acts of the General Assembly of 1930.

4. Is the graduation prescribed in the statute, or indeed any graduation at all, justifiable on the ground that the dealer operating on a large scale pays relatively less tax for State and local purposes, or for all purposes, than does the smaller one? If it is shown that this is the case, it may be possible to justify graduation of rates even in the absence of evidence that the larger retailer has more tax paying ability than the small one.

5. Assuming that the taxes imposed in the gross sales tax statute are not shifted to consumers by raising prices, are the rates so high as to be in effect confiscatory?

Before attacking these problems specifically, certain remarks concerning the basis and method of analysis should be made. Some of our analysis is based on secondary sources of information; that is, dependence has been placed on reports by the Harvard Bureau of Business Research and Moody's Reports which are in turn based on original data, namely, reports of merchants and corporate reports to stockholders respectively.

Due to pressure of time the original data necessary for our analysis could not be assembled in all cases. The statistics submitted have two claims to consideration to which attention should be directed.

(1) In every instance, the statistics not collected from original sources are the work of agencies recognized throughout the worlds of economic scholarship and of business as being entirely reliable. Policies of well-managed department stores all over the country, for example, are determined in the light of results reported by the Harvard Bureau and unmeasured sums are invested or withdrawn from investment on the basis of Moody's reports.

(2) While the data offered are reliable, even where derived from secondary sources, they are not presented as data, but as a basis for statistical analysis. It is the analysis, not the raw figures, which is submitted as evidence in this matter. Even if the figures presented contained errors,

which we do not believe, the substantial accuracy of our results would not, in the absence of mistakes so numerous and [fol. 579] extensive as to be unthinkable, be impugned. In other words, the exhibits below as to be regarded as units and not as statements of detailed data. Moreover, these data have been checked in a general way by a careful investigation of the problems involved and sometimes by direct comparison of different sources of information.

I

From petitions which have been submitted by the Kroger Grocery and Baking Company, the J. C. Penney Company, the Stewart Dry Goods Company, and Levy Brothers, in the Eastern and Western Districts of Kentucky, it would appear that the rate on dealers who have sales of $1,000,000 or more is 1 per cent flat, whereas the rate on those who have only $400,000 to $1,000,000 of sales are graduated so that on the smaller the rate is 0.05 per cent and reaches 1 per cent on sales in excess of $1,000,000. The actual fact is that the rates are very much less severe than the petitions imply. For example, the rate which Levy Brothers would pay under the statute for the year 1930, assuming they have correctly stated taxable sales at $1,253,389.07, and computed the tax to be $5,449.28, would be 0.43 per cent. The tax on the J. C. Penney Company, again assuming accuracy of statement and competition, would be 0.54 per cent; that on the Stewart Dry Goods Company, 0.74 per cent; and that on the Kroger Company, assuming taxable sales to be $10,000,000 and accepting the company's statement with respect to offsets, would be 0.77 per cent. In other words, the tax rate is made considerably less than the apparent 1 per cent by (a) the very low rates on sales of less than $400,000 and (b) in some instances the offsets of license taxes which are permitted by the statute.

A second point that should be noted in this connection is that graduation is not nearly so steep as the bare statement of the facts set forth in the several petitions tend to imply. This has already been illustrated in the cases cited. It will be further illustrated in the exhibits submitted herewith.

II

The facts with respect to the relative efficiency of unit stores operating on a small scale and large retailers,

[fol. 580] whether operating in chains or not, are set forth in the exhibits discussed below. In a preliminary way, attention should be directed to the fact that some of the small-scale stores, the operating expenses of which have been analyzed below, do actually cooperate with other unit stores, while some do not. It appears from careful investigation of the subject-matter that in general there is distinct advantage in completely unified management, which makes itself manifest in lower operating expense, greater efficiency in purchasing, and higher rate of return on capital invested. Careful statistical analysis discloses that the prices at which small-scale retail grocers, for instance, actually sell, either in cooperative groups or not, are in general decidedly above the prices at which very large-scale competitors sell. One such investigation made in Lexington indicates that the most efficient of the small retailers, including those in the cooperative organizations, in the spring of 1930, sold at price levels 3 or 4 per cent below the prices charged by the least efficient large-scale retailers. (The term "efficient" is here used to mean simply ability to sell at lower prices.)

III

Economic theorists have long urged, and in some instances have demonstrated, that large-scale enterprises are able to obtain certain economies of operation which small-scale operators cannot enjoy. Most investigations of this sort have been directed to manufacturing enterprises, but in recent years some attention has been given to the study of the relative efficiency of large-and-small-scale merchants. For present purposes at least, two aspects of this problem require analysis.

In Exhibit I the ratios of net gain of a large number of specialty stores to the sales of those retailers are shown. These data are available and are shown in the exhibit for the years 1927, 1928, and 1929. In 1929 they were so reported as to indicate the typical ratios for specialty stores having sales of $500,000 or less, for those having sales of between $500,000 and $2,000,000 and for those having sales of $2,000,000 and over. These data are based on reports of operating expense gathered from all parts of the United States. In 1927 and 1928 as shown in the exhibit, only two

[fol. 581] classes, those having sales of $1,000,000 or less and those having sales of over $1,000,000 are reported.

The significance of this exhibit for present purposes lies in the fact that, in all these instances, the several retailers have a very much higher ratio of net gain to net sales if they are large-scale than if small-scale merchants. This is equally true for each of the three years, the only years for which comparable information is available.

Exhibit II sets forth similar data for a large number of department stores scattered over the United States, including several in Kentucky. In each year the experience of department stores confirms that of the specialty already discussed in that earnings on sales were very much higher for large-scale enterprises than for the smaller-scale operators. In 1929, for instance, the retailers having sales of between $150,000 and $299,000 made an average of 2 per cent on sales, whereas those selling $10,000,000 or more during the year made an average of 5.3 per cent. The showing for the years 1928 and 1927 is even more conclusive (for department stores) than for the abnormal year 1929.

Another and more significant analysis of the reliability of the theory that large-scale operation makes possible certain economies unattainable for those who operate on a small scale is offered in a series of exhibits now being presented, showing the ratios of profits or net gain (by which we mean return on invested, borrowed as well as owned capital) to invested capital as shown by net worth, in certain types of retailing by size groups.

Exhibit III shows the ratio of net profits to net worth of retail jewelry stores for the year 1927, the only year for which information is available. The exhibit indicates that the least efficient jewelers, speaking in terms of size-groups, are those having sales of between $20,000 and $49,000 each. On the average these incurred a loss of 0.7 per cent. The return ranges from this negative quantity on small stores to a positive 3.2 per cent on stores having $500,000 or over of sales. This exhibit may be accepted as a typical example of one of the less efficient retailing groups. It indicates that in no instance is the net return based on the investment of owners particularly generous. It approaches adequacy only in the case of those having net sales of $500,000 or over.

[fol. 582] Exhibit IV shows the relation between net gain and the capital investment, as measured by net worth, of retail specialty stores scattered over the United States. (This is the same group of stores used in Exhibit I.) Analysis of this exhibit shows that large retailers in the specialty field appear to derive very much greater gains if they are large-scale operators than if they do business on a small scale or relatively small scale.

Exhibit V shows the ratio of net gain to net worth of department stores, both chain and independent, for the three years ending 1929. In 1927 and 1928 it will be observed that, as the size of the business increases, there is an almost perfectly continuous tendency toward an increase of the rate of net gain to net worth. Even in the abnormal year 1929 this tendency, while not absolutely continuous, is certainly unmistakable.

Summarizing these evidences, it may be said that the effectiveness of the merchant, as measured either in terms of ratio of net income or net gain to sales or of the ratio of net income or net gain to capital invested by owners, is greater in large than in small enterprises. The evidence all points to the conclusion that large-scale are more profitable than small-scale enterprises. This conclusion would imply, on the basis of generaly accepted principles of justice in taxation, that it is justifiable to tax the large-scale operator at a higher rate than the dealer engaged in retailing on a small scale.

These conclusions are still further confirmed by analysis of data on retailing for 1930 published by the Census Bureau on or before January 28, 1931. All cases so published, in which the distribution in detail is shown, are included in the analysis presented in Exhibit VI. The significant part of this exhibit is column four, headed "Turn-over" and to a certain extent column five, headed "Sales per Store." The term "turnover" as used in this and the next exhibit is not to be taken as the equivalent of the term as used by accountants because the Census Bureau values inventory (shown in column two) at cost and sales, of course, at selling price. To secure a ratio which could be technically defined as "turn-over" it would be necessary to show both of these items according to the same method of valuation. This cannot be done on the basis of reports by the Census Bureau. It follows, therefore,

[fol. 583] that if the mark-up employed in practice by a given class of retailers is large the figures shown in column four will be correspondingly large. Certain allowance for this error must be made as will be indicated below.

Careful examination of the table at the top of the page, from which data for Chicago are excluded on the ground that Chicago is so large as to be a city somewhat different from any to be found in the State of Kentucky, indicates that the larger the retail enterprise, generally speaking the greater the turnover with the modification that single store independents have a higher turn-over, as measured here, than do two-store multiples or three-store multiples. Undoubtedly this showing is contrary to the actual fact and appear as it does because of the large mark-up of single store independents. The data at the bottom of the page, where figures for Chicago are included, show the tendency even more clearly than do those with Chicago omitted. The apparent reason for this is that Chicago seems to be an exceptionally favorable area for chain store operation.

It must be observed that this exhibit, throwing together as it does, slow turn-over businesses like jewelry and rapid turn-over lines like cigars, is not wholly satisfactory.

Examination of Exhibit VII showing information similar to that just discussed for grocery and variety store owners tends to confirm the conclusion tentatively suggested already. These figures all clearly indicate that in a general business field the rate of turn-over is very definitely larger where the size of the retail enterprise is large. Grocery and variety stores have been chosen for this illustration because they are reported for a comparatively large number of cities, whereas department stores and specialty stores, for example, are reported for a relatively small number of places.

Here again the statistics are shown both with and without the Chicago data. If it is considered that Chicago is not typical of large cities in this State to the extent that it should be excluded, the data at the top of he page should be observed. If, on the other hand, it is believed that all data available to date should be considered, statistics at the bottom of the page will be more convincing.

As plaintiffs have urged in their petitions, rate of turnover is a significant fact in retailing efficiency. That mer-

[fol. 584] chant who secures the highest rate of turn-over, other things remaining the same, will enjoy the most profitable business. Consequently, it may be concluded on the basis of data already published from the Census of Distribution that, generally speaking, large-scale merchants enjoy a more profitable business than do small-scale operators.

That the data shown above are actual comparisons of large with small-scale retailers is borne out by examinations of column five in the tables presented in Exhibits VI and VII. Examination of this column makes it entirely clear that in general two-store multiples have larger sales per store than single store independents; three-store multiples still larger sales, et cetera. From an examination of this column also, it may be concluded that the large-scale retailer must pay less in the way of managerial expense per unit of sales than must the small-scale dealer, since the former has so much greater average sales per store.

IV

If it is true that the large-scale grocer or variety store merchant or the retailer of any other class enjoys greater sales per store and, at the same time, higher rate of turnover, it must follow that, if ad valorem taxes are assessed against different retailers, the small-scale operator will have to pay considerably more per dollar of sales than will the dealer operating on a large scale.

In Kentucky heretofore, and at the present time, the State and its local subdivisions secure general revenue primarily through the imposition of property taxes; consequently, when the inventory of the large-scale merchant is assessed it will constitute a decidedly less proportion of the total goods sold during the year than will that property assessed against the small store owner.

It should also be observed that since turnover is higher and since in many cases the same warehouse may be used by the large-scale merchant, it is practicable to reduce the amount of goods on hand on July 1st, the day as of which ad valorem tax assessments are made, to a minimum figure. Some such reduction undoubtedly takes place in the stores of small merchants, but it is inconceivable that the small independent store is able to do this as effectively as the

[fol. 585] larger store and particularly the large multiple-unit retailer.

Another strong indication that the property tax burden on large retailers is less than that on those doing a smaller business is provided by Exhibit VIII. A careful comparison of the last two columns make it clear that with rare exceptions, the large-scale dealer doing business both within and without the State of Kentucky have decidedly a larger percentage of business in Kentucky than of property. Indeed, the cases in which the contrary is true are so rare as to suggest that there is some extraordinary reason; and a careful investigation of the situation indicates that this is certainly true, at least in the case of Montgomery Ward and Company, which constitutes the most unexpected variation of this sort.

An examination of the annual report of this corporation to stockholders indicates that the total net sales of the corporation for the year 1929 were over $267,000,000 and that the total gross sales of chain and department stores operated by the company were at practically $125,000,000; consequently there must be some error in the report to the State Tax Commission indicating aggregate sales of only $60,000,000. If this is the case it is not at all unlikely that the ratio of sales in Kentucky to total sales is higher than that shown in the exhibit. No details concerning the National Bellas Hess Company, the other extraordinary variant, are known, but there is doubtless some peculiar explanation of that company's higher ratio of property in Kentucky than of sales.

Exhibit IX shows that the taxes on different classes of retail stores operating in Louisville, Kentucky, in 1928 tend to decline as the sales of the store get larger. In the case of drug stores, for example, it will be observed that the very small merchant pays three times as much tax per dollar of sales as the merchant having sales of $100,000 or more. The merchant doing a general grocery business pays about six times as much tax in proportion to sales if he is one of the very small dealers, as he pays if his sales amount to $100,000 or more. The table indicates clearly that, if information available (that is, concerning merchants doing some kind of food business) is typical, the large merchant generally must pay less taxes, relatively speaking, than the small one.

[fol. 586] Exhibit X shows for the years 1927 to 1929 that the same conclusion applies to department stores in general. (Several of these are Kentucky retailers.) Examination of the table in any of the three years for which data are available, indicates that the very large merchant, that is, the merchant having $10,000,000 or more of sales, pays less than one-half as much tax per unit of business as the department store having less than $150,000 of sales. Generally speaking, the gradation is fairly even throughout the several groups.

On the basis, then, of the information available, it is fair to say that, not only does the large retailer enjoy greater tax-paying ability than the small one, but in actual practice at the present time he appears to pay less tax in proportion to amount of business than does his already handicapped competitor. Therefore, it may be suggested that the graduation of rates in the gross sales tax is justified, not only by greater taxable capacity on the part of the large retailer, but also by the fact that the payment of larger taxes will tend to equalize the tax burdens already imposed on large and small merchandising enterprises.

One other point in this connection should be made. Exhibit XI indicates that, taking the country as a whole, the tax burden resting on the department stores tends to decline with increase in the scale of operations at about the same rate whether the merchant is an independent, a cooperative, or a chain dealer. The tax on the enterprise having $2,000,000 or more of sales is in either instance approximately one-half that imposed on those merchants having less than $500,000 of sales.

V

The allegation that the rates imposed in this statute are confiscatory, so far as the business of large-scale dealers is concerned, has been examined in several exhibits now to be submitted.

Exhibit XII constitutes a tabulation of the important corporations doing a retail business for which information concerning sales, net worth, and earnings could be had. The corporations include merchants doing chain store businesses, some doing both chain and mail order business, and perhaps some of still other types. An attempt was made

[fol. 587] to include as many as possible of the principal retailers whose operating results could be determined, whether directly by examination of annual reports, or, if that were impossible, by the use of Moody's Manual of Industrials.

For the purpose of this analysis, it has been assumed that 5 per cent of the total sales, property, and net worth of the corporation is in Kentucky. This percentage was chosen because in round numbers it is the figure which shows the allocation of the business of the Kroger Grocery and Baking Company.

Some of the corporations included do not do business in this State at all, but they were included in the analysis in order to give some indication of how their business would be affected if they chose to operate in this commonwealth, assuming that the sales tax is sustained.

The last two columns of the body of the table show for each individual corporation the ratio of net earnings to net worth before and after the application of the tax rates prescribed in the statute. In view of the fact that the assignment of business to Kentucky has been very generous, as indicated in exhibit VIII, the twelfth column for comparison with the eleventh, shows in general the application of the tax to businesses of the sort examined would not prevent these corporations from earning a substantial rate of return. Examination of column 6 in comparison with column 12 indicates that, if the tax were imposed at a flat rate of 1 per cent this conclusion would not be so valid.

The typical net result of the imposition of the tax rates prescribed in the Kentucky statute is even more clearly shown in the summary at the end of this table. The most significant part of the summary is found in columns ten, eleven and twelve. Column ten shows that the average concern having extremely large sales, the average of those having moderately large sales, the average of those having smaller sales, and the average of those having the smallest sales would be before any tax on sales. Column eleven makes it clear that, if a 1 per cent sales tax were applied in Kentucky the larger retailer, typified by those who have presented petitions before the United States District Court, would still have average returns on net worth of 10 to 12.31 per cent, while those having average sales in Kentucky of less than $1,000,000 would be reduced to a decidedly lower

[fol. 588] rate on owned investment, and the smallest group, on the average, would find itself unable or almost unable to continue in business.

Examination of column twelve shows that the application of the Kentucky sales tax with the graduated rates prescribed in the statute leaves the largest scale enterprises still earning, on the average, 12.49 per cent, the second largest scale, 11.61 per cent, and the third, 9.74 per cent, while the group of smallest merchants have their earnings on proprietorship reduced only to 7.79 per cent.

Summarizing, it may be said that, if these merchants are typical, the conclusion is perfectly obvious that the sales tax prescribed by the 1930 legislature, not only does not result in confiscation but tends to equalize the burdens on the merchants of various sizes who do business in Kentucky.

Exhibit XIII, in the main, is based on the figures presented in Exhibit VIII, namely, sworn statements by merchants reporting their sales within and without Kentucky. Only the fifth column, per cent earning on sales, is derived from other sources. As shown in the appendix to the table, this information is taken directly from the annual reports of corporations to stockholders or indirectly from the same source through Moody's Investment Manual: Industrials, 1930, or Moody's special report.

Analysis of the results shown by this exhibit drives one to the same conclusion which was reached in the study of the Exhibit VII, that is, the comparison of the columns headed "Per cent Earned on Property Before Sales Tax," and "Per Cent Earned on Property After Sales Tax," indicates clearly that the imposition of the sales tax is not confiscatory even ignoring the license offsets which the law allows these various retailers.

Exhibit XIV is based on the same logic as Exhibit XIII but instead of using property invested in Kentucky and total property invested in the business, Exhibit XIV employs invested capital as measured by net worth, as shown in the annual report of the corporations to stockholders. It is assigned to Kentucky on the assumption (a decidedly generous one as shown above) that net worth in Kentucky to total net worth is in the same relation as sales in Kentucky [fol. 589] to total sales. The conclusions reached above in connection with the analysis of Exhibit XIII are almost

equally obvious from a comparison of the two columns in the exhibit.

Exhibit XV is taken from a study of the leading chain stores of two different classes. It shows in the first table average ratio of net earnings to sales for four stores of each class over a period of ten years, 1920 to 1929 inclusive. The merit of this table does not lie in the large number of cases included, but in the fact that they were selected as leading representative cases for an entirely different purpose, namely, investment analysis, and that the showing is highly favorable to these stores from the point of view of earnings on net sales.

The second table in Exhibit XV shows clearly that the earnings of large scale variety and grocery stores of the chain type are sufficiently large in proportion to net worth that the application of the rates prescribed in the Kentucky statute do not cut them down sufficiently to constitute confiscation. This is particularly obvious in the light of the first table which shows that the typical earnings on sales of variety stores in 1929 were 9 per cent, and on grocery stores, 2.6 per cent or 3.1 per cent, depending on what one regards as typical. Application of the rates in the statute would, of course, reduce the variety store earnings in 1929 of 16.8 per cent by one-ninth of that figure and computation may be made similarly for the grocery store earnings.

Exhibit XVI, a tabulation of all the cases (shown completely) selected by Moody to indicate the trend, shows in the second column unsolicited verification of the above conclusions. To reduce any of these figures by a fraction of one point would in no normal case result in cutting the ratio, shown in the last column but one, to a figure which would picture confiscation.

The conclusion from these analyses, then, is that application of the rates prescribed in the gross sales tax statute would have the effect, if actually borne by the merchants, of taxing most heavily these, relatively speaking, with large tax paying ability, those who pay at the present time, least taxes to the commonwealth and its subdivisions, and in any event application of the rates do not,

MARTIN—EXHIBIT No. I

Ratio of Net Gain to Net Sales from Operation of Specialty Stores, 1927-1929*

Net sales	1929 Number of stores	1929 Ratio	1928 Number of stores	1928 Ratio	1927 Number of stores	1927 Ratio
$500,000 or less	35	2.8%	Reported as shown below			
500,000–2,000,000	29	3.0				
2,000,000 or over	21	5.2				
1,000,000 or less	Reported as shown above		36	2.8%	36	2.1%
Over $1,000,000			28	5.8	31	6.1

* As reported in Bulletins 74, 78, and 83, Bureau of Business Research, Harvard University.

MARTIN—EXHIBIT No. II

Ratio of Net Gain to Sales, Department Stores, 1927-1929*

Net sales	1929 Number stores	1929 Ratio	1928 Number stores	1928 Ratio	1927 Number stores	1927 Ratio
Less than $150,000	59	3.0%	Reported as shown below			
150,000– 299,000	83	2.0				
300,000– 499,000	84	2.2				
Less than 250,000	Reported as shown above		121	2.3%	140	3.0%
250,000– 499,000			69	3.4	98	3.6
500,000– 749,000	59	3.2	61	2.8	90	3.3
750,000– 999,000	36	3.0				
1,000,000– 1,999,000	73	3.1	55	3.8	82	3.8
2,000,000– 3,999,000	58	3.7	42	4.5	41	4.3
4,000,000–10,000,000	46	3.9	40	4.8	36	4.8
10,000,000 and over	29	5.3	25	5.8	21	6.1

* As reported in Bulletins 74, 78, and 83, Bureau of Business Research, Harvard University.

[fol. 591] MARTIN—EXHIBIT No. III

Ratio of Net Profits to Net Worth Retail Jewelry Stores, 1927*

Net sales	Number stores	Ratio net profits, sales
Less than $20,000	49	2.7%
20,000– 49,000	69	Loss 0.7
50,000– 99,000	40	1.1
100,000–499,000	53	1.9
500,000 or over	19	3.2

* As reported in Bulletin 76, Bureau of Business Research, Harvard University

MARTIN—EXHIBIT No. IV

Ratio of Net Gain to Net Worth from Operation of Specialty Stores, 1927-1929*

Net sales	1929 Number of stores	1929 Ratio	1928 Number of stores	1928 Ratio	1927 Number of stores	1927 Ratio
Less than $500,000	35	6.5%	Reported as indicated below			
500,000 to 2,000,000	29	11.5				
2,000,000 and over	21	14.0				
1,000,000 or less	Reported as		36	8.9%	36	7.0%
Over $1,000,000	indicated above		28	15.5	31	16.0

* As reported in Bulletins 74, 78, and 83, Bureau of Business Research, Harvard University.

MARTIN—EXHIBIT No. V

Ratio of Net Gain to Net Worth in Department Stores—Chain and Independent*

Net sales	Number of stores, 1929	Ratio, 1929
Less than $150,000	59	6.3%
150,000 to 299,000	83	5.0
300,000 to 499,000	84	6.0
500,000 to 749,000	59	6.8
750,000 to 999,000	36	6.6
1,000,000 to 1,999,000	73	8.4
2,000,000 to 3,999,000	58	7.6
4,000,000 to 9,999,000	46	8.1
10,000,000 and over	29	11.3

	1928	1927	1928	1927
Less than $250,000	121	140	5.0%	6.2%
250,000 to $499,000	69	98	7.8	8.8
500,000 to 999,000	61	90	7.8	7.1
1,000,000 to 1,999,000	55	82	9.7	9.5
2,000,000 to 3,999,000	42	41	9.2	10.0
4,000,000 to 9,999,000	40	36	9.8	11.5
10,000,000 and over	25	21	12.1	13.5

* As reported in Bulletins 74, 78, and 83, Bureau of Business Research, Harvard University.

Aggregate Sales, Inventory, and Number of Stores by Type of Organization, All Stores Combined of All Cities so Far as Census Data (1930) Were Announced on or Before January 28

Type of organization	Number cities included	I Net sale (1929) (000 omitted)	II Inventory, Dec. 31 cost (000 omitted)	III Number of stores	IV Turnover, I/II	V Sales per store, I/III
Excluding Chicago						
Single-store independents	57	$1,429,340	$205,611	40,719	6.95	$35,103
Two-store multiples	46	161,417	27,360	2,237	5.90	72,158
Three-store multiples	55	84,043	13,350	987	6.30	85,150
Local chains (four stores and over)	55	171,816	21,975	2,105	7.82	81,623
Sectional chains	55	107,892	12,577	1,523	8.58	70,842
National chains	58	186,630	23,373	1,702	7.98	109,653
Including Chicago						
Single-store independents	..	2,517,300	352,761	75,666	7.14	33,269
Two-store multiples	..	299,102	48,135	4,255	6.21	70,294
Three-store multiples	..	173,215	25,124	1,731	6.89	100,066
Local chains (four stores and over)	..	421,350	45,671	4,416	9.23	95,414
Sectional chains	..	208,320	20,887	2,923	9.97	71,269
National chains	..	480,779	52,847	3,702	9.10	129,870

[fol. 593] MARTIN—EXHIBIT NO. VII

Aggregate Sales, Inventory, and Number of Stores by Type of Organization and Kind of Business for All Cities so Far as Census Data (1930) Were Announced on or Before January 28

Type of organization	Number cities included	I Net sales, 1929	II Inventory, Dec. 31 cost	III Number of stores	IV Turnover, I/II	V Sales per store, I/III
Excluding Chicago						
Grocery Stores:						
Single-store independents	27	$155,695,800	$10,414,042	6,566	14.95	$23,712
Local multi-units	26	38,719,068	2,828,727	632	13.69	61,168
Sectional and national chains	23	68,581,915	3,532,101	995	19.42	68,927
Variety, 5c to $1, Including General Stores:						
Single-store independents	18	6,758,462	1,514,968	258	4.46	26,196
Local multi-units	5	1,940,913	466,421	29	4.16	66,928
Sectional and national chains	18	24,220,827	3,392,027	85	7.14	284,951
Including Chicago						
Grocery Stores:						
Single-store independents	..	245,878,346	16,534,060	11,949	14.87	20,577
Local multi-units	..	52,174,190	3,799,835	895	13.73	58,295
Sectional and national chains	..	167,462,243	7,152,763	2,624	23.41	63,819
Variety, 5c to $1, Including General Stores:						
Single-store independents	..	13,538,755	3,720,110	597	3.64	22,678
Local multi-units	..	3,651,795	806,177	61	4.53	59,865
Sectional and national chains	..	52,402,610	6,637,912	232	7.89	225,873

[fol. 594] EXHIBIT No. VIII TO AFFIDAVIT OF JAMES W. MARTIN

Comparison of Investment with Sales in Kentucky by Retailers Doing Business Both Within and Without the State*

Name	Sales		Property invested		Per cent of sales in Ky.	Per cent of property in Ky.
	Total	In Kentucky	Total	In Kentucky		
Great A. & P. Tea Co.	$896,719,959	$14,134,788	$121,247,407	$1,211,462	1.58	1.00
Kroger Grocery & Baking Co.	286,611,215	12,635,115	63,940,978	1,500,620	4.41	2.35
S. S. Kresge Co.	155,166,527	3,108,312	98,496,309	692,547	2.00	.70
F. W. Woolworth Co.	303,047,172	2,422,358	136,397,650	505,615	.80	.37
J. C. Penny Co.	209,690,417	2,164,974	76,955,489	657,360	1.03	.85
Sears Roebuck & Co.	455,360,619	761,734	274,437,218	148,220	.17	.05
Montgomery Ward & Co.	60,628,672	675,623	224,159,596	495,410	1.11	2.05
W. T. Grant Co.	65,448,298	617,436	12,987,769	86,304	.94	.66
J. J. Newberry Co.	27,789,369	451,279	19,020,685	245,620	1.62	1.29
Walgreen Co.	4,680,305	448,953	2,133,774	95,580	9.59	4.48
McCrory Stores Corporation	44,706,253	437,011	37,935,356	213,447	.98	.56
Mangels, Inc.	10,600,006	408,084	2,366,843	28,008	3.85	1.18
Melville Shoe Corp.	25,520,675	377,824	7,029,269	64,357	1.48	.92
S. H. Kress Co.	18,427,479	370,770	9,467,722	88,771	2.01	.94
Schulte United	10,363,432	362,040	16,771,348	205,836	3.49	1.23
G. C. Murphy Co.	15,726,651	297,544	4,457,129	66,358	1.89	1.49
American News Co.	37,021,107	264,160	4,584,269	14,631	.71	.32
Reliable Stores Corp.	14,055,480	248,714	346,911	.....	1.77	....
Jewel Tea Co., Inc.	16,844,110	207,498	7,559,542	8,604	1.23	.11
Edison Brothers Stores, Inc.	3,778,460	204,806	1,536,146	59,941	5.42	3.90

EXHIBIT No. VIII TO AFFIDAVIT OF JAMES W. MARTIN—Continued

Name	Sales		Property invested		Per cent of sales in Ky.	Per cent of property in Ky.
	Total	In Kentucky	Total	In Kentucky		
Western Auto Supply Co	15,959,440	204,658	6,563,989	26,300	1.28	.40
Sterchi Brothers Stores, Inc	7,870,435	200,617	7,584,514	84,729	2.55	1.12
Childs Co	24,127,725	165,050	9,433,572	3,009	.68	.03
Lerner Stores Corp	19,077,143	125,160	4,973,000	7,000	.66	.14
[fol. 595]						
G. R. Kenney Co	20,861,960	106,230	11,033,337	46,690	.51	.42
D. A. Schulte, Inc	18,027,784	104,105	25,502,290	16,000	.58	.06
United Cigar Stores Co. of America	69,461,594	89,055	23,465,685	22,385	.13	.10
Feltman & Curme Shoe Store Co	7,671,195	72,309	2,066,232	10,183	.94	.49
Schiff Co	5,364,922	71,474	1,436,827	12,706	1.33	.88
B. & G. Sandwich Shops, Inc	3,404,523	65,476	1,360,932	10,231	1.92	.75
C. F. Adams Co	3,180,260	51,626	471,062	5,882	1.62	1.25
National Bellas Hess Co	42,448,047	45,573	8,853,131	80,582	.11	.91
Federal Bake Shops of Missouri, Inc	481,260	41,678	53,491	5,519	8.66	10.32
Ground Gripper Shoes, Inc	1,148,864	23,935	726,350	9,093	2.08	1.25
Nunn Bush Shoe Co., Inc	2,785,483	21,792	1,124,325	6,050	.78	.54
Metropolitan Chain Stores	18,095,858	13,200	14,506,000	27,600	.07	.19

* Source: Records of Kentucky State Tax Commission.

[fol. 596]

EXHIBIT No. IX TO AFFIDAVIT OF JAMES W. MARTIN

Ratio of Taxes to Sales by Volume of Business, Louisville, 1928*

Kind of business	Less than $5,000	$5,000 to $9,999	$10,000 to $24,999	$25,000 to $49,999	$50,000 to $99,999	$100,000 and over	All
Bakeries	.8	.9	.7	.2a	...	...	.5
Confectioneries	1.2	.6	.3	.4	.8b	...	.8
Dairy and poultry product	.8	.3	.3	.1	.2	.5	.4
Delicatessen	1.0	.7	.4c	...	...	...	.5
Drug	.9	.6	.5	.3	.3	.3	.6
Fish and other sea food	.6	...	.1c	...	...	...	.1
Fruit and vegetable	.1	.5	.1c	...	...	...	.2
General department and variety	...	.1a	...	...	...	...	.1
Grocery	1.3	.6	.4	.2	.2	.2	.3
Hay, grain and feed	.2	.5	.5	.5	.1	.1	.1
Hotels	.5	.3	.3	.3	.2b	...	.2
Hucksters	.8	.3d	...	...	...	...	.6
Ice cream parlors	1.7	.6	.3c	...	...	...	.7
Meat market	.9	.3	.1	.1	.1b	...	.1
Pool rooms	1.7	.5e	...	...	...	...	1.0
Restaurants and lunch room	1.3	.6	.5	.4	.3f .2g	.3	.5

* U. S. Department of Commerce, Distribution of Cost Studies No. 6, "Louisville Grocery Survey."

a—$25,000 and over.
b— 50,000 and over.
c— 10,000 and over.
d— 5,000–12,000.
e— $5,000–$15,000.
f— 50,000– 74,999.
g— 75,000– 99,999.

[fol. 597] EXHIBIT NO. X TO AFFIDAVIT OF JAMES W. MARTIN

Ratio of Taxes to Net Sales of Department Stores—Chain and Independent*

Net sales	Number of stores, 1929	Ratio of taxes to net sales, 1929
Less than $150,000	59	.65%
150,000 to 299,000	83	.6
300,000 to 499,000	84	.6
500,000 to 749,000	59	.6
750,000 to 999,000	36	.45
1,000,000 to 1,999,000	73	.4
2,000,000 to 3,999,000	58	.35
4,000,000 to 9,999,000	46	.35
10,000,000 and over	29	.3

	1928	1927	1928	1927
Less than $200,000	21	140	.7%	.7%
250,000 to 499,000	69	98	.7	.65
500,000 to 999,000	61	90	.65	.6
1,000,000 to 1,999,000	55	82	.5	.5
2,000,000 to 3,999,000	42	41	.5	.45
4,000,000 to 9,999,000	40	36	.45	.45
10,000,000 and over	25	21	.3	.3

* As reported in Bulletins 74, 78, and 83, Bureau of Business Research, Harvard University.

EXHIBIT NO. XI TO AFFIDAVIT OF JAMES W. MARTIN

Ratio of Taxes to Net Sales—Department Stores Independently and Centrally Owned, 1929*

	Doing no group buying		Doing some group buying		In ownership group	
Net sales	Number of stores	Per cent	Number of stores	Per cent	Number of stores	Per cent
Less than $500,000	100	.6	55	.6	34	.6
$500,000 to $2,000,000	58	.45	43	.45	31	.5
$2,000,000 or more	45	.35	34	.3	44	.35

* Bulletin No. 83, Bureau of Business Research, Harvard University, pp. 34–35.

(Here follows Exhibit No. XII to Affidavit of James Martin, side folio 598.)

[fol. 599]

MARTIN—EXHIBIT No. XIII

Effect of Sales Tax on Rate of Return on Property Investment of Retailers in Kentucky, 1929*

Name	Sales		Property invested		Per cent earned on sales	Amount earned in Ky. before sales tax	Income in Ky. after sales tax	Per cent earned on property	
	Total	In Kentucky	Total	In Kentucky				Before sales tax	After sales tax
Great A. & P. Tea Co	$896,719,959	$14,134,788	$121,247,407	$1,211,462	2.8	$395,774	$261,376	32.67	21.58
Kroger Grocery & Baking Co	286,611,215	12,635,115	63,940,978	1,500,620	2.07	261,546	142,146	17.42	9.47
S. S. Kresge	155,166,527	3,108,312	98,496,309	692,547	10.86	337,563	313,430	48.74	45.26
F. W. Woolworth	303,047,172	2,422,358	136,397,650	505,615	8.4	203,478	186,204	40.24	35.64
J. C. Penny	209,690,417	2,164,974	76,955,489	657,360	5.8	125,568	110,868	19.10	16.87
Sears Roebuck Co	455,360,619	761,734	274,437,218	148,220	8.2	62,462	61,172	42.14	41.27
Montgomery Ward Co	60,628,672	675,623	24,159,596	495,410	5.4	36,484	35,632	7.36	7.19
W. T. Grant	65,448,298	617,436	12,987,769	86,304	5.8	35,811	35,191	41.49	40.78
J. J. Newberry	27,789,369	451,279	19,020,685	245,620	6.8	30,687	30,436	12.49	12.39
Walgreen	4,680,305	448,953	2,133,774	95,580	7.0	31,427	31,178	32.88	32.62
McCrory Stores	44,706,253	437,011	37,935,356	213,447	7.1	31,028	30,791	14.54	14.43
Mangels, Inc	10,600,006	408,084	2,366,843	28,008	2.95	12,038	11,830	42.98	42.24
Melville Shoes	25,520,675	377,824	7,029,269	64,357	5.9	22,292	22,103	34.50	34.34
S. H. Kress Co	18,427,479	370,770	9,467,722	88,771	9.1	33,740	33,555	38.01	37.80
Schulte-United	10,363,432	362,040	16,771,348	205,836	6.57d	23,786d	23,967d	11.56d	11.64d
G. C. Murphy	15,726,651	297,544	4,457,129	66,358	6.01	17,882	17,733	26.95	26.72
American News Co	37,021,107	264,160	4,584,269	14,631	2.67	7,053	6,921	48.21	47.30
Reliable Stores Corp	14,055,480	248,714	346,911	.....	10.89	27,085	26,961	.....	.....
Jewel Tea Co	16,844,110	207,498	7,559,542	8,604	9.4	19,505	19,401	226.70	225.49
Edison Brothers, Inc	3,778,460	204,806	1,536,146	59,941	4.7	9,626	9,524	16.06	15.89

* Data in columns 1 to 4, inclusive, are based on tabulations by the State Tax Commission of statements given by the management of the corporations concerned. Source of column 5 is shown on appended table. Remaining columns were computed.

[fol. 600] MARTIN—EXHIBIT No. XIII—Continued

Name	Sales		Property invested		Per cent earned on sales	Amount earned in Ky. before sales tax	Income in Ky. after sales tax	Per cent earned on property	
	Total	In Kentucky	Total	In Kentucky				Before sales tax	After sales tax
Western Auto Supply	$15,959,440	$204,658	$6,563,989	$26,300	2.32	$4,748	$4,646	18.05	17.67
Sterchi Brothers Stores	7,870,435	200,617	7,584,514	84,729	10.40	20,864	20,764	24.62	24.51
Childs Co	24,127,725	165,050	9,433,572	3,009	6.1	10,068	9,985	334.60	331.84
Lerner, Inc	19,077,143	125,160	4,973,000	7,000	6.8	8,511	8,448	121.59	120.69
G. R. Kenney Co	20,861,960	106,230	11,033,337	46,690	6.3	6,692	6,639	14.33	14.22
United Cigar Stores	69,461,594	89,055	23,465,685	22,385	6.57d	5,851d	5,896d	26.14d	26.34d
Feltman & Curme Store	7,671,195	72,309	2,066,232	10,183	.50	362	326	3.55	3.20
Schiff Co	5,364,922	71,474	1,436,827	12,706	5.4	3,860	3,824	30.38	30.10
B. & G. Sandwich	3,404,523	66,476	1,360,932	10,231	8.38	5,487	5,454	53.63	53.31
C. F. Adams	3,180,260	51,626	471,062	5,882	2.34d	1,208d	1,234d	20.54d	20.98d
National Bellas Hess	42,448,047	45,573	8,853,131	80,582	.17d	77d	100d	.10d	.12d
Federal Bake Shop of Missouri	481,260	41,678	53,491	5,519	8.0	3,334	3,313	60.41	60.03
Ground Gripper Shoes	1,148,864	23,935	726,350	9,093	9.74	2,331	2,319	25.64	25.50
Nunn-Bush Shoe	2,785,483	21,792	1,124,325	6,050	9.06	1,974	1,963	32.63	32.45

[fol. 601] APPEND. TO XIII

MARTIN—EXHIBIT NO. XIII

Appendix to Table on Effect of Sales Tax on Rate of Return on Investment of Retailers in Kentucky, 1929

Name	Total sales	Net operating income	Ratio net to sales
Great A. & P. Tea Co	.....	.....	2.8%c
Kroger	.....	.....	2.07a
S. S. Kresge Co	$156,458,000	$16,847,210	10.86*
F. W. Woolworth	303,047,000	25,420,000	8.4*
J. C. Penny	.....	.....	5.8c
Sears & Roebuck Co	443,453,000	36,479,000	8.2*
Montgomery Ward & Co	267,326,000	14,505,000	5.4*
W. T. Grant	65,902,000	3,829,000	5.8*
J. J. Newberry Co	.....	.....	6.8c
Walgreen Co	.....	.....	7.0c
McCrory	.....	.....	7.1c
Mangels, Inc	10,600,008b	312,631b	2.95b
Melville Shoe	25,521,000	1,518,000	5.9*
S. H. Kress	68,474,000	6,222,000	9.1*
Schulte United	12,979,422b	853,186d b	6.57b
G. C. Murphy Co	15,726,652b	944,559b	6.01b
American News	56,863,194b	1,519,246b	2.67b
Reliable Stores	14,217,783	1,547,652b	10.89b
Jewel Tea Co	16,844,000	1,582,000	9.4*
Edison Brothers Stores	3,778,460b	179,313b	4.07b
Western Auto Supply	15,959,521b	370,348b	2.32b
Sterchi Bros. Stores	7,887,681b	820,359b	10.40b
Child's	.....	.....	6.1c
Lerner Stores Corp	19,077,123b	1,297,542b	6.8b
G. R. Kinney	20,862,000	1,305,000	6.3*
United Cigar Stores Co	84,679,557	5,561,372d	6.57*d
Feltman & Curme	7,671,196	38,678b	.50b
Schiff & Co	.....	.....	5.4c
B. & G. Sandwich	3,404,523	285,167b	8.38b
C. F. Adams	3,163,328b	73,781d b	2.34d b
National Bellas Hess	48,311,813b	80,064d b	.17d b
Federal Bake Shop of Missouri	4,490,000	360,000	8.0*
Ground Grippers Stores	2,017,188b	196,468b	9.74b
Nunn Bush Shoe	5,018,912b	454,747b	9.06b

* Information shown is taken from corporation annual reports to stockholders.

a—From Bill of Complaint, Kroger Grocery & Baking Co. v. Ky. Tax Commission et al.

b—Computed from Moody's Investment Manual: Industrials, 1930.

c—Ratio taken from Moody's Investors Service (Business and Industries Guide), Sept. 26, Oct. 16, and Dec. 11, 1930.

d—Deficit.

Effect of Sales Tax on Rate of Return on Owned Capital (as Indicated by Book Value of Stock) of Retailers in Kentucky, Assuming Property and Income in and out of State Proportional to Sales, 1929a

Name	Sales		Invested owned capital		Per cent earned on sales	Amount earned in Ky. before sales tax	Income in Ky. after sales tax	Per cent earned on invested capital in Ky.	
	Total	In Kentucky	Total	In Kentucky				Before sales tax	After sales tax
Great A. & P. Tea Co	896,719,959	14,134,788	118,770,855	1,876,580	2.8	395,774	261,376	21.09	13.93
Kroger Grocery & Baking Co	286,611,215	12,635,115	50,549,295	2,229,224	2.07	261,547	142,146	11.73	6.38
S. S. Kresge Co	155,166,527	3,108,312	83,436,207*	1,668,724	10.86	337,563	313,430	20.23	18.78
F. W. Woolworth Co	303,047,172	2,422,358	158,804,130*	1,270,433	8.4	203,478	186,204	16.02	14.66
J. C. Penny Co	209,690,417	2,164,974	66,613,930*	686,123	5.8	125,568	110,868	18.30	16.16
Sears Roebuck & Co	455,360,619	761,734	241,841,326*	411,130	8.2	62,462	61,172	15.19	14.88
Montgomery Ward & Co	60,628,672	675,623	174,456,810*	1,936,471	5.4	36,484	35,632	1.88	1.84
W. J. Grant Co	65,448,298	617,436	20,496,966*	192,671	5.8	35,811	35,191	18.59	18.26
J. J. Newberry Co	27,789,369	451,279	15,055,500	243,899	6.8	30,687	30,436	12.58	12.48
Walgreen Co	4,680,305	448,953	16,034,002	1,537,661	7.0	31,427	31,178	2.04	2.03
McCrory Stores Corporation	44,706,253	437,011	23,136,615	226,739	7.1	31,028	30,791	13.68	13.58
Mangels, Inc	10,600,006	408,084	2,759,723	106,249	2.95	12,038	11,830	11.33	11.13
Melville Shoe Corp	25,520,675	377,824	7,643,446*	113,123	5.9	22,292	22,103	19.71	19.54
S. H. Kress Co	18,427,479	370,770	34,785,237	699,183	9.1	33,740	33,555	4.83	4.80
Schulte-United	10,363,432	362,040	10,935,271	381,641	6.57d	23,786d	23,967d	6.23d	6.28d
G. C. Murphy Co	15,726,651	297,544	6,716,749	126,947	6.01	17,882	17,733	14.09	13.97
American News Co	37,021,107	264,160	16,048,861	113,947	2.67	7,053	6,921	6.19	6.07
Reliable Stores Corp	14,055,480	248,714	7,803,438	138,121	10.89	27,085	26,961	20.33	19.52
Jewel Tea Co	16,844,110	207,498	6,231,109*	76,643	9.4	19,505	19,401	25.45	25.31
Edison Brothers Stores, Inc	3,778,460	204,806	1,440,986	78,101	4.7	9,626	9,524	12.33	12.19

[fol. 603]

Western Auto Supply Co.....	15,959,440	204,658	4,647,657*	59,490	2.32	4,748	4,646	7.98	7.81
Sterchi Brothers Stores, Inc...	7,870,435	200,617	6,476,503	114,151	10.40	20,864	20,764	18.28	18.19
Childs Co.....	24,127,725	165,050	14,625,486	99,453	6.1	10,068	19,985	10.12	10.04
Lerner Stores Corp.....	19,077,143	125,160	6,191,136*	40,861	6.8	8,511	8,448	20.83	20.67
G. R. Kinney Co.....	20,861,960	106,230	7,762,547*	39,589	6.3	6,692	6,639	16.90	16.77
United Cigar Stores Co. of Amer.	69,461,524	89,055	38,215,365*	49,680	6.57d	5,851d	5,896d	11.78d	11.87d
Feltman & Curme Shoe Stores Co.....	7,671,195	72,309	1,876,183*	17,636	.50	362	326	2.05	1.85
Schiff Co.....	5,364,922	71,474	2,576,889	34,273	5.4	3,860	3,824	11.26	11.16
B. & G. Sandwich Shops, Inc..	3,404,523	65,476	897,427	17,231	8.38	5,487	5,454	31.84	31.65
C. F. Adams Co.....	3,180,260	51,626	1,805,826	29,254	2.34d	1,208d	1,234d	4.13d	4.22d
National Bellas Hess Co.....	42,448,047	45,573	14,877,102	16,365	.17d	77d	100d	.47d	.61d
Federal Bake Shop of Mo., Inc.	481,260	41,678	973,523*	84,307	8.0	3,334	3,313	3.95	3.93
Ground Gripper Shoes, Inc....	1,148,864	23,935	1,633,603	33,979	9.74	2,331	2,319	6.86	6.82
Nunn Bush Shoe Co., Inc.....	2,785,483	21,792	2,396,853	18,695	9.06	1,974	1,963	10.56	10.50

a—Data taken directly from Corporation Report to Stockholders where possible (indicated by *); otherwise from Moody's *Investment Manual: Industrials*, 1930.

[fol. 604] MARTIN—EXHIBIT No. XV

Average Ratios of Net Earnings to Sales for Variety and Grocery Chain Stores, 1920–1929a

Type of Store	1920	1921	1922	1923	1924	1925	1926	1927	1928	1929
Four variety b	5.0%	6.1%	9.5%	10.1%	9.1%	10.2%	9.8%	10.1%	10.2%	9.0%
Four grocery c	1.4	3.0	4.2	3.9	4.3	3.7	3.7	3.5	3.1	3.1
Three grocery d	1.1	3.1	3.7	3.1	3.5	3.0	2.7	2.8	2.8	2.6

a. Data from H. G. Guthmann and K. E. Miller, "Some Financial Tendencies among Leading Variety and Grocery Chains during the Past Decade," *Harvard Business Review*, January 1931, p. 251.
b. Including Woolworth, Kresge, Kress, and McCrory.
c. Including A. & P., Kroger, National Tea and American Stores.
d. Excluding American Stores.

Average Percentages Earned on Net Tangible Investment by Variety and Grocery Chain Stores, 1920–1929a

Type of Store	1920	1921	1922	1923	1924	1925	1926	1927	1928	1929
Four variety b	17.8	19.4	26.5	26.2	22.0	22.6	19.2	20.2	19.1	16.8
Four grocery c	11.4	18.3	25.0	23.7	24.9	20.4	21.8	20.4	17.5	17.4

a. Data from H. G. Guthmann and K. E. Miller, *op. cit.*, p. 249.
b. Including Woolworth, Kresge, Kress, and McCrory.
c. Including A. & P., Kroger, National Tea, and American Stores.

[fol. 605]

MARTIN—EXHIBIT No. XVI

Operating Results of Certain Stores, 1929*

Name of stores	Net sales (1929)	Ratio of operating net to sales.	Net earnings	Ratio of earnings to book value stock	Ratio of earnings to book after 1% sales tax (estimated)
1. Bohack	$29,000,060	3.3%	$900,337	10.1%	6.9%
2. American Stores	143,000,000	4.8%	6,594,822	15.2%	11.9%
3. First National Stores	107,000,000	4.9%	4,773,445	24.1%	20.1%
4. Great A. & P	1,053,000,000	2.8%	26,219,631	20.6%	13.2%
5. Kroger Groc. & Bkg. Co	287,000,000	2.1%	5,919,096	11.2%	5.4%
6. National Tea Co	90,210,000	3.4%	2,731,267	12.9%	9.1%
7. Daniel Reeves	33,767,000	3.6%	1,128,349	24.4%	17.6%
8. Safeway Stores	213,413,000	3.2%	6,147,313	14.5%	10.1%
9. Jewel Tea Co	16,844,000	9.3%	1,691,302	26.6%	23.7%
10. Grand Union	37,000,000	2.4%	1,021,385	8.9%	5.2%
11. Pender	15,921,000	1.6%	287,715	12.4%	4.7%
Restaurant Chains:					
1. John R. Thompson	15,742,600	7.9%	1,584,836	10.8%	9.4%
2. Frank G. Shattuck Co	26,442,000	13.2%	3,355,720	13.3%	12.4%
3. Waldorf System	16,362,000	8.5%	1,205,547	19.1%	16.4%
4. Bickford's	5,312,000	9.3%	509,572	15.8%	14.1%
5. Childs Co	30,000,000	6.1%	1,277,138	3.7%	3.07%
Variety Chains:					
1. F. & W. Grand Silver	30,400,000	3.8%	1,812,693	14.7%	10.8%
2. W. T. Grant Co	66,000,000	4.9%	3,057,750	14.9%	11.8%
3. S. S. Kresge	156,500,000	10.5%	14,952,210	17.9%	16.1%
4. S. H. Kress & Co	68,500,000	8.1%	5,834,400	16.6%	14.4%
5. McCrory Corporation	44,700,000	7.1%	2,223,234	8.2%	7.05%
6. McLellan Co	23,800,000	4.6%	1,001,457	10.7%	8.3%
7. Neisner Bros., Inc	15,000,000	7.5%	1,025,363	18.4%	15.8%
8. J. J. Newberry Co	28,000,000	6.8%	1,594,247	10.6%	9.01%
9. F. W. Woolworth Co	303,000,000	9.1%	35,664,253	22.4%	19.9%
10. J. C. Penny Co	210,000,000	5.8%	12,413,378	24.8%	20.5%

[fol. 606]

MARTIN—EXHIBIT No. XVI—Continued

Operating Results of Certain Stores, 1929*

Name of stores.	Net sales (1929)	Ratio of operating net to sales	Net earnings	Ratio of earnings to book value stock	Ratio of earnings to book after 1% sales tax (estimated)
Shoe Chains:					
1. Melville Shoe Corp	$25,500,000	5.9%	$1,594,216	20.6%	17.09%
2. Schiff Co	9,200,000	5.4%	493,623	19.4%	15.7%
3. G. R. Kinney Co	20,900,000	6.3%	859,548	8.4%	7.1%
Drug Chains:					
1. Peoples Drug, Inc	15,500,000	6.0%	893,920	17.1%	14.7%
2. Walgreen Co	47,000,000	7.0%	3,130,466	19.5%	16.6%

* Figures except estimate taken from Moody's Investment Letters (Business and Industries Guide).
#58, September 26, 1930.
#61, October 16, 1930.
#73, December 11, 1930.

[fol. 607] James W. Martin

JAMES W. MARTIN called for the defendants testified as follows:

He was the same James W. Martin who testified by affidavit in the case in 1931. Since that time he has continued his work with the University of Kentucky as Director of business research. He has followed the general line that he had been in at the time the affidavit was made. He had emphasized specially on tax research rather than on general business research. He has been continuously engaged in the study of taxation since that time and has issued several reports and at the request of the Attorney General's office the Bureau of Business Research had made some further investigation in connection with the gross sales tax and also in connection with the Kentucky oleomargarine tax enacted by the Legislature of Kentucky. At the request of the Attorney General the witness had prepared certain [fol. 608] exhibits designed to supplement the information already in the record respecting the effective tax rates of Kentucky as compared with those in other states and countries. The witness thereupon produced the exhibit which was introduced as Martin Exhibit No. 17 and stated that this showed the maximum gross sales tax rate imposed on retailers in the various states and foreign countries. Witness then produced an exhibit in the form of a table showing the effective tax rate on gross sales in Kentucky as compared with other states. This was introduced as Martin Exhibit No. 18.

The witness then introduced the chart introduced as Exhibit 19, showing the net gain of department stores in 1929 to percentage of net worth. Witness then stated that Exhibit 17 was a tabulation of the rates imposed on gross sales in seventeen states and in seveteen foreign or extra continental possessions of the United States. This table included all of the states on which the bureau with which he was connected had any authentic information and purported to include New Mexico and North Carolina in addition. The statutes of the last two states had been examined and the data given in the table was accurate. The left-hand part of the table indicates the states having the maximum gross sales tax applicable ranging from one-tenth of one per cent to five per cent in the State of Utah. The right-

hand part of the table shows that various foreign countries and extra continental possessions of the United States have gross sales taxes ranging from less than one per cent to a maximum of over ten per cent. All of these taxes are placed directly on volume of sales.

Exhibit 18, the witness stated, showed the effective tax rate on gross sales in Kentucky and compared it with those in other states having graduated retail sales taxes. Computations had been made for various amounts ranging up to Twelve Million Dollars and the figures were shown in the right-hand column in such a way as to indicate exactly the effect of the tax rate on the total amount of sales as [fol. 609] indicated in the left-hand column of figures. The chart attached to and made a part of the exhibit showed exactly the same kind of data in graphic form as the rates for Kentucky, being shown in the bottom line; the rates for Minnesota in the next highest line and the rates for New Mexico and Vermont still higher. The chart, the witness stated, was accurate at the various points indicated in the totals and the lines were conventional between those points. The witness was thereupon asked the significance of Exhibit 19 and replied that in his affidavit filed in 1931 the data given in the line marked "Average" were incorporated as part of the affidavit. The evidence presented by Mr. Schacter made a good deal of comment on the fact that there was omitted from the witness's original testimony the data respecting the interquartile range. Witness thought it would be convenient for the court to put the testimony of Mr. Schacter in graphic form. The exhibit means, the witness stated, that the average percentage, that is, the average net gain as a percentage of net worth is indicated in the middle line. The solid line in the chart and the middle fifty percent of the cases arrayed according to the rate of earnings on net worth are shown between the dotted lines, the middle fifty per cent being the interquartile range that Mr. Schacter referred to. This graph showed, the witness stated, that the middle fifty per cent of the cases arrayed with respect to earnings of the department stores moved very much as the average moved. In other words, the earnings on the invested capital in the case of the smaller enterprises is relatively lower and that on enterprises of intermediate size considerably higher, and that on enterprises of very large size in the department store business it is

even larger than the earnings on the intermediate class. The witness stated that it did not seem worthwhile to prepare an exhibit to show the earnings on net sales but from his general investigation it would be about the same in general character. The witness also stated that in preparing [fol. 610] his chart he did not use the data used by Mr. Schacter but he drew it from the original source. When Exhibits 18 and 19 are compared the most important figures are the figures giving the average as far as Exhibit 19 is concerned. The witness did not mean to suggest by his testimony that every department store behaves according to the picture that he presented, but the general average in department store business did behave that way. Consequently, the average was the more satisfactory figure.

The data respecting Kentucky was the most important figure in Exhibit 18 and the comparison of effective tax rate for Kentucky as shown by the chart of Exhibit 18 shows a remarkable resemblance to the curve of the average earnings on net worth of department stores as shown in Exhibit 19.

In imposing progressive business taxes, it is customary that the levy apply against the entire business as a unit rather than against the individual operating divisions. This is true with respect to general business taxes. This has been the case with respect to excess profit taxes of the Federal Government. With respect to Mississipi and Wisconsin, it is true of the graduated income tax. In Maine it is true of the tax on gross receipts from public utilities. The sources of information are shown on the exhibit itself with the exception of an occasional instance in which the witness verified the data by a later examination of more authentic sources.

The witness stated that students of taxation generally believe that a gross sales tax is divided, some of it being passed on to the consumer and some being borne by the original seller. The witness thereupon introduced Exhibits 20, 21, 22 and 23 which were designed to sustain this point. The introduction of these exhibits was objected to.

[fol. 611] Witness stated that Exhibit 20 was based on a survey of the average prices of commodities sold by the chain stores in Lexington, Kentucky, in the Spring of 1930 and in the Spring of 1933. The prices charged by the various chains were indicated in the form of ratio of the aver-

age price charged by the individual chain to the average price charged by all chains.

In 1930 there were five chains recorded as doing business in Lexington, and in 1933 there were three chains. The figures in the second column in each half of the table indicated that in actual practice at the present time the chain stores are selling at prices differing by as much as nearly 10% and differing in each instance by some amount. The same general showing is found by an examination of the right-hand figures except that the differences appearing in 1932 with three chains appeared to be not so large as in 1930 when there were five chains operating.

Asked to explain why there were only three chains in 1932 and five in 1930, the witness stated that the Piggly Wiggly stores had been acquired by The Kroger Grocery & Baking Company. Actually, they were acquired prior to 1930 but at the time the data was collected they appeared to be operating separately and the prices were not the same as between Kroger and Piggly Wiggly stores.

Lexington, according to the United States census, is a city having a population of 46,000 to 47,000 persons but having something like 15,000 outlying population which was not included in the corporate limits. There was a variation shown in the prices charged by chain stores there.

Exhibit 21 was based on a study of retail prices in Chicago and New York similar to the one conducted in Lexington and the Chicago study conforms in point of time in a considerable part to the Lexington study. The one respecting the situation in New York was made a little bit earlier. Witness stated that the significance that he was attaching to this exhibit was the same as the other exhibit except that [fol. 612] it might be important to observe that even in the highly organized markets, such as Chicago and New York, the same situation existed as in Lexington.

Witness stated that other studies had been made in other parts of the country and he had incorporated the data in Exhibit 22, which shows that even within the same chain and in the same section of the city the prices vary considerably in higher organized markets such as New York.

The witness then stated that the purpose of the Exhibits 20, 21 and 22 was to show that there are price differentials in actual practice among chain stores engaged in the grocery business. The purpose of Exhibit 23 was to show

that chain store official organization believed that the tax would be shifted to the consumer if it was imposed. The exhibit was extracted from an article which was published with editorial comment presumably prepared by the Secretary of the Chain Store Association in approval of the general implications of the article. The author of the article was Robert S. Marx, Cincinnati, Ohio.

Counsel for the plaintiff here noted an objection to the exhibits and particularly to Exhibit 23.

Witness was then asked whether he had anything to add to his other testimony relative to the competitive condition of chain stores as compared with the so-called unit stores or voluntary chain. He replied that he had nothing to add except that the test made in 1933 in the City of Lexington, Kentucky, indicated that the implication from the 1930 survey that voluntary chains were properly considered along with unit stores rather than chain stores was still a proper view to take of the situation. The data in the record showed that the differential in 1930 between the chain charging the highest price and the unit stores charging the lowest price was between 3% and 4%. That appeared to be borne out by the as yet incomplete tabulation of 1933. The voluntary chain or cooperative unit stores came into exist-[fol. 613] ence in comparatively recent years. In Lexington some of the members who formerly operated with the voluntary chains now operate independently and have eliminated their connection with the I. G. A. chain. The witness did not know what has happened over the country generally.

The witness thereupon introduced Exhibits 1a, 2a, 2b, 4a and 5a, supplementing previous exhibits 1, 2, 4 and 5 which he had introduced at the time his affidavit was drawn. Counsel objected to the introduction of these exhibits as being incompetent and irrelevant. Witness was asked whether these exhibits tended to sustain the figures given in his former testimony. This was objected to. The witness replied that the exhibits named referred to the operating expense of certain classes of retail enterprises. Exhibit Martin 1a refers to the ratio of net gain to net sales from the operation of specialty stores 1930 to 1931 and it is shown in the third column that from 1931 the small stores lost 1.6% and stores of an intermediate size lost on an average of 1.5% and

large stores having sales in excess of Two Million Dollars enjoyed a net gain of .9%. Witness stated that the general character of the data presented in Exhibit 1 was similar to the general character of the data presented in Exhibit 1a, with the exception that the majority of the enterprises lost money in 1931, whereas the majority of them gained in the earlier years, that is, the years 1927-1928 and 1929 reported in Martin Exhibit 1-a.

An examination of the data of 1930 indicates that on the average each of the three classes enjoyed net profits or net gains as the Bureau designated it, the larger the size in general the larger the net gain.

In Exhibit 2a the data for department stores is given and in 1930 all of them except the smallest group enjoyed net profits, the largest of all enjoying the largest net profit. [fol. 614] In 1931 the smaller stores suffered net losses, the average net loss in the smallest being generally greater than the average net loss of those in the intermediate size and the average of the larger stores enjoyed a net gain for that year.

Witness then stated that the data presented in Exhibit 2b had become available through the Harvard Bureau of Business Research since Exhibit 2 was prepared and it was presented bodily. Witness stated that an examination two-thirds of the way dawn the page on Exhibit 2b under the column headed "percentage of net gain to percentage of net sales" one would discover that all classes lost money in 1932, the group having aggregate sales of less than $150,000 which included 78 concerns, lost 6.7% and those in the next class 5.4% and so on across with for the most part a gradual downward tendency until the group having Twenty Million Dollars or more of sales was reached, in which case the net losses were the lowest to be found in any group reported. Exhibit 4a contains similar data respecting the ratio of net gain to net worth or the earnings on capital from the operation of specialty stores. It is comparable with the data shown in Exhibit 1a. This Exhibit indicates that in 1930 the smaller stores had made profits and the stores of intermediate size have made larger profits and those of the larger size had made larger profits than any group. Whereas, in 1931 stores having sales of less than $500,000.00 suffered losses of 4½%; those from $500,000.00 to $2,000,000.00 of sales suffered losses of 6% and the lar-

gest group of all enjoyed profits on invetsted capital of 1.6%.

The figures in Exhibit 5-a-are comparable with those in Exhibit 2a and show the data for department stores ratio of net gain to net worth. This table shows that the lowest sales group having sales of less than $150,000 suffered losses in 1930 of 3.3% and the other classes enjoyed gains ranging up to 6.4% in cases of stores having sales in excess of $10,000,000.00. The data in the middle column shows [fol. 615] that the losses in 1931 of stores having sales of less than $150,000.00 amounted to an average of 7% and that all of the groups up to the $2,000,000.00 group suffered losses, whereas those having sales in excess of $2,000,000.00 had gains, the larger the enterprise on an average the higher the gain, reaching a maximum of 3.7% on enterprises having sales in excess of $10,000,000.

Exhibit 5a is supplemented also by Exhibit 2b. An examination of the column headed "Net Gain Percentage of Net Worth" indicated that in the year 1932 all classes of department stores on an average lost money, the smaller sized stores lost 12.2% and the average ranging down to .8% with those stores having $10,000,000 to $20,000,000 in sales.

[fol. 616] Witness thereupon identified the chart showing relative net profits to sales of variety chain stores for the four year period ending 1932. This was marked Exhibit 24. The introduction of this exhibit was objected to. Witness testified that the exhibit took all of the enterprises reported in Fairchild's Financial Monthly and showed the aggregate net sales for the period of four years as compared with the average net profit for a similar period. The table, the witness stated, showed the exact figures which appeared in the chart which is a part of the exhibit. The data was presented in graphic form with the trend line drawn across the middle of the chart. This trend line is an attempt to show the general relationship in mathematical terms existing between net profits on sales and the volume of sales. It is computed by the so-called method of semi-averages which involves taking the upper half of the cases, in this case chain of stores, and the lower half, excepting the middle, and drawing the line through the averages thus found. That line is a mathematically constructed

trend line and shows that the variety stores selected by Fairchild for reporting in their Financial Monthly indicates that the larger concerns like Woolworth have an average rate of earning higher than the average return of earnings for the smaller enterprises shown at the bottom of the exhibits.

Witness thereupon identified a table which was introduced as Exhibit 25. This exhibit was objected to. He testified: "In exhibit 25 the data represented in the census of retail distribution with respect to food stores have been copied, certain irrelevant matter being omitted. The statistics representing grocery chains which do not do a meat business are shown in the middle table and the indication is that those having aggregate sales in excess of ten million dollars have an average operating expense of 13.62 to the one hundred dollars of net sales and that the chains [fol. 617] having smaller aggregate sales have a higher operating expense in general. Those with sales of $100,000 have 16.7% of operating expenses or $16.70 per $100.00. The last column shows similar data for those grocery stores also doing a meat business and this column also indicates *that* the range of 13.6 to 16.88 for the exact percentage. The statistics at the bottom of the page tend to verify the statistics that are introduced at the top of the page and are included for whatever they are worth.

The most interesting thing about the figures respecting the larger stores and the meat sales is the fact that they have in general a substantially lower operating expense than any of the others. Each of them have sales well in excess of ten million dollars and the five million to ten million dollar bracket is exclusive of the three largest.

Witness thereupon introduced a table purporting to show the index of earnings from operations in Kentucky for the year 1929. This table was marked Exhibit 26 and the introduction was objected to. Witness whereupon testified—the statistics presented in this table as shown by the evidence already in the record have to do with the factors of earning capacity which are important in a retailing business. First, the number of employees necessary to do a given volume of business, secondly, the inventory turnover which is obviously a factor in the earning capacity of different classes of stores. This exhibit is based on the retail expenses for Kentucky and includes all of the retailers enumerated by the census bureau in Kentucky. It compares *with*

experience of independent retailers with the experience of chain and local branch retailers. The two columns at the end of the table are the significant columns being made to show how these two were computed. These columns show that independent retailers would average or require 14.61 employees to secure annual sales of one hundred thousand dollars, whereas, chain and local branch retailers require 10.01 employees to secure the same volume of trade on an [fol. 618] average. The last column shows the best index of turnover that is available from the census. It indicates that independent retailers have an average turnover index of 5.67 relative to sales inventory rather than sales to average inventory for the entire year. For the chain and local branch retailers the turnover is 9.48 per year.

Witness was then asked what information he had relative to wages paid by chain stores. This question was objected to as not being relevant to the question in controversy. Witness replied that the information he had was that in retail circles the belief was widespread that chain stores pay relatively lower wages than the independent merchants. Counsel for the plaintiffs moved that the answer be stricken. Witness stated that he received his information from discussion with retailers and partly from "Retailing," which is a trade publication generally recognized in retailing circles as reporting the facts on retailing fairly. Witness thereupon identified and marked as Exhibit 27 an excerpt from an editorial publication in June, 1933. Witness stated that he did not have a copy of the report made by a Federal Bureau on this subject and he only knew of the contents of this report from newspaper comments. Witness thereupon filed a chart or table which was introduced as Exhibit 28, the introduction of which was objected to and testified that the exhibit was an extract from a page in Bradstreet's publication on chain store earnings dated January, 1933. The publication, witness stated, was a reputable trade publication in the financial field and "Chain Store Earnings" was a reputable publication in the chain store field. There were two separate publications, the witness stated, that had been pasted together on the same sheet, one being from Bradstreet and the other from "Chain Store Earnings." Witness there- [fol. 619] upon identified a table which was introduced as Exhibit 29, and objected to by counsel for the plaintiff, which he stated showed the earnings of The Kroger Gro-

cery & Baking Company on its investment assuming the accuracy of the figures testified to by Mr. Morrill and also assuming the accuracy of the figures in the verified bill of complaint. Witness testified that the first several columns on the table enumerated the factors involved in order to arrive at the net tax shown in the fourth column. The next column showed the net income according to Mr. Morrill's deposition before the sales tax and the following column the income after the sales tax. The next column indicated the investment in Kentucky as shown in the sworn statement submitted to the State Tax Commission in connection with the corporation license tax. The following column indicated the earnings of The Kroger Grocery & Baking Company on that volume of net profit according to the testimony of Mr. Morrill and the second last column indicated the investment in Kentucky adjusted to take care of the reduction in investment which Mr. Morrill indicated in his deposition ought to be made, with the assumption, however, that those adjustments should be allocated to Kentucky in proportion to the sales, which might or might not be a good basis for them as the witness did not know the conditions of the various other Kroger stores. The last column indicates the rate of earnings on investments with that adjustment projected back to 1931 and 1930. The average shown according to the first method of computation is 1.54 and according to the second method is 1.82% for the three years involved in this case.

[fol. 620] Witness thereupon identified and filed Exhibits 8A, 10A and 11A. The introduction of these exhibits was objected to because the exhibits were based upon records not available to counsel for plaintiff. Witness stated Exhibit 8A is in the nature of a bringing up to date of Exhibit 8, submitted in 1931. The significant part of the exhibit is shown in the last two columns. It might be assumed in the absence of investigation that the decline in sales which has occurred recently would result in making the operation of these corporations' sales in Kentucky as compared with their total sales lower than the proportion of property in Kentucky as compared with the total property of the same corporations invested throughout the country. As a matter of fact, the exhibit shows that in every instance these corporations enjoyed a larger proportion of sales in Kentucky than they had of property located in that state. The source for the figures on sales was Moody's Manual of Industrials.

Data respecting property invested within and without Kentucky is based on reports filed under the corporation license tax law of the State of Kentucky with the Kentucky State Tax Commission. The reports were prepared and filed by the merchants themselves, these merchants being party to the litigation so far as the witness knew.

Exhibit 10A, witness testified, showed the ratio of the tax paid by department stores by sales volume. The proportion of gross sales, that is, the ratio of sales paid to gross sales for merchants having sales of $150,000 or less and those from $150,000 to $299,000, and those from $300,000 to $499,000 and so on up, including those having sales of over $10,000,000. This is shown for 1930 and 1931. Martin Exhibit 2B shows the data for the year 1932 and the general implication of the data is apparent on the face of the exhibit, namely, that the merchants having the smallest volume of sales on the average had the highest ratio of taxes to sales, under the present tax laws. This is true not only for Kentucky but wherever department stores are [fol. 621] located in the United States.

Exhibit 11A showed that such differences as existed between the department stores operated as a chain and those operated as so-called voluntary chains from those operated independently are minor in character and such differences as do exist are in the group having sales volume of less than $500,000. The exhibit shows that those in ownership group have tax payments equal to .65 of 1% of the net sales, whereas, those not being in a group but being entirely independent have .75 of 1%. Group stores having sales volume of less than $500,000 enjoy an advantage in amount of taxes based on sales over those not in the group. No particular difference is shown for the larger merchants.

Witness then stated that he had made some further investigations of the operations of the Kentucky Gross Sales Tax Law in order to determine whether of not the actual effect would be to drive merchants out of the business in the event they were unable to shift the tax to their customers. He thereupon filed Martin Exhibit 12B, which was a table showing the statistics of large retailers doing business throughout the United States, including everyone listed by Mr. Nystrom and also those reported in Moody's Manual of Investments.

Witness was then asked as to whether he had any correction to offer to former exhibits 12, 12B and 30 and

stated he had none except as to Exhibit 12, on which there was a typographical error due to the insertion of a number of businesses reported in the original Exhibit 12. The typographical error showed up a misnaming of the number of the columns. The correction offered was simply to make Exhibit 12 read as it was prepared to read. The correction was thereupon introduced and marked correction of exhibit 12. Witness then stated that Exhibit 12B shows for all those merchants included in Mr. Nystrom's list, whose records are available in Moody's, the operating ex- [fol. 622] perience in terms of the volume of net sales, the net profit after taxes, the net profits which would have been made after the deduction of 1% flat sales tax, the net worth, the ratio of the net profit to the net worth and the ratio of net profit that would have been made after the deduction of such a tax to the net worth, assuming all along that the tax would not have affected the sales and that the sales volume would have continued. The righthand side of the table shows the situation which would have existed if those merchants had operated in Kentucky to the extent of 5% of their total business. That 5% is an arbitrary figure and was suggested by the fact that that is roughly the proportion of business which the Kroger Company does in Kentucky as compared with its total business. The essentials of the table are shown in the summary at the bottom of the page and the most essential parts are shown in columns 10 and 12. Column 10 shows the rate of earnings which those merchants would have enjoyed in Kentucky under the circumstances described without the gross sales tax or any gross sales tax, and Column 12 shows the net earnings on the net worth of the corporation which these merchants would have enjoyed after the application of the sales tax. The range of the new volume of business done by each of these corporation- is shown by the first column of this summary, and in brief, the two columns designated indicate that the largest class of merchants would have enjoyed in 1932 9.4% on their investments as evidenced by net worth and that that would have dropped in the next largest sales group to 2.53% and in the third largest or the next to the smallest 1.61% and in the lowest group to a loss of 5.73%. The last column shows that after the application of the sales tax as to Kentucky business the range of profit would have been from 6.54% for the largest group down to a

loss of 5.79%. The greatest alteration would have been in the group having the highest sales but that group would [fol. 623] still enjoy a substantial profit making differential over the other merchants.

Counsel for plaintiff thereupon objected and moved that the answer be stricken for the reason that it was incompetent and irrelevant and for the further reason that it was not responsive to anything set forth in Mr. Nystrom's affidavit or in any exhibit therein referred to because Mr. Nystrom's affidavit does not deal with sales for the year 1932 at all. Counsel further objected because the answer was predicated upon statistics purported to have been made from Moody's Manual of Industrials for the year 1932 and the sources from which these figures are taken are not made available to counsel in order that they might cross examine on the exhibit or the correctness of his report as to the digest as to what is contained in Moody's Manual of Industrials. Counsel objected for the further reason that the statement was entirely hearsay even if based upon Moody's Manual of Industrials.

Witness stated that Moody's Manual of Industrials was available in any reputable library and in most investment offices and stock brokers' offices.

Counsel for plaintiff further objected because exhibit Martin 12-B was predicated upon the assumption that 5% of Kroger's sales are made in the State of Kentucky and upon the further assumption that all of the other companies referred to in Exhibit 12-B do the same proportion of their business in the State of Kentucky, which assumption is wholly without foundation in the evidence or in any document which is exhibited or referred to by the witness.

Witness was of the opinion that the situation in Kentucky would not be materially different as regards taxation, operating conditions, such as rent, costs of labor, etc., stability of business conditions, competition, which would render it a better or worse market in those communities in which large scale merchandising is carried on than the markets in similar communities to be found on the average in the other states. There would be minor advantages in Kentucky and minor disadvantages in that State which would practically offset each other.

[fol. 624] Witness thereupon produced and filed Exhibit 18 which he stated was a table showing or comparing Kroger's taxes in Kentucky with those that the company would pay if it operated in other states with the same gross sales. Witness stated that the table applied to the following states: Minnesota, Vermont, New Mexico and other states having gross sales taxes somewhat similar to those in Kentucky. The table did not apply to Louisiana.

Witness thereupon filed Exhibit 31, the introduction of which was objected to as was the introduction of Exhibit 18. This exhibit, the witness stated, summarized evidence he had offered and included data which had been omitted. The witness stated that this part of the report was based on the implication that the taxes were wholly taken out of earnings but the witness was of the opinion that taxes would not be taken wholly out of earnings. The exhibit was also based on the supposition that the tax would be paid wholly by the company and would not be passed on to the consumer. Witness thereupon continued his explanation of Exhibit 31 by stating that it was made up of a table showing the method of computing the data given with the exception of the tax data. The exhibit also consists of a chart which shows in graphic form the relationship of the effective tax rates described in the gross sales tax act on the one hand and the earnings of the three classes of merchants on the other. The first part of the graph is a large scale chart to show completely the grocery chains, which have in some instances large volumes of sales, so that other informtion may be compared with data effecting the Kroger Grocery & Baking Company which are also shown on the chart. The lower part of the chart shows the effective tax rate without taking account of the credits in any instances on the earnings of grocery chains as compared by the Harvard Bureau of Business Research and on the average earnings of department stores from 1927 to 1932, inclusive, being all the years for which the Harvard Bureau has reported complete data. It also [fol. 625] shows the same thing on the earnings of variety stores as reported by the Harvard Bureau. Since the Harvard statistics do not give a class which included all of the larger grocery chains, a computation outlined at the top of the page was made in order to get other chains comparable with Kroger. This computation includes all.

of the chain grocery stores reported in Moody's Manual of Industrials. The number of those chains is much smaller than the number reported to the Harvard Bureau.

The interesting thing about the chart is the similarity between the graph indicating the effective tax rate without taking account of credit for other taxes and the graph reporting the earnings of those corporations.

The five chief grocery chains, the Great Atlantic & Pacific Tea Company, the First National Stores, the American Stores, the National Tea Company and Safeway Stores, Inc., had average earnings for 1930 of 2.85%—for 1931 it was 2.92% and for 1932 it was 2.66% as reported by Moody's Manual of Industrials. Mr. Morrill in his testimony listed these five, apparently as an after thought three others. If the entire eight corporations were included the earnings on sales for 1930 would have been 2.82%; for 1931 2.92%, and for 1932 2.67%. That is weighted average, the weighting being based on volume of sales in each case. That is compared with the data for grocery chains as is shown in exhibit Martin 31, which gives almost exactly the same result. The main reason for that is that Mr. Morrill included very largely the same group stores we included in getting up the data for this chart. The exact comparison may be had by relating the figures just given from Mr. Morrill's group and the figures shown at the upper righthand corner of the table which was filed.

[fol. 626] Witness stated that exhibit 26 entitled Some Indexes of the Relative Earning Power of Retailers in Kentucky By Types of Operation in 1929, which purports to be computed from the 15th census of the United States, had just recently been published, and that exhibit dealt with Kentucky cases. That in preparing the exhibit the witness had allocated to the store owner and members of his family wages for the purpose of determining the earning power of the store.

[fol. 627] Cross-examination of Professor Martin

Witness is a professor of economics and director of the Bureau of Business Research of the University of Kentucky, having held that position since September, 1928. Prior to that time he was professor in Emory University. Immediately prior to that he was a summer school teacher

at Peabody College for Teachers and before that he was a graduate student and student instructor in the University of Chicago. He taught at Peabody in the summer of 1924.

He had no practical experience, conducting any retail business either in Kentucky or elsewhere. He had been engaged in teaching since he took his graduate course at the University of Chicago in 1924 and had never conducted any merchandising business, either wholesale or retail. He had also been engaged in research work. This is particularly so since the time he came to the University of Kentucky. The research dealt chiefly with particular problem on which he is now working. The Bureau of Business Research in the University of Kentucky was founded by administrative action in February, 1928. The witness had been connected with it throughout its history. He had associated with him at various times different members of the teaching staff of the University of Kentucky and also students working for the doctors' degree at the University. These numbered from two to four in the course of years. Any work done in the Bureau was done under the personal supervision of the witness, and generally in accordance with plans laid down by him for the conduct of research. He specified the objects to be examined and the extent of the research. The Bureau undertakes problems at the request of the University administration.

Witness stated that he was head of the Bureau but it was not correct to say that in effect he was the Bureau of Business Research because he had associated with him several others who also took part, as for example, the tabulating work was done by others. He personally worked the matter [fol. 628] up. Witness stated that other than matter taken from other people's survey, he was in effect and substance quoting himself as authority. This was done solely for convenience to prevent cluttering up of the records, with all the reports of the bureau, foreign and domestic statutes, etc. Witness was of the opinion that he had referred to these reports in every instance in his exhibit.

Witness testified on behalf of the State in other tax cases, among these being the so-called "Oleomargarine Tax Case". He testified in this case at the request of the Assistant Attorney General Brown. The first case he testified in was a rate case brought by the Interstate Commerce Commission. This took place in 1928 or 1929. The style

of the case was the Commonwealth of Kentucky vs. Ahnepee and Western Railroad Company and others. He also testified in connection with the condemnation of Mammoth Cave, the so-called new entrance to Mammoth Cave and the Great Onyx Cave. In that case he testified as a valuation witness and appraiser. He also prepared himself to testify as a witness for the attorney general in the condemnation suit to acquire Cumberland Falls. In this case the question involved was to ascertain the amount of flow of water over Cumberland Falls in the area that would be inundated by the dam, and also the value of the water rights required for the development of the water power. The evidence which he contemplated giving in that case was of an economic nature and not of an engineering nature. It would have related to the valuation of the area and rights involved.

The witness did not appear before any committee of the legislature at the time the gross sales tax law prepared for the 1930 session was under consideration, nor did he present any ideas or any of the information which he has developed for the purpose of this suit to the legislature. He did not know whether such information was submitted or not. No member of the Bureau of Business Research appeared before any committee, nor were they called before the legislature to testify regarding the law which was afterwards passed.

[fol. 629] Witness stated that he had made a personal investigation of the tax situation in Kentucky and had made a general investigation of the tax situation in other States on this question, and that he was testifying from the data which he had gathered in such investigation.

[fol. 630] Witness stated that he confined his consideration of the act largely to an analysis of chain stores and department stores. He also considered other stores doing a large scale of retailing and he also considered individually owned stores. In connection with the data respecting average prices of retail stores in Lexington, Ky., a survey was made under his own general supervision and under the more direct supervision of his colleague, Professor Palmer. The results of a similar survey by Professor Palmer, made in 1933, are not yet completely tabulated. The information was secured directly from the merchants. This survey was local for Lexington.

Witness stated that he had obtained this data representing those stores which do business in Kentucky from the returns made by the stores themselves to the State Tax Commission under the Corporation License Tax and that the data was therefore accurate.

The witness' attention was then called to Bulletin 78 of the Bureau of Business Research of Harvard University and particularly to page one of that bulletin, which showed the location of cooperating firms. Witness examined this table and stated that of the eighty concerns only one firm from Kentucky having sales over a million dollars made reports and only four firms with sales under one million dollars from Kentucky reported to the Bureau. All of these concerns were department stores. Witness stated that these were the figures for 1928, but in various years the number varied. The bulletin listed 251 department stores having net sales of less than one million dollars of which only four were located in Kentucky. It listed 162 department stores with net sales of over one million dollars of which only one is located in Kentucky. With regard to specialty stores, there is no reference to any doing business in Kentucky. Harvard Bulletin No. 83 issued by the Bureau of Business Research of that University contains 527 department stores, of which only 6 are located in Kentucky. It also contains 85 specialty stores, of which only one is located in that State. Report No. 85 of the Bureau indicates that the material came from firms located in all parts of the United States, Hawaii and Canada. The same was true with regard to Bulletin 88 for the year 1931. Witness stated that he had investigated the tax situation as it existed in other states and countries and he makes a tabulation of the facts regarding taxation in each of the various [fol. 631] states that comes under his observation.

Witness went on to testify that the tax rate is found only after credits are taken into consideration. In order to determine what tax any merchant pays under this act, the credits to which that merchant is entitled must be determined. The best way of finding out the distribution of the tax insofar as those who have paid is concerned, would be to examine the returns of the State Tax Commission and the best way of determining just how the law works and exactly the burden it imposes upon the taxpayers under its provisions, would be by examination of the tax returns of

those who have made returns. Such an examination would be better than any theory.

The laws of Minnesota, New Mexico and Vermont became effective during the current calendar year and the witness had no access to any reports showing the exact workings of those laws. As far as witness knows, litigation concerning the validity of these laws had been instituted in New Mexico.

A store in a given town having gross sales of $50,000 to $400,000., paying a tax and coming into competition with a store owned by another individual who does not have to pay a tax, can shift the tax to consumer in large part. The reason for it is that price is not the sole advantage. People trade with stores from habit and for other reasons. A great deal depends upon the accommodations extended by the manager of any store in order that customers may be held. The impression of affability that customers get from the employees also enters as a factor in keeping business. Where all competitors pay the same tax on a similar volume of business it is much easier to shift the tax.

The fifteenth census of the United States as to retail operations referred to in Martin Exhibit No. 25, has only recently been published. It deals with the calendar year 1929. That year was abnormal in some respects insofar as business is concerned.

[fol. 632] Exhibit 12A was prepared to show what various corporations would do if they had a business which was proportionately as large in Kentucky as that of Krogers. Some of these businesses however did not do any business in the State.

[fol. 633] MARTIN EXHIBIT XVII

Maximum Gross Sales Tax Rates Imposed on Retailers in Various States and Foreign Countries*

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*Based on statutes so far as commonwealths of the United States are concerned except New Mexico (Commerce Clearing House Tax Service) and North Carolina (newspaper comment). The data for foreign countries and U. S. territories were gathered under my supervision a year ago and reflect the situation as of the winter of 1931-32. The sources are cited in "The Gross Sales Tax in Kentucky," published by the Bureau of Business Research, University of Kentucky.

Jurisdiction	Rate	Jurisdiction	Rate
Connecticut	0.1%	Australia	2.5%
Delaware	0.1	Austria	10.0
Indiana	1.0	Belgium	10.0
Kentucky	1.0	Bolivia	0.5
Minnesota	1.0	Brazil	2.0
Mississippi	2.0	Cuba	10.0
New Mexico	2.5	Czecho-Slovakia	12.0
New York	1.0	Equador	1.0
North Carolina	3.0	France	13.0
North Dakota	2.0	Germany	.75
Oregon	2.0	Italy	3.0
Pennsylvania	0.1	Poland	2.25
South Dakota	1.0	Philippine Islands	1.5
Utah	5.0	Porto Rico	2.0
Vermont	4.0	Roumania	10.0
Washington	3.0	Russia	6.0
West Virginia	1.0	Turkey	6.0

[fol. 634] MARTIN EXHIBIT XVIII

Effective Tax Rates on Gross Sales in Kentucky Compared with Those in Other States Having Graduated Retail Sales Taxes [a]

	Total gross sales	Amount of tax	Effective tax rate
Kentucky [b]—			
	$50,000	$25.00	.0500%
	100,000	50.00	.0500
	200,000	100.00	.0500
	400,000	200.00	.0500
	600,000	550.00	.0917
	800,000	1,500.00	.1875
	1,000,000	3,050.00	.3050
	2,000,000	13,050.00	.6525
	3,000,000	23,050.00	.7683
	4,000,000	33,050.00	.8263
	5,000,000	43,050.00	.8610
	6,000,000	53,050.00	.8842
	7,000,000	63,050.00	.9007
	8,000,000	73,050.00	.9131
	9,000,000	83,050.00	.9228
	10,000,000	93,050.00	.9305
	11,000,000	103,050.00	.9368
	12,000,000	113,050.00	.9421

	Total gross sales	Amount of tax	Effective tax rate
Minnesota [c]—			
	50,000	0	0
	100,000	0	0
	200,000	60.00	.0300
	400,000	330.00	.0825
	600,000	810.00	.1350
	800,000	1,570.00	.1963
	1,000,000	2,730.00	.2730
	2,000,000	13,430.00	.6715
	3,000,000	25,940.00	.8647
	4,000,000	39,040.00	.9760
	5,000,000	52,140.00	1.0428
	6,000,000	65,240.00	1.0873
	7,000,000	78,340.00	1.1191
	8,000,000	91,440.00	1.1430
	9,000,000	104,540.00	1.1616
	10,000,000	117,640.00	1.1764
	11,000,000	130,740.00	1.1885
	12,000,000	143,840.00	1.1987
New Mexico [d]—			
	50,000	50.00	.1000
	100,000	125.00	.1250
	200,000	650.00	.3250
	400,000	1,950.00	.4875
	600,000	6,950.00	1.1583
	800,000	11,950.00	1.4938
	1,000,000	16,950.00	1.6950
	2,000,000	41,950.00	2.0975
	3,000,000	66,950.00	2.2317 [b]
	4,000,000	91,950.00	2.2988
	5,000,000	116,950.00	2.3390
	6,000,000	141,950.00	2.3658
	7,000,000	166,950.00	2.3850
	8,000,000	191,950.00	2.3994
	9,000,000	216,950.00	2.4106
	10,000,000	241,950.00	2.4195
	11,000,000	266,950.00	2.4268
	12,000,000	291,950.00	2.4329
Vermont [e]—			
	50,000	0	0
	100,000	62.50	.0625

Total gross sales	Amount of tax	Effective tax rate
200,000	312.50	.1563
400,000	1,312.50	.3281
600,000	2,812.50	.4688
800,000	5,062.50	.6328
1,000,000	8,062.50	.8063
2,000,000	35,562.50	1.7781
3,000,000	75,562.50	2.5188
4,000,000	115,562.50	2.8891
5,000,000	155,562.50	3.1113
6,000,000	195,562.50	3.2594
7,000,000	235,562.50	3.3652
8,000,000	275,562.50	3.4445
9,000,000	315,562.50	3.5063
10,000,000	355,562.50	3.5556
11,000,000	395,562.50	3.5960
12,000,000	435,562.50	3.6297

[a] In these computations deductions, credits, and offsets provided in Kentucky and other states are ignored. The data for Minnesota reflect total taxes levied under both schedules provided in the Act. It is assumed that average annual sales are $50,000 a store and the maximum $100,000.

[b] Ky. Acts, 1930, chap. 149.

[c] Session Laws, 1933, chap. 213.

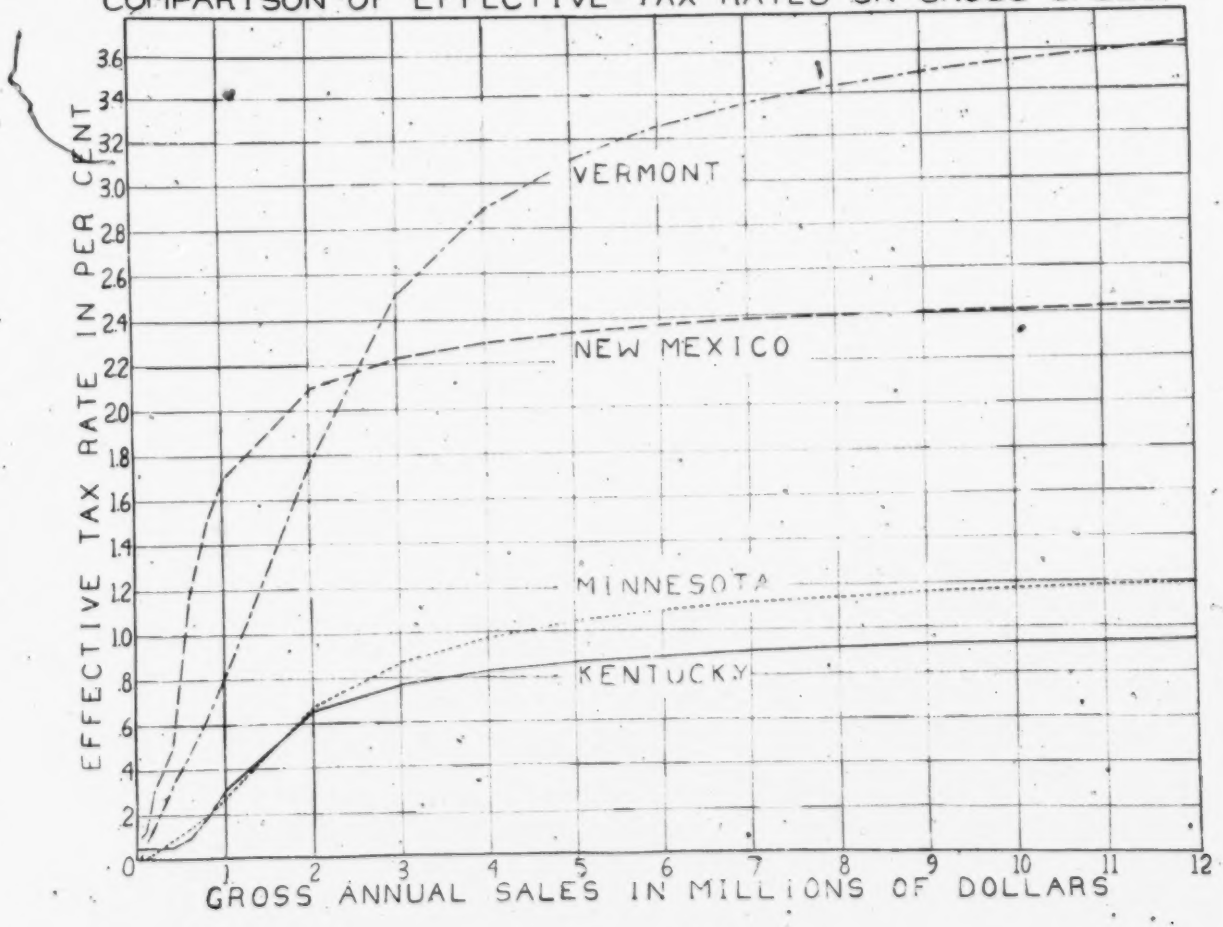
[d] Laws, 1933, chap. 73.

[e] Act approved March 25, 1933.

(Here follow photolithographs, 2 drawings, side folios 635 and 636)

MARTIN EXHIBIT XVIII

COMPARISON OF EFFECTIVE TAX RATES ON GROSS SALES



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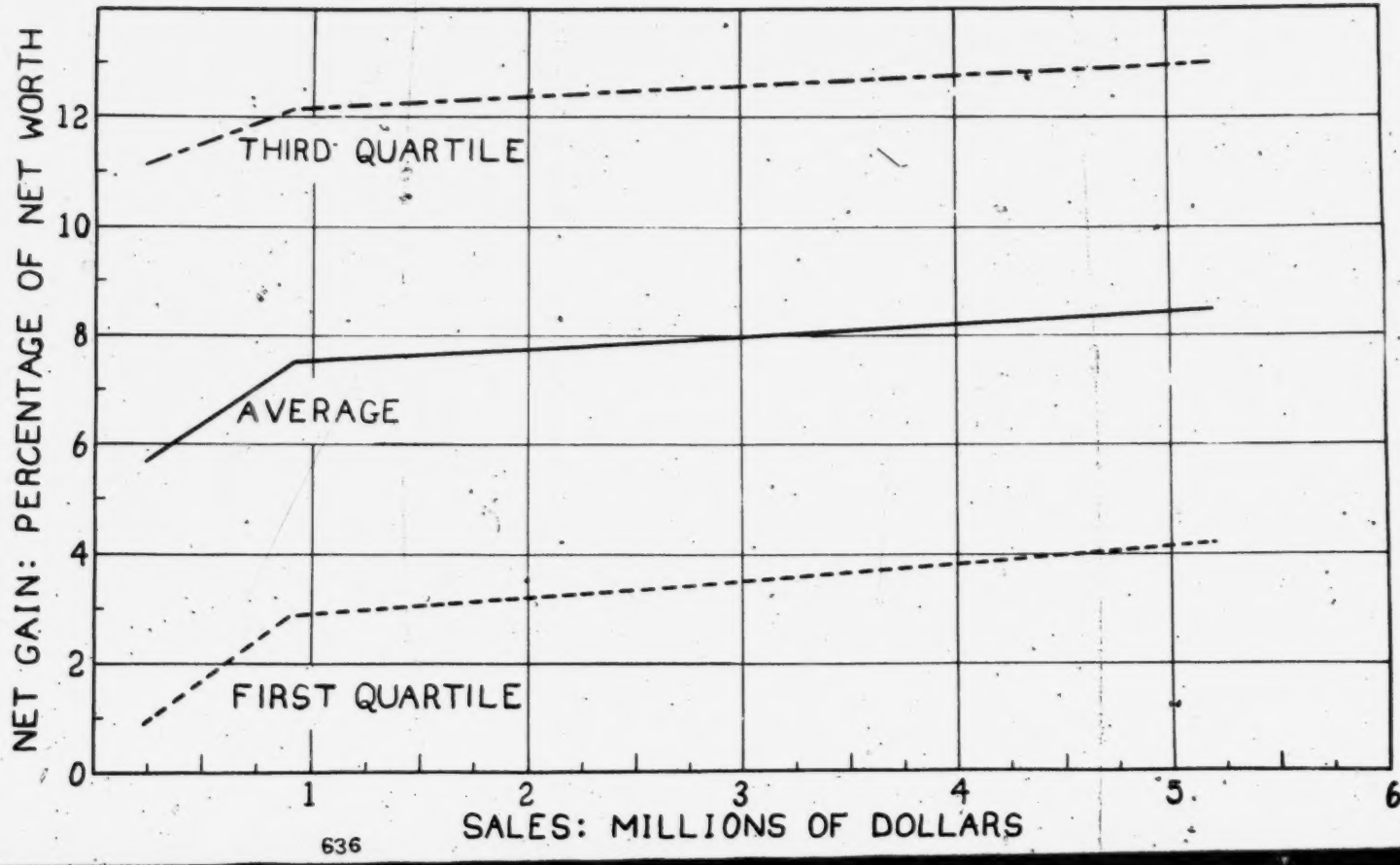
MARTIN EXHIBIT XIX

NET GAIN OF DEPARTMENT STORES, 1929

(HARVARD BUREAU OF BUSINESS RESEARCH, BULLETIN 83)



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[fol. 637] MARTIN EXHIBIT XX

Average Prices in Chain Stores in Lexington, Kentucky, Spring, 1930, and Spring, 1933[a]

Chain store system	Ratio of average prices to average of all chains, 1930	Chain store system	Ratio of average prices to average of all chains, 1933
A	95.1%	F	98.5%
B	97.1	G	99.3
C	99.9	H	102.2
D	103.0		
E	104.6		

[a] Based on surveys of chain and independent store prices made in the College of Commerce, University of Kentucky. The 1933 figures will be checked again before final publication, though each computation has already been made twice.

[fol. 638] MARTIN EXHIBIT XXI

Comparison of Chain Store Prices in Chicago and New York to Ascertain Degree of Variation Between Chains

	Price variations
Chain	Ratio of average price to lowest chain average in city
New York[a]—	
A	100.7
B	101.4
C	102.5
D	101.9
E	100.0
F	103.9
G	106.9
H	103.2
I	102.5
Chicago[b]—	
J	100.0
K	100.0
L	103.0
M	101.6

[a] Computed from R. S. Alexander, "A Study in Retail Grocery Prices," Journal of Commerce (reprint).

[b] Computed from E. Bjorklund and J. L. Palmer, "A Study of Prices of Chain and Independent Grocers in Chicago," Studies in Business Administration, University of Chicago.

[fol. 639]

MARTIN EXHIBIT XXII

Price Variations Between Different Units of Same Chain[a]

Columns A=Number of products on which different prices were quoted.
Columns B=Average price difference as percentage of average price of products.

	Chain No. 1		Chain No. 2		Chain No. 3		Chain No. 4		Chain No. 5		Chain No. 6		Chain No. 7	
	A	B	A	B	A	B	A	B	A	B	A	B	A	B
Westchester	19	13.69	7	12.98	..	.....	..	.....	..	.....	..	.....	..	.....
Madison Avenue	24	12.03	13	13.68	20	12.38	21	16.89	..	.....	..	.....	..	.....
Broadway	19	9.84	16	15.29	..	.....	..	.....	11	17.12	..	.....	..	.....
Hempstead	..	.....	16	11.87	..	.....	..	.....	..	.....	..	.....	..	.....
Leonia	..	.....	..	.....	..	.....	..	.....	..	.....	12	15.90	..	.....
Bergenfield-Dumont	..	.....	..	.....	..	.....	16	12.17	..	.....	..	.....	10	10.42

[a]Dorothy Dowe, "A Comparison of Independent and Chain Store Prices," The Journal of Business, University of Chicago, April 1932.

[fol. 640] MARTIN EXHIBIT XXIII

Chain Taxes Will React on Consumers*

* * * * * * *

"Let us expand the illustration. Assume that the legislature steps in, and for the purpose of punishing the chain store for its efficiency, and for having reduced the cost of living to the consumer, levies a tax on the chain store—what is the net result? The obvious answer is that the tax must be added to costs, and costs and interest must be paid by the consumer. Who is the consumer?

"The consumer who patronizes the chain store is ordinarily a customer who is required to measure expenditures carefully, and to buy where he or she gets the best foods for the least money. In the final analysis, when the legislature taxes a chain store, it is taxing the consumer, i. e., the working men and women of the state—the men and women who can least afford to pay the tax. It is levying a tax upon the necessities of life—food, clothing and drugs—and increasing indirectly the cost of living to the American people. Instead of chain store taxation, it is food taxation. The levying of taxes on food and clothing is repugnant to the whole principle upon which taxation has been based in the United States."

[fol. 641] MARTIN EXHIBIT NO. I-A

Ratio of Net Gain to Net Sales from Operation of Specialty Stores, 1930-31*

	1931		1930	
Net sales	Number of stores	Ratio	Number of stores	Ratio
$500,000 or less	30	L 1.6%	37	0.5%
500,000-2,000,000	22	L 1.5	29	1.8
2,000,000 or over	18	0.9	19	2.2

*As reported in Bulletin 88, Bureau of Business Research, Harvard University.

* Chain Store Progress, August, 1931, p. 3.

[fol. 642] MARTIN EXHIBIT II-A

Ratio of Net Gain to Sales, Department Stores, 1930-31*

Net sales	1931 Number stores	1931 Ratio	1930 Number stores	1930 Ratio
Less than $150,000	65	L 4.7%	76	L 2.0%
150,000- 300,000	64	L 3.4	88	0.2
300,000- 500,000	58	L 1.8	81	0.5
500,000- 750,000	51	L 1.5	58	1.3
750,000- 1,000,000	27	L 2.3	35	0.1
1,000,000- 2,000,000	65	L 0.4	75	1.2
2,000,000- 4,000,000	50	0.4	67	2.7
4,000,000-10,000,000	44	1.2	54	2.5
10,000,000 and over	27	1.9	30	3.3

*As reported in Bulletins 85 and 88, Bureau of Business Research, Harvard University.

(Here follows photolithograph, Martin Exhibit II-B, side folio 643)

MARTIN EXHIBIT IIB

Table 2. Operating Results of Department Stores by Sales Volume Groups: 1932

(Common Figures; Net Sales = 100%, except where noted)

Items	Sales Volume Groups (000 omitted)									
	Less than $150	$150–300	$300–500	$500–750	$750–1,000	$1,000–2,000	$2,000–4,000	$4,000–10,000	$10,000–20,000	$20,000 or more
umber of Reports	78	70	45	33	24	65	45	47	15	6
ggregate Sales (in millions)	$7	$17	$18	$21	$21	$96	$165	$287	$213	$223
ypical Net Sales (in thousands)	$80	$210	$395	$610	$890	$1,375	$2,650	$5,750	$14,000	$32,000
ndex of Change in Sales (1932/1931)	74.8	74.5	75.5	77.0	76.5	77.0	77.7	77.2	76.1	77.5
opulation of City (in thousands)	10	25	40	70	95	125	350	500	1,700	2,500
otal Merchandise Costs (Net)	73.9%	72.8%	69.0%	69.1%	69.7%	68.0%	67.3%	67.4%	65.8%	65.1%
ROSS MARGIN	26.1	27.2	31.0	30.9	30.3	32.0	32.7	32.6	34.2	34.9
otal Pay Roll	19.3%	18.4%	19.5%	19.9%	19.9%	19.1%	18.5%	18.7%	18.6%	18.2%
eal Estate Costs	4.6	4.6	4.2	4.9	5.9	5.3	6.3	6.45	6.8	7.7
ewspaper Advertising	•	2.1	2.5	3.35	•	3.3	4.0	4.0	3.45	•
irect Advertising	•	0.2†	0.25†	0.15†	•	0.1	0.3	0.3	0.15	•
ther Advertising	•	0.3†	0.35†	0.25†	•	0.3	0.3	0.2	0.2	•
otal Advertising (subtotal)	2.5	(2.6)	(3.1)	(3.75)	3.75	(3.7)	(4.6)	(4.5)	(3.8)	3.3
axes (except on real estate and income)	0.8	0.75	0.7	0.65	0.55	0.55	0.5	0.4	0.35	0.4
nterest (except on real estate)	3.4	3.1	2.6	2.55	2.5	2.6	2.6	2.4	2.2	2.2
upplies	0.85	1.05	1.25	1.4	1.5	1.6	1.8	1.8	1.7	1.8

(Common Figures; Net Sales = 100%, except where noted)

Items	Sales Volume Groups (000 omitted)									
	Less than $150	$150–300	$300–500	$500–750	$750–1,000	$1,000–2,000	$2,000–4,000	$4,000–10,000	$10,000–20,000	$20,000 or more
Number of Reports	78	70	45	33	24	65	45	47	15	6
Aggregate Sales (in millions)	$7	$17	$18	$21	$21	$96	$165	$287	$213	$223
Typical Net Sales (in thousands)	$80	$210	$395	$610	$890	$1,375	$2,650	$5,750	$14,000	$32,000
Index of Change in Sales (1932/1931)	74.8	74.5	75.5	77.0	76.5	77.0	77.7	77.2	76.1	77.5
Population of City (in thousands)	10	25	40	70	95	125	350	500	1,700	2,500
Total Merchandise Costs (Net)	73.9%	72.8%	69.0%	69.1%	69.7%	68.0%	67.3%	67.4%	65.8%	65.1%
GROSS MARGIN	26.1	27.2	31.0	30.9	30.3	32.0	32.7	32.6	34.2	34.9
Total Pay Roll	19.3%	18.4%	19.5%	19.9%	19.9%	19.1%	18.5%	18.4%	18.6%	18.2%
Real Estate Costs	4.6	4.6	4.2	4.9	5.9	5.3	6.3	6.45	6.8	7.7
Newspaper Advertising	*	2.1	2.5	3.35	*	3.3	4.0	4.0	3.45	*
Direct Advertising	*	0.2†	0.25†	0.15†	*	0.1	0.3	0.3	0.15	*
Other Advertising	*	0.3†	0.35†	0.25†	*	0.3	0.3	0.2	0.2	*
Total Advertising (subtotal)	2.5	(2.6)	(3.1)	(3.75)	3.75	(3.7)	(4.6)	(4.5)	(3.8)	3.3
Taxes (except on real estate and income)	0.8	0.75	0.7	0.65	0.55	0.55	0.5	0.4	0.35	0.4
Interest (except on real estate)	3.4	3.1	2.6	2.55	2.5	2.6	2.6	2.4	2.2	2.2
Supplies	0.85	1.05	1.25	1.4	1.5	1.6	1.8	1.8	1.7	1.8
Service Purchased	1.15	1.25	1.3	1.4	1.2	1.1	1.15	1.05	0.8	0.8
Unclassified: Losses from Bad Debts	0.4	0.55	0.45	0.5	0.6	0.65	0.7	0.65	0.7	0.85
Other	0.75	0.6	0.7	0.9	0.85	0.65	0.95	0.75	0.85	1.0
Travelling	0.3	0.35	0.45	0.35	0.35	0.45	0.5	0.45	0.3	0.3
Communication	0.45	0.55	0.6	0.6	0.6	0.6	0.6	0.6	0.55	0.5
Repairs	0.15†	0.2	0.25	0.3	0.3	0.3	0.3	0.3	0.3	0.35
Insurance (except on real estate)	0.7	0.6	0.6	0.45	0.4	0.4	0.4	0.3	0.3	0.3
Depreciation (except on real estate)	0.9	1.0	0.9	0.9	0.9	1.15	1.0	1.05	1.25	1.35
Professional Services (See Appendix, page 56)	0.15†	0.3†	0.6	0.55	0.5	0.65	0.6	0.6	0.6	0.55
TOTAL EXPENSE	36.4%	35.0%	37.2%	39.1%	39.8%	38.8%	40.5%	40.0%	39.1%	39.6%
NET PROFIT OR LOSS	L. 10.3%	L. 8.7%	L. 6.2%	L. 8.2%	L. 9.5%	L. 6.8%	L. 7.8%	L. 7.4%	L. 4.9%	L. 4.7%
Net Other Income (including interest on capital owned)	3.6	3.3	3.6	3.2	5.0	4.2	4.0	4.4	3.8	4.2
NET GAIN:										
Percentage of Net Sales	L. 6.7%	L. 5.4%	L. 2.6%	L. 5.0%	L. 4.5%	L. 2.6%	L. 3.8%	L. 3.0%	L. 1.1%	L. 0.5%
Percentage of Net Worth	L. 12.2	L. 9.0	L. 5.0	L. 10.0	L. 6.0	L. 4.0	L. 6.7	L. 3.5	L. 0.8	*
Rate of Stock-turn (times a year):										
Based on Beginning and Ending Inventories	2.0	2.5	3.2	3.5	3.4	3.6	4.0	4.3	4.5	5.7
Returns and Allowances	2.0%†	5.0%†	6.4%†	6.4%†	6.5%†	8.0%	10.7%	11.9%	13.3%	16.0%
Initial Mark-up (percentage of original retail value):										
On Net Cost Delivered	35.2	37.2	39.3	39.4	38.4	39.3	40.4	40.5	41.9	41.8
[illegible]	*	*	*	11.2†	9.8	8.7	9.3	9.8	10.0	8.5
Discounts to Employees and Others	*	*	*	0.45†	0.4†	0.5†	0.5†	0.55	0.6	0.7
Stock Shortages (total for year)	*	*	*	1.65	1.4	1.8	1.6	1.65	1.8	1.8
Total Retail Reductions	13.5%†	15.0%†	13.0%	13.3%	11.6%	11.0%	11.4%	12.0%	12.4%	11.0%
Sales per Square Foot of Total Space	$8.00†	$9.60†	$11.00†	$12.50†	$10.50	$12.30†	$12.80	$15.50	$16.00	$20.00†
Real Estate Costs per Square Foot of Total Space	.40†	.40†	.45†	.60†	.60	.65†	.80	1.00	1.10	*
Sales/Total Employees	$5,700†	$6,000†	$5,700†	$5,500†	$5,000†	$5,300	$5,800	$6,000	$6,300	$7,100†
% Cash and C. O. D. Sales	62.0%†	55.0%†	58.0%†	49.5%†	†50.25%	46.5%†	48.4%	46.7%	48.5%	56.3%
% Charge and Installment Sales	38.0†	45.0†	42.0†	50.5†	49.75†	53.5†	51.6	53.3	51.5	43.7
% of Firms Earning Some Net Profit	6.4%	0.0%	8.9%	0.0%	0.0%	0.9%	0.0%	6.4%	0.0%	16.7%
% of Firms Earning Some Net Gain	11.5	11.4	26.7	15.2	12.5	26.2	23.4	36.2	40.0	33.3

* Data not available.
† Figures for this item were given on less than 75% of the reports used.

[fol. 644] MARTIN EXHIBIT No. IV-A

Ratio of Net Gain to Net Worth from Operation of Specialty Stores, 1930–31*

Net sales	1931 Number of stores	1931 Ratio	1930 Number of stores	1930 Ratio
Less than $500,000	30	L 4.5	37	3.1%
500,000–2,000,000	22	L 6.0	29	6.3
2,000,000 and over	18	1.6	19	7.4

*As reported in Bulletin 88, Bureau of Business Research, Harvard University.

[fol. 645] MARTIN EXHIBIT No. V-A

Ratio of Net Gain to Net Worth in Department Stores—Chain and Independent, 1930–31*

Net sales	1931 Number of stores	1931 Ratio	1930 Number of stores	1930 Ratio
Less than $150,000	65	L 7.0%	76	L 3.3%
150,000– 299,000	64	L 8.0	88	0.1
300,000– 499,000	58	L 3.0	81	1.5
500,000– 749,000	51	L 3.5	58	2.3
750,000– 999,000	27	L 4.0	35	0.6
1,000,000–1,999,000	65	L 0.9	75	3.2
2,000,000–3,999,000	50	0.7	67	4.5
4,000,000–9,999,000	44	2.5	54	4.6
10,000,000 and over	27	3.7	30	6.4

*As reported in Bulletins 85 and 88, Bureau of Business Research, Harvard University.

[fol. 646] MARTIN EXHIBIT XXIV

Relation of Net Profit to Net Sales of Variety Chain Stores for Four-Year Period Ending 1932*a*

Variety chain	Aggregate net sales (4 years)	Aggregate net profit (4 years)	Rate of profit on sales	Semi-averages, middle case omitted
Woolworth (F. W.) Co.	$1,124,898,214	$133,850,302*b*	11.90%	
Penny (J. C.) Co.	731,611,257	34,700,237	4.74	
Kresge (S. S.) Co.	567,339,516	40,691,779	7.17	8.05%
Grant (W. T.) Co.	286,044,965	11,101,320	3.88	
Kress (S. H.) & Co.	269,576,969	19,621,635	7.28	
McCrory Stores Corp.	170,893,923	5,384,771	3.15	
Newberry (J. J.) Co.	122,245,233	5,796,182	4.74	
McLellan Stores Co.*c*	89,646,579	2,910,283	3.25	
Murphy (G. C.) Co.	70,995,049	3,070,023	4.32	3.81
Neisner Brothers, Inc.	61,987,192	1,308,143	2.11	
Fishman (M.H.) Co., Inc.	9,588,987	435,582	4.54	

*a*Computed from data reported in Fairchild's Financial Manual, sixth edition. All cases reported are included in this analysis except Rose's 5, 10 & 25¢ Stores, Inc., which has been omitted because data were incomplete. All figures are for calendar years except those for W. T. Grant Co. which are for the four-year period ending January 31, 1933.

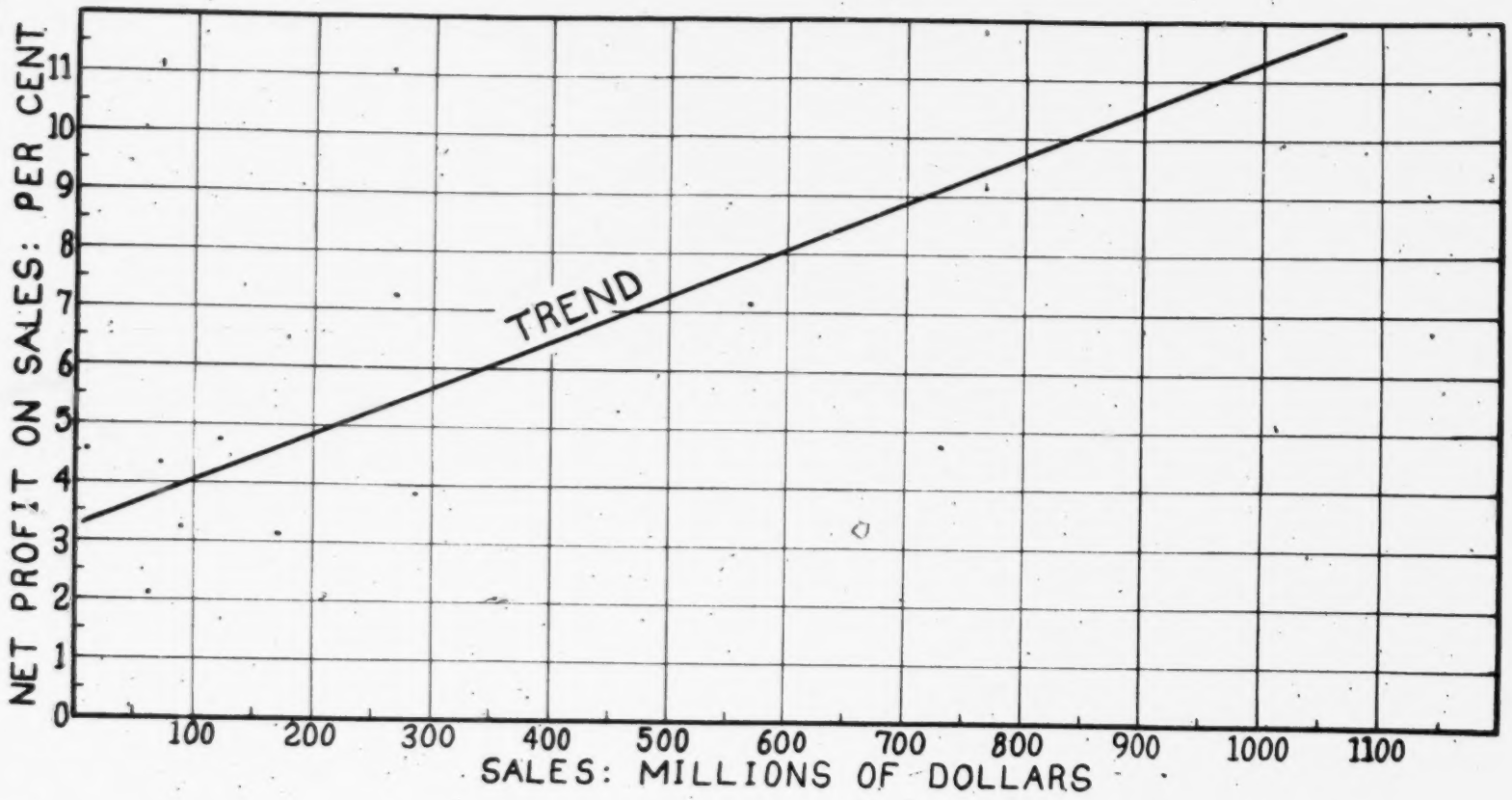
*b*Includes $9,977,452 profit on sale of securities in 1931.

*c*Figures for four years ending 1931 last reported.

(Here folows photolithograph, 1 drawing, side folio 647.)

MARTIN EXHIBIT XXIV.

RELATION OF NET PROFITS TO NET SALES OF VARIETY STORES FOR FOUR-YEAR PERIOD ENDING 1932



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[fol. 648] MARTIN EXHIBIT XXV

Store Operating Expenses of Food Chains Classified by Sizes[a]

Sales	Grocery		Grocery and meat	
	No. of chains	Expense per $100 of sales	No. of chains	Expense per $100 of sales
Three largest	..	.....	3	$13.60
Others with more than $10,000,000	11	$13.62	13	15.07
$5,000,000–$10,000,000	4	13.42	17	16.41
2,500,000– 5,000,000	13	14.82	15	17.14
1,000,000– 2,500,000	30	15.03	57	15.46
500,000– 1,000,000	61	13.40	88	14.62
250,000– 500,000	70	13.34	144	15.37
100,000– 250,000	83	14.28	110	15.59
Less than 100,000	41	16.70	28	16.88
Number of units				
Three largest[b]	..	.....	3	13.60
Others with over 1,000 units	20	13.70	4	14.69
101 to 1,000 units	..	.....	25	14.99
26 to 100 units	39	14.13	28	17.40
Less than 26 units	254	14.16	415	16.42

a Fifteenth Census of the United States, "Retail Distribution; Retail Chains."
b The store operating expense of the three largest food chains, averaging $13.60 a $100 of sales, may be compared with $15.46 for all other chains.

[fol. 649] MARTIN EXHIBIT XXVI

Some Indexes of Relative Earning Power of Retailers in Kentucky by Types of Operation, 1929[a]

	Number of stores	Number of employees[b]	Total sales	Number of employees per $100,000 of sales	Sales inventory at end of year
Independent retailers	19,767	59,660	$408,226,139	14.61	5.67
Chain and local branch retailers	1,677	8,739	87,316,987	10.01	9.48

a Computed from Fifteenth Census of the United States, "Retail Distribution: Kentucky," Table V-A.
b Includes proprietors and assumes part time = half time.

[fol. 650] MARTIN EXHIBIT XXVII

Chain Store Wages*

* * * * * * *

"It is no secret that one of the great advantages of the chains was due to the fact that they paid lower wages than the bigger independents, especially the department stores. Selling behind the counter of a chain store was simpler, it is true, and more mechanical. But the fact remains that the wages are generally below the average for other kinds of stores."

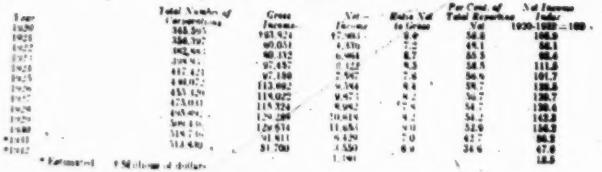
* Editorial, Retailing, June 19, 1933.

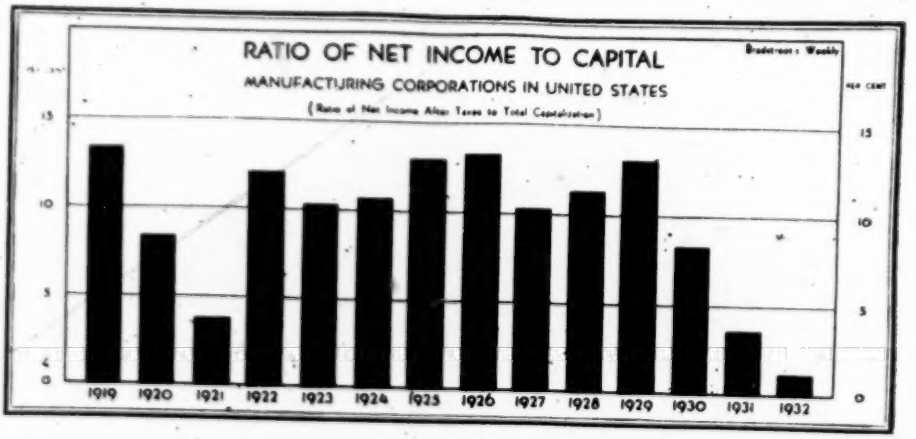
(Here follows photolithograph, side folio 651)

MARTIN EXHIBIT

XXVIII

POST-WAR RECORD OF CORPORATE EARNINGS



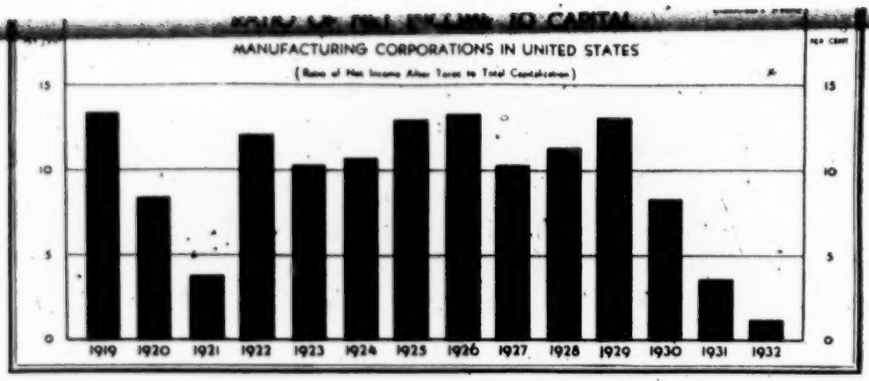


January, 1933

CHAIN STORE AGE

Chain Earnings Stand Up Despite Sales Drop

By VICTOR J. OLEARO



January, 1933

CHAIN STORE AGE

Chain Earnings Stand Up Despite Sales Drop

By VICTOR J. OLEARO

CHAIN store reports of operations for 1932, which will shortly begin to make their appearance, are expected to furnish pleasant reading. Despite the further drop in retail prices and contraction of public buying power which combined greatly to restrict dollar sales, the chain store business as a whole will record a highly satisfactory earnings mark, quite unlike the showing of most other major branches of industry.

From present indications, it appears that among the companies covered by the CHAIN STORE AGE sales index, the grocery chains as a group again will make relatively the best showing from the standpoint of total earnings and ratio of net to sales. This showing, furthermore, will be accomplished in the face of heavy expenditures made during the year in remodeling and consolidating a large percentage of stores. The five-and-ten and drug groups are expected to make a close bid for second place, while the shoe and apparel groups will probably compare in the order named.

The annexed table presents the aggregate estimated sales and profits for 1932 for each group, together with comparative figures for 1931. The estimated results are based on the assumption that December sales will at least maintain the rate of comparison with 1931 as was shown by volume for the first 11 months.

On the basis of these estimates, aggregate net profits in 1932 for the group of six grocery chains will be about [illegible] less than 1931. The ratio of net to sales, however, will remain unchanged at 2.7%, a truly remarkable achievement considering the conditions which existed.

Total estimated profits for the five-and-ten group will be roughly 27% under the 1931 total, while the profit ratio will show a decline from 7.4% to about 6.0% for all six companies taken as a unit.

Two drug chains will probably fare better than the five-and-ten group, though the smaller number of units in the drug group does not afford as weighty an index as is the case with the five-and-ten chains. At any rate, the combined earnings of the drug chains are estimated roughly at 21% under the 1931 results. The profit ratio, however, will witness only a slight decline, or from 3.7% to about 3.3% on sales.

Estimated earnings for two shoe chains in 1932 indicate a decline of about 35% under the 1931 total. On this basis, the profit margin will be about 2.8% on sales, as against 3.6% in the preceding year.

Data on the apparel group is insufficient to permit even an estimate of probable results, but it is doubtful whether any sizeable profit will be shown for the year. More likely, the combined showing will show a net loss. In 1931, on a total business of nearly $80,000,000, the four chains in this classification obtained a combined net profit of only $678,000.

Aside from this satisfactory display of earning power, nearly all of the chain store companies above covered, regardless of type, are expected to present a financial standing at the close of the year which will compare favorably with previous years. Preliminary information at hand indicates, in most instances, the maintenance of a continued healthy cash position and either complete freedom from bank debt, or a substantial reduction of such obligations.

	Estimated 1932			1931		
	Sales (in thousands)	Profits	Ratio Profits on Sales	Sales (in thousands)	Profits	Ratio Profits on Sales
Groups						
6 Grocery Chains	$1,578,000	$42,000	2.7%	$1,918,000	$48,712	2.7%
6 Five & Ten Chains	700,000	42,000	6.0%	790,000	58,729	7.4%
2 Drug Chains	63,000	2,100	3.3%	74,500	2,667	3.7%
2 Shoe Chains	30,000	850	2.8%	36,500	1,292	3.6%
4 Apparel Chains	65,000	not avail		80,000	678	0.8%

All in all, it may be stated with a fair degree of accuracy that the chain stores, for the most part, will commence business in 1933 in practically the same strong financial shape as a year ago—a condition which carries an encouraging augury for operations in the new year.

Whenever a business consistently shows a high and relatively well sustained earning power year after year it is only natural to attribute the success to capable management. It cannot be denied that this factor was largely responsible for the continued progress of the retail organizations.

But, without intending to minimize the important part played by good management, the satisfactory results of the chains last year was due in no small part to the excellent cooperation obtained from landlords who, instead of attempting to hold successful companies to rent obligations contracted for on bases patently made burdensome by existing conditions, have regarded the chains in their true light of steady and well-paying tenants.

Instead of adopting an obstinate attitude on the matter of rent relief, these property owners have seen the benefits which would ultimately accrue to all concerned from a satisfactory adjustment of rentals. The chains have cut every controllable item of expense, in some instances rather drastically. It remains for all landlords to contribute their share and aid in preserving intact an industry which, in the final analysis, has brought and will continue to bring them abundant returns.

Safeway Earnings Estimated

IN connection with the recent reduction of the quarterly dividend on Safeway Stores, Inc., common stock, it has been learned that, although final results for 1932 will not be known for another month or two, the company should show net earnings for the year in the neighborhood of $5,000,000. This would compare with $5,415,590 earned in the year 1931.

The company is reported to continue free of bank debt. Current working condition remains strong, with cash probably in excess of the $6,611,588 on hand on June 30, last.

536A

[fol. 652]

Martin Exhibit XXIX

Kroger Earnings on Investment in Kentucky Assuming Accuracy of Morrill Figures for Sales and Earnings

	Sales[a]	Computed tax	Credits[b]	Net tax	Income before sales tax[c]	Income after sales tax	Investment in Kentucky[d]	Rate of earnings on investment	Investment in Kentucky adjusted	Rate of earnings on investment adjusted[e]
1930	$14,653,448	$139,584.48	$15,369.00	$124,215.48	$172,892.93	$48,677.45	$1,756,000	2.8%	$1,438,721.46	3.4%
1931	15,496,915	148,469.15	15,643.84	132,825.31	151,734.19	18,908.88	1,353,000	1.4	1,035,721.46	1.8
1932	11,447,611	107,526.11	12,271.75	95,254.36	86,230.98	9,023.38*	1,076,000	0.8*	1,076,000.00	0.8*

[a] Morrill Deposition, p. 26.
[b] Sworn amendment to Bill of Complaint.
[c] Morrill Deposition, p. 27.
[d] Sworn statement to Kentucky Tax Commission quoted in Martin Exhibit VIII-A.
[e] The capital adjustment necessary as shown in Morrill No. 3, p. 5, is here reflected in data for 1930 and 1931, as well as in the figures for 1930. The adjustment was assumed to have taken place in Kentucky ratably with Kentucky sales, that is, 5.5 of the total for the company. The assumption is presumably only approximately accurate, but figures for 1932 indicate the substantial validity of the assignment.
* Loss.

[fol. 653] MARTIN EXHIBIT NO. VIII-A

Comparison of Investment with Sales in Kentucky by Retailers Doing Business Both Within and Without the State[a]

(In Thousands of Dollars)

Name	Year	Sales		Property invested		Per cent of sales in Kentucky	Per cent of property in Kentucky
		Total	In Kentucky	Total	In Kentucky		
Great A. & P. Tea Co.	1930	916,265	13,710	135,598	919	1.50	0.68
	1931	869,482	14,498	149,243	836	1.67	0.56
	1932	753,013	11,026	161,016	854	1.46	0.53
Kroger Grocery and Baking Co.	1930	267,094	14,653	60,781	1,756	5.49	2.89
	1931	244,371	13,497	58,260	1,353	5.52	2.32
	1932	213,160	11,448	53,002	1,076	5.37	2.03
S. S. Kresge Co.	1930	146,836	2,576	108,071	590	1.75	0.55
	1931	140,859	2,424	104,280	560	1.72	0.54
	1932	119,237	1,990	99,084	491	1.67	0.50
F. W. Woolworth Co.	1930	289,289	2,276	145,646	452	0.79	0.31
	1931	282,670	2,230	145,123	452	0.79	0.31
	1932	249,893	1,934	139,559	419	0.77	0.30
J. C. Penny Co.	1930	192,944	2,236	69,126	561	1.16	0.81
	1931	173,705	2,170	71,443	585	1.25	0.82
	1932	155,272	1,961	64,752	421	1.26	0.65
Sears Roebuck & Co.	1930	395,133	1,119	296,071	133	0.28	0.04
	1931	363,453	1,282	300,636	140	0.35	0.05
	1932	299,341	1,890	297,069	135	0.40	0.05
Montgomery Ward & Co.	1930	75,353	1,086	34,740	431	1.44	1.24
	1931	60,497	808	26,564	287	1.34	1.08
	1932	54,916	713	19,596	213	1.30	1.09
W. T. Grant & Co.	1930	71,050	437	14,425	55	0.61	0.38
	1931	69,149	424	17,110	50	0.61	0.29
	1932	73,309	560	17,081	65	0.76	0.38
J. J. Newberry & Co.	1930	30,187	726	21,814	278	2.40	1.27
	1931	31,147	954	22,044	312	3.06	1.41
	1932	33,122	1,012	21,304	299	3.06	1.40
Walgreen Co.	1930[b]	.....	.....	.....	.....	....	....
	1931	5,969	538	1,668	83	9.02	4.98
	1932	4,816	460	1,359	74	9.56	5.43
McCrory Stores Corporation	1930	43,224	330	36,457	196	0.76	0.54
	1931	43,296	320	34,408	186	0.74	0.54
	1932[c]	.....	.....	.....	.....	....	....
[fol. 654] Mangels, Inc.	1930	9,987	371	2,747	34	3.72	1.23
	1931	9,357	326	2,258	31	3.48	1.38
	1932[c]	.....	.....	.....	.....	....	....
Melville Shoe Corp.	1930	28,654	353	7,776	87	1.23	1.12
	1931	26,287	339	9,144	61	1.29	0.67
	1932[c]	.....	.....	.....	.....	....	....
S. H. Kress Co.	1930	19,206	327	15,229	53	1.70	0.35
	1931	20,972	261	16,214	124	1.24	0.76
	1932	19,084	220	15,736	122	1.15	0.77
G. C. Murphy Co.	1930	17,498	246	4,519	48	1.40	1.05
	1931	19,182	221	4,477	51	1.15	1.14
	1932	18,497	188	4,553	44	1.02	0.97
American News (Louisville News Co.)	1930	35,095	241	4,708	18	0.69	0.38
	1931	32,488	220	4,503	15	0.68	0.34
	1932[c]	.....	.....	.....	.....	....	....
Reliable Stores Corp.	1930	8,692	387	260	0	4.45	0
	1931	8,541	354	228	0	4.15	0
	1932	5,631	316	142	0	5.61	0
Jewel Tea Co.	1930	15,522	201	8,231	13	1.30	0.16
	1931	13,743	162	8,129	34	1.18	0.42
	1932	11,091	132	7,476	32	1.19	0.43

MARTIN EXHIBIT No. VIII-A—Continued

Name	Year	Sales		Property invested		Per cent of sales in Kentucky	Per cent of property in Kentucky
		Total	In Kentucky	Total	In Kentucky		
Edison Brothers Stores, Inc.	1930	4,912	256	1,591	52	5.22	3.26
	1931	6,423	286	1,825	41	4.46	2.23
	1932	8,018	243	2,000	22	3.03	1.09
Western Auto Supply Co.	1930*b*	.....	.....	.....	.....	....	....
	1931	12,433	90	5,414	15	0.72	0.28
	1932	11,798	84	5,670	12	0.72	0.22
Sterchi Brothers Stores, Inc.	1930	5,671	189	6,311	77	3.34	1.23
	1931	4,215	145	4,323	63	3.45	1.45
	1932	2,951	102	3,250	45	3.45	1.38
Childs Co.	1930	23,127	166	11,840	3	0.72	0.02
	1931	21,123	143	11,640	2	0.68	0.02
	1932	15,681	108	23,288	4	0.69	0.02
Lerner Stores Corp.	1930	25,293	129	7,129	5	0.51	0.08
	1931	26,077	101	6,190	5	0.39	0.08
	1932*c*	.....	.....	.....	.....	....	....
G. R. Kenny Co.	1930	17,852	71	9,148	30	0.40	0.33
	1931	14,024	65	5,935	27	0.47	0.46
	1932	11,869	52	5,402	18	0.44	0.32
[fol. 655]							
D. A. Schulte Inc.	1930	19,898	68	22,021	5	0.34	0.02
	1931	17,968	55	22,693	5	0.31	0.02
	1932*c*	.....	.....	.....	.....	....	....
United Cigar Stores Co. of America	1930	74,486	78	22,087	10	0.10	0.04
	1931	63,163	55	20,310	10	0.09	0.05
	1932*d*	186	18	73	6	9.52	8.56
Feltman & Curme Shoe Store Co.	1930	6,161	74	2,019	11	1.20	0.54
	1931	5,349	88	1,070	8	1.64	0.76
	1932	4,379	77	1,009	9	1.76	0.93
Schiff Co.	1930	9,933	200	3,196	63	2.01	1.96
	1931	10,180	208	2,849	48	2.04	1.68
	1932	8,910	166	2,743	32	1.86	1.15
B. & G. Sandwich Shops, Inc.	1930	3,451	57	1,440	71	1.66	0.49
	1931	2,883	39	1,214	66	1.36	0.55
	1932*c*	.....	.....	.....	.....	....	....
C. F. Adams Co.	1930	2,708	41	415	6	1.53	1.43
	1931	1,856	23	1,498	18	1.22	1.22
	1932*c*	.....	.....	.....	.....	....	....
National Bellas Hess Co.	1930	29,646	153	11,849	56	0.52	0.47
	1931	27,431	160	8,694	54	0.58	0.63
	1932*c*	.....	.....	.....	.....	....	....
Federal Bake Shops of Missouri, Inc.	1930	402	34	45	5	8.45	11.55
	1931	323	28	38	5	8.76	12.02
	1932	213	22	31	4	10.18	14.39
Ground Gripper Shoes, Inc.	1930	1,228	24	748	10	1.94	1.34
	1931	1,179	17	446	8	1.46	1.78
	1932*c*	.....	.....	.....	.....	....	....
Nunn Bush Shoe Co., Inc.	1930	2,954	28	1,063	6	0.96	0.57
	1931	2,503	26	820	4	1.03	0.54
	1932	1,197	23	578	3	1.92	0.50
Metropolitan Chain Stores	1930	9,073	None	5,892	26	0	0.45
	1931*e*	.....	.....	.....	.....	....	....
	1932*c*	.....	.....	.....	.....	....	....

a Source: Records of Kentucky State Tax Commission.
b Report lost.
c Report in hands of Field Agent.
d Incorporated in Tennessee in 1932.
e No report filed.

[fol. 656] MARTIN EXHIBIT No. X-A

Ratio of Taxes to Net Sales of Department Stores—Chain and Independent, 1930–31*

Net sales	1931 Number of stores	1931 Ratio	1930 Number of stores	1930 Ratio
Less than $150,000	65	.75%	76	.7%
150,000– 299,000	64	.6	88	.6
300,000– 499,000	58	.6	81	.6
500,000– 749,000	51	.65	58	.6
750,000– 999,000	27	.5	35	.55
1,000,000–1,999,000	65	.4	75	.45
2,000,000–3,999,000	50	.4	67	.4
4,000,000–9,999,000	44	.4	54	.35
10,000,000 and over	27	.25	30	.3

* As reported in Bulletins 85 and 88, Bureau of Business Research, Harvard University.

[fol. 657] MARTIN EXHIBIT No. XI-A

Ratio of Taxes to Net Sales—Department Stores Independently and Centrally Owned, 1930*

Net sales	Doing no group buying: Number of stores	Doing no group buying: Per cent	Doing some group buying: Number of stores	Doing some group buying: Per cent	In ownership group: Number of stores	In ownership group: Per cent
Less than $500,000	85	.75	50	.65	35	.65
500,000–2,000,000	42	.55	54	.55	38	.55
2,000,000 or more	33	.35	40	.35	61	.35

* As reported in Bulletin 85, Bureau of Business Research, Harvard University, pp. 38–40.

(Here follow tables, side folios 658 and 659)

[fol. 658]

SUMMARY S

Sales group	Total business				Correc
	I Number of merchants included	II Net worth	III Net profit before gross sales tax	IV Net profit after gross sales tax at 1% flat rate	Ra III
$1,053,693–$33,767...	30	$1,420,982	$220,214	$174,937	15.5
32,817– 15,543...	30	276,720	34,553	28,144	12.4
15,176– 5,030...	30	133,679	13,308	10,319	9.9
5,019– 1,140...	29	44,147	3,615	1,589	8.1

SUMMARY SHOWING DATA IN AGGREGATE

(000 Omitted)

Correction of Summary of Martin Exhibit XII

...s group	I Number of merchants included	II Net worth	III Net profit before gross sales tax	IV Net profit after gross sales tax at 1% flat rate	V Ratio III/II	VI Ratio IV/II	VII Kentucky net worth	VIII Net profit before gross sales tax	IX Net profit after Kentucky gross sales tax at rates provided in statute	X Ratio VIII/VII	XI Ratio net profit after 1% sales tax to net worth in Kentucky	XII Ratio IX/VII
...3-$33,767...	30	$1,420,982	$220,214	$174,937	15.50%	12.31%	$71,049	$11,011	$8,873	15.50%	12.31%	12.49%
...7- 15,543...	30	276,720	34,553	28,144	12.49	10.17	13,836	1,728	1,606	12.49	10.17	11.61
...6- 5,030...	30	133,679	13,308	10,319	9.96	7.72	6,684	665	651	9.95	7.72	9.74
...9- 1,140...	29	44,147	3,615	1,589	8.19	3.60	2,207	181	172	8.20	3.60	7.79

Total business

Kentucky data assuming 5% of total in state

[fol. 660] MARTIN EXHIBIT XXX

Comparison of Kroger Taxes in Kentucky with Those to Which the Company Would Be Liable If It Operated in Other States Having Similar Gross Sales Taxes*a*

	Gross tax	Offsets	Total taxes under sales tax act	Sales tax per store
Kentucky *b*	$107,526.11	$12,271.75	$95,254.36	$382.55
Minnesota *c*	140,463.00	.....	140,463.00	564.11
Vermont *d*	413,466.94	182,253.34	231,223.60	928.61
New Mexico *e*	.....	.....	279,150.00	1,121.08

a The assumption is that the corporation sell the same amount and through the same number of stores as it did sell in Kentucky in 1932, as set out in the depositions of Albert H. Morrill, namely, $11,447,611 of sales in 249 stores, the credits for other taxes being $12,271.75 and property taxes paid, $169,971.59.

b Kentucky Acts, 1930, chap. 149.

c Session Laws, 1933, chap. 213.

d Act approved March 25, 1933.

e Laws, 1933, chap. 73.

[fol. 661] MARTIN EXHIBIT XXXI

Comparison of Effective Tax Rates (Under Chap. 149, Kentucky Acts, 1930) With Rate of Net Gain on Sales of Grocery and Variety Chains and of Department Stores

(Amounts in Thousands of Dollars)

	Range of sales	Number of enterprises	Average sales per enterprise	Average gain
Grocery Chains as Computed*a*—	Over 225,000	5	304,744	2.8%
	50,000–225,000	6	27,942	2.7
	Under 50,000	6	11,672	2.1
Grocery Chains (Harvard)*b*—	Over 5,000	21	91,437	2.8
	750–5,000	30	1,724	2.2
	Under 500	31	404	0.9
Variety Chains*c*—	Over 2,000	13	31,065	6.2
	500–2,000	7	1,267	3.0
	Under 500	13	205	0.4*
Department Stores*d*—	Over 2,000	121	8,502	3.5
	500–2,000	143	1,096	1.9
	Under 500	187	253	0.9

* Loss.

a All grocery chains listed by Nystrom or in Martin Exhibit XII and reported in Moody are included and shown in three groups as nearly equal in number of chains as possible. The figures shown are three-year averages, 1930–1932 inclusive, except in the case of U. S. Stores Corporation (1928–1930, the last reported, are used).

b Figures for 1929 as reported in Harvard Bureau of Business Research Bulletin No. 84.

c Figures for 1929 and 1931 averaged on basis of data in Harvard Bureau of Business Research Bulletin No. 89.

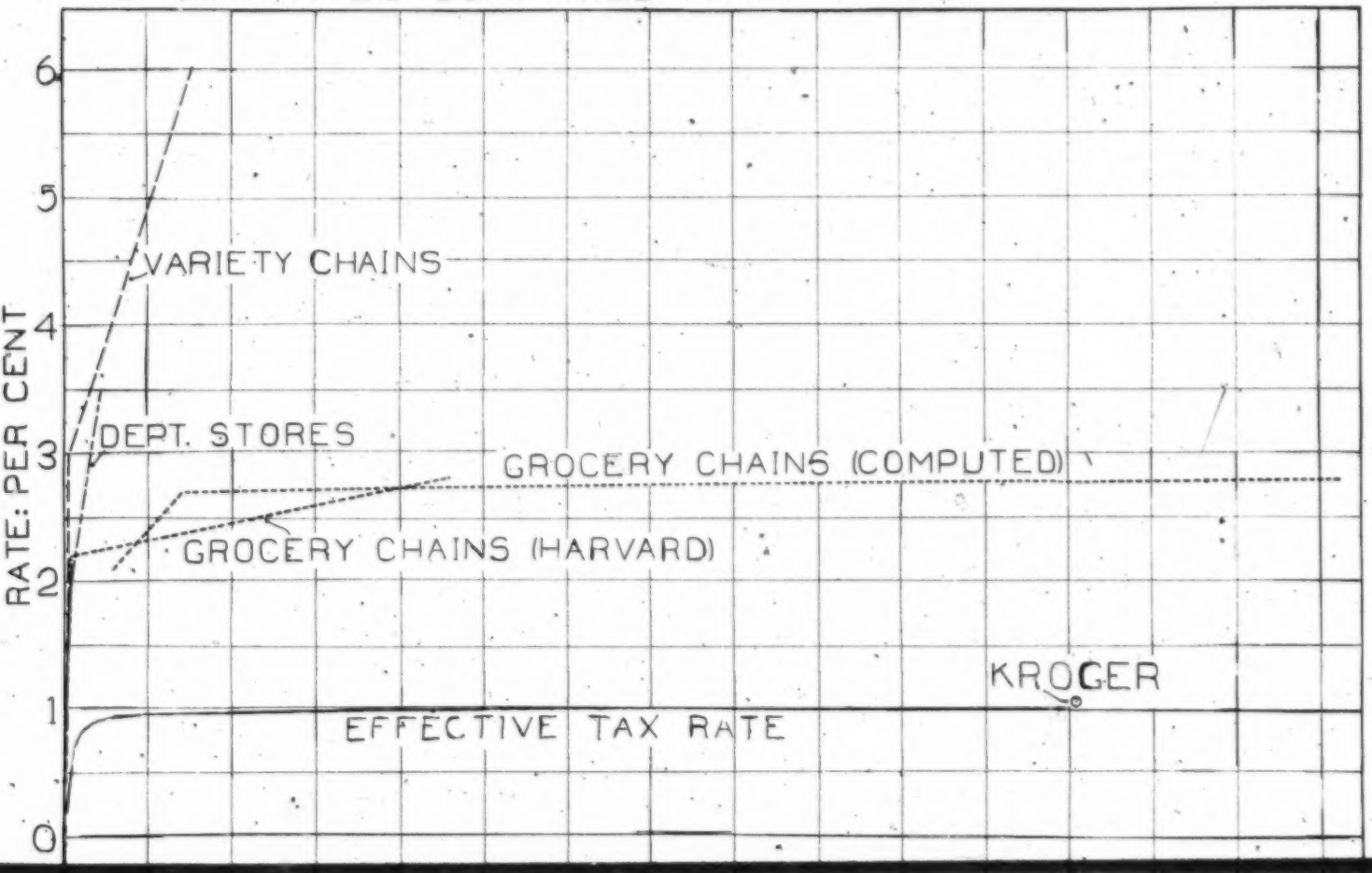
d Figures for 1927–1931 inclusive averaged on basis of data reported in Harvard Bureau of Business Research Bulletin 85 and Bulletin 88.

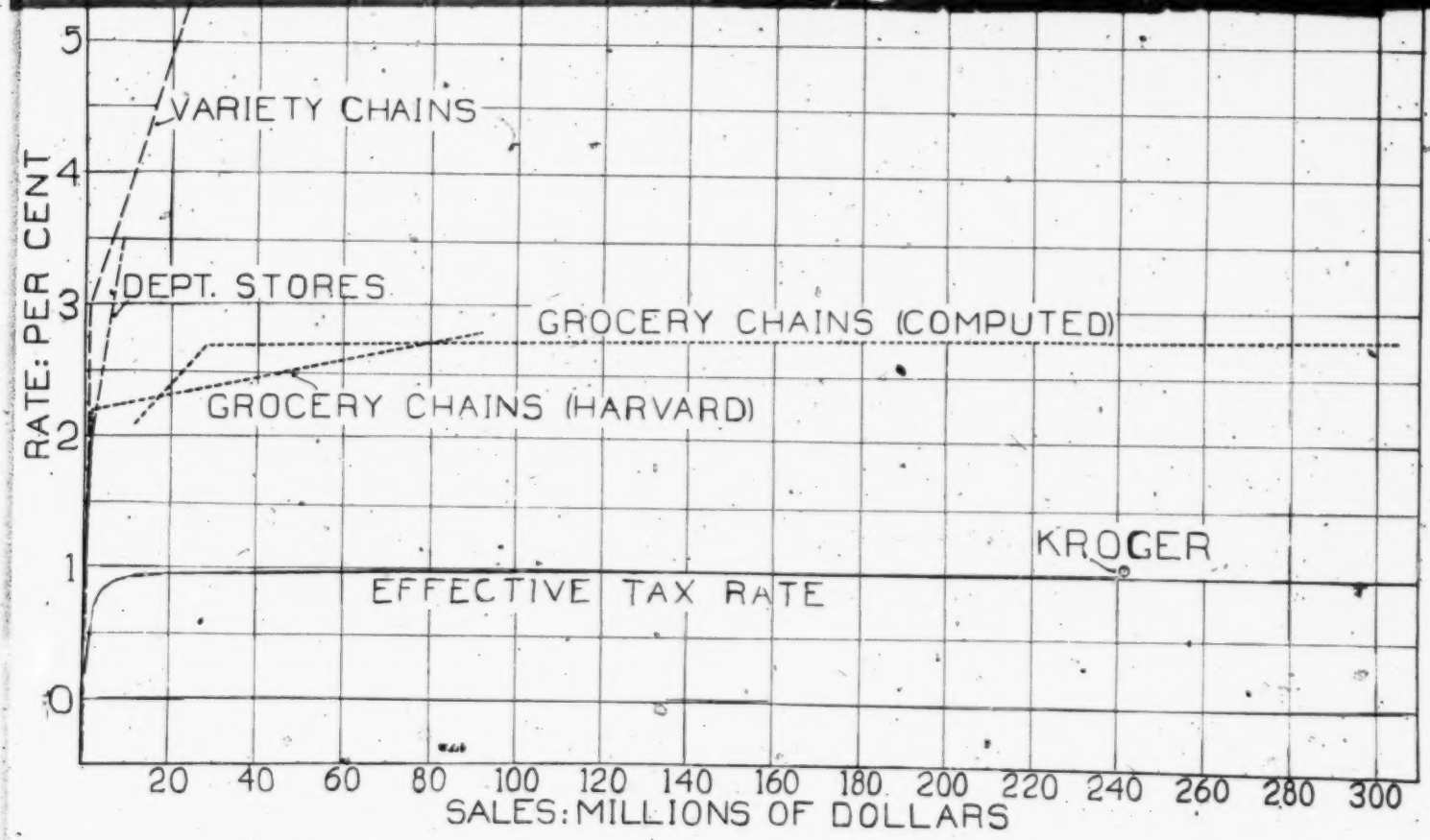
(Here follows photolithograph of Martin Exhibit XXI, side folio 662.)

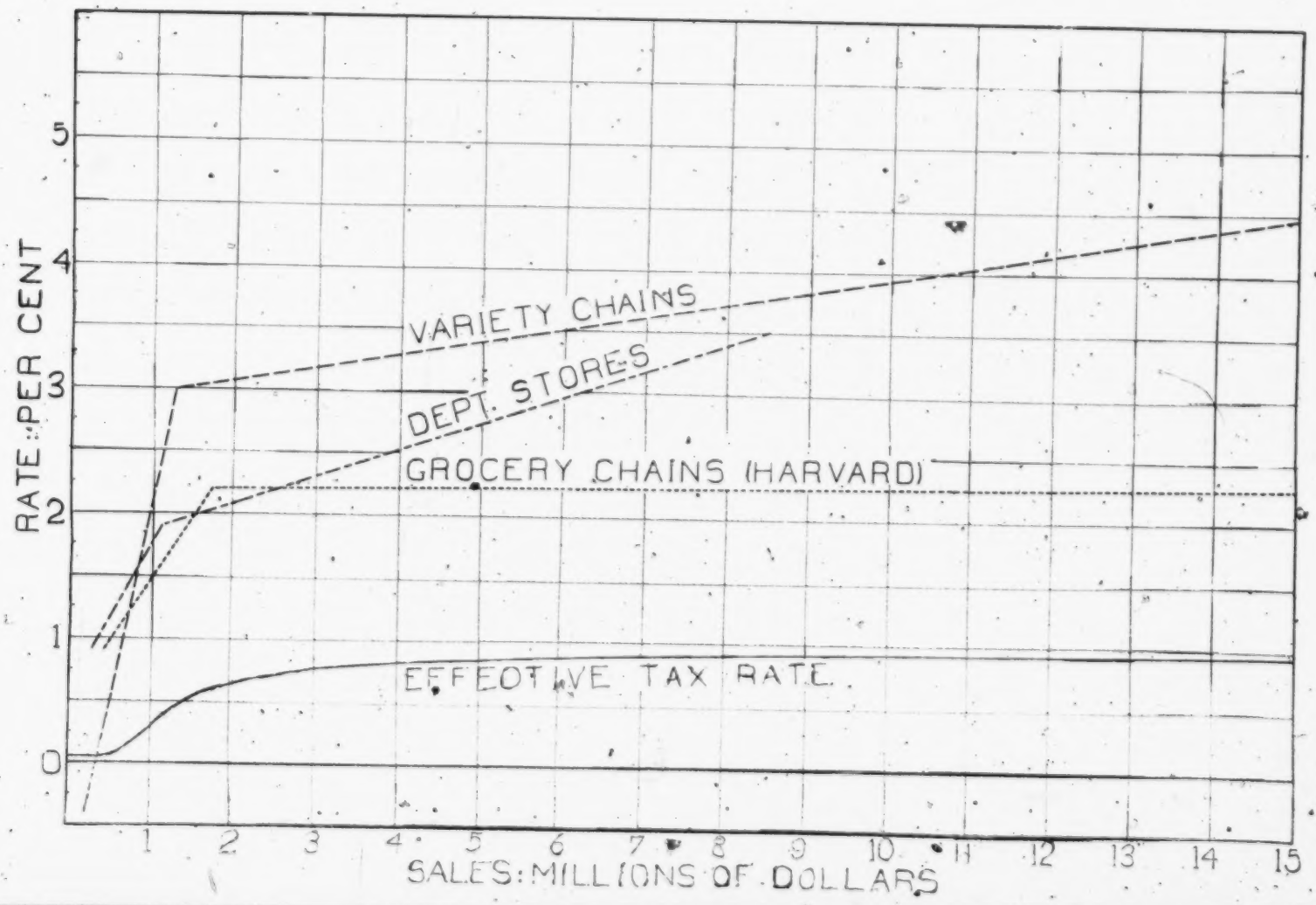
(Here follows photolithograph of Martin Exhibit XXI, side folio 662)

MARTIN EXHIBIT XXXI

TAX RATES COMPARED WITH RATES OF NET GAIN




VARIETY CHAINS
DEPT. STORES
GROCERY CHAINS (COMPUTED)
GROCERY CHAINS (HARVARD)
KROGER
EFFECTIVE TAX RATE
RATE: PER CENT
0
1
2
3
4
5
20 40 60 80 100 120 140 160 180 200 220 240 260 280 300
SALES: MILLIONS OF DOLLARS


VARIETY CHAINS
DEPT. STORES
GROCERY CHAINS (HARVARD)
EFFECTIVE TAX RATE
RATE: PER CENT
0
1
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1 2 3 4 5 6 7 8 9 10 11 12 13 14 15
SALES: MILLIONS OF DOLLARS

[fol. 663] AFFIDAVIT OF CLYDE WILLIAM PHELPS

STATE OF KENTUCKY,
County of Franklin, ss:

Affidavit of Clyde William Phelps in Opposition to Plaintiff's Motion for Interlocutory Decree

Clyde William Phelps, being first duly sworn, says:

I, Clyde William Phelps, a citizen and resident of Chattanooga, Tennessee, state that I am thirty-four years of age and am at present occupying the position of Head of the Department of Economics in the University of Chattanooga, Tennessee, and have held that position since 1925; that my duties in that capacity are to teach public finance, money and banking, economics, of corporations and other economic subjects; that I am a graduate of the following institutions of learning: Harvard University with the degree of Bachelor of Arts; the University of Toulouse, France, with the degree of Doctor of Law; studied public finance while at the University of Toulouse, paying some attention to the French Sales Tax; also did some graduate work at Heidelberg University, Germany, and the University of Vienna, Austria.

I was employed by the State of Kentucky in January, 1931, to investigate the cases involving the Kentucky Gross Sales Tax with the view of testifying in said cases for the Commonwealth of Kentucky.

I have been giving some time to the study of Chapter 149, Acts of the General Assembly of 1930, as it relates to those fields of economics that are commonly designated as Public Finance and Marketing. The following three questions have interested me:

1st. Is that tax based upon ability to pay?

2nd. Is the tax confiscatory?

3rd. Does it fill out the tax system of Kentucky to some desirable degree?

I would like to discuss these questions in order.

First of all, let us turn our attention to the first question, namely: Is the tax based upon ability to pay? There is a reason for being interested in this question for the real [fol. 664] justification of a tax as a revenue measure rests

fundamentally on whether or not it taxes according to ability to pay. This means, on the one hand, not taxing beyond ability to pay and, on the other hand, it means that the state must not restrict itself to proportional taxation in all tax measures. Taxing according to ability to pay means taking a larger and larger percentage from the more and more able to pay,—as in the case of progressive or graduated taxes. Examples of progressive or graduated taxes are to be found in the tax systems of foreign countries, in the Federal Income Tax, and in the Wisconsin Corporation and Personal Income Taxes.

Now, ability to pay taxes increases progressively as the size of an establishment (as measured by the volume of sales) increases. It is a well-known principle in the field of economics that there are important economies in large scale production and large scale operation which bring it about that, in general, the larger the business the more efficient it is (and consequently the greater tax-paying power it has).

This principle is confirmed by the surveys of actual facts in the fields of production and distribution which have been published from time to time. Thus we find in the retail field that in general, as the size of the establishment (as measured by sales) increases, the greater is the percentage of net profit or net gain to sales and the greater is the percentage of net profit or net gain on investment. Exhibits 1, 2, 3, 4 and 5 filed with and made a part of the affidavit of James W. Martin are referred to and made a part of this affidavit as fully as if copied at length herein.

The progressive increase in the ability to pay taxes, as indicated by the aforementioned five exhibits, constitutes a reasonable basis, in my opinion, for a graduated or progressive gross sales tax.

One of the indications of the greater efficiency possessed by large enterprises as compared to small ones is to be found in the comparative rates of turn-over. The facts which have come to my attention show that in general the large retail operators have a higher rate of turn-over than the small operators. Exhibits 6 and 7 filed and made a part of the affidavit of James W. Martin are hereby referred to and made a part hereof as fully as if copied at length herein.

[fol. 665] An example of the efficiency of the large enterprises over the small in quicker transfer of merchandise

from the factory to the consumer is given in the following paragraph from an address delivered before the Sixth Annual Conference of Major Industries at Mandel Hall, University of Chicago, October 23, 1929 (published in Chain Store Progress, Volume 1, No. 9), by E. C. Sams, President of the J. C. Penney Company:

"To illustrate, the Harvard Bureau of Research has found that the individual dry goods store requires 281 days on the average to bring merchandise from the factory via the wholesalers and the store to the customer. All that time either borrowed money or the consumer's money is used. Interest to cover all this time is tremendous in amount. Contrast this with the experience of the chain store system that takes only 85 days on the average to bring the same character of merchandise from the factory direct to the consumer. Our chain store system, for example, had an average inventory through the year of 1928 of $44,127,941.00. Interest at six per cent on that amount for 85 days was $623,333.00. That is the amount our chain must charge the consumer. Based upon the same inventory in the average individual stores, examined by the Harvard Bureau of Research, interest must be charged their consumers for 281 days, or a total interest charge of $925,796.00 for the same inventory."

A student of public finance and of the general field of economics is necessarily led to conclude from his studies that if retailers are to be taxed according to their ability to pay (which is a sound canon of public finance), the larger enterprises, which are generally the more efficient, must be taxed at higher rates than the smaller are taxed. This is what the Kentucky Law does.

Since the facts which have been collected upon efficiency (and thus tax paying ability) show that efficiency or ability increases stage by stage as size of business increases, it appears that a progressive or graduated tax, with numerous brackets (such as the Kentucky Retail Gross Sales Tax), reasonably endeavors to adjust the rate of taxation to increasing ability to pay.

The petitions submitted by the Kroger Grocery & Baking Company, the J. C. Penny Company and others make

[fol. 666] it appear that the Kentucky tax progresses in a jumpy, arbitrary and very sharp manner. This is not so. A study of the progression of the tax as it would work in actual practice (as shown in Prof. Walradt's affidavit) demonstrates that the effective rate progresses in an even and reasonable manner.

Before leaving this first question, it is interesting to ask whether or not independents who are uniting in voluntary associations are able to attain the economies of large scale operation to the same extent as large consolidated enterprises. In theory it would seem, from a superficial examination, that a large number of co-operating independents might secure any and all of the valuable advantages possessed by the large consolidated enterprises. The facts, however, do not confirm such a theory.

Prof. E. Z. Palmer's survey of the prices of independent grocery stores and chain grocery stores (the chains representing large scale consolidated enterprises) in Lexington, Kentucky, during the month of March, 1930, showed that the chains in that city were 14.3% below the independents. Furthermore, the survey shows that the four most efficient independents were being undersold 6.3% to 9.2% by the average chain.

These four most efficient independents were even being undersold three to four per cent by the least efficient chain in the city. Voluntary co-operation of independents evidently did not enable a single independent to meet the competition of even the most inefficient chain in Lexington, Kentucky. The survey of Professor E. Z. Palmer, just referred to, was published in Chain Store Progress, Volume 2, Number 9.

In "A Study of the Prices of Chain and Independent Grocers in Chicago," by Bjorklund and J. L. Palmer, published by the University of Chicago November, 1930, pages 37 and 38, we find that the so-called voluntary chain or voluntary co-operative group of independent grocers was being undersold 5.04 cents on the dollar by the chains. Professors Bjorklund and Palmer state: "It is significant to note, however, that they (the voluntary associated grocers) were not experiencing as much success in meeting chain prices as were certain entirely independent merchants."

[fol. 667] The big advantage of the regular chain over the voluntary group of independents, which prevents the

latter from achieving the ability and efficiency of the former, is to be found in the fact that the regular chain enjoys the efficiency which comes from a military organization in which the ideas, policies, and orders of the management are certain to be carried out promptly, harmoniously, and efficiently by the many units or branches. The voluntary group of small retailers is handicapped by its democratic organization. It is a case of the proverbial efficiency of the military organization or the autocratic government as compared to the proverbial inefficiency of democracy.

Voluntary co-operation of small retailers in brief does not appear to increase the ability of these smaller retailers so as to place them in the ability class represented by the large scale consolidated enterprises.

The second question which has interested me is whether or not the tax is confiscatory in its higher brackets. I do not think that a 1% tax, such as is levied upon sales in excess of $1,000,000.00 is confiscatory. This opinion comes from a study of the present returns upon property and on investment of various large scale enterprises operating in the State of Kentucky and the returns on the investment and the property of these companies after payment of the Kentucky tax. The pertinent figures are set forth in Exhibits Nos. 13 and 14 in the affidavit of J. W. Martin, which exhibits are incorporated herein and made a part hereof as fully as if copied in full herein.

From these exhibits, it is evident that the per cent earned on property and also the per cent earned on invested capital of large-scale operators in Kentucky would not be reduced in general very much, and certainly the reduction would constitute a far cry from confiscation.

The third question of interest in this Kentucky tax is whether or not it tends to fill out the present tax system, remedying some of the present defects of that system. In judging a tax, one must always consider the place of that tax in the tax system. In other words, a tax system in the nature of one single tax would not be desirable. Therefore, in the modern tax system, we have many kinds of taxes which tend to supplement one another. In the [fol. 668] Kentucky tax system, it appears that the retail gross sales tax is a desirable addition to previous taxes in that it tends toward equalization of the tax burden imposed

upon retail merchants enjoying different volumes of sales. Without the retail gross sales tax, we find (as shown by Exhibits 9, 10 and 11 of J. W. Martin's affidavit, which exhibits are incorporated herein and made part hereof as fully as if copied in full herein) that enterprises with a large volume of business are actually paying in taxes an amount which represents a very much smaller percentage of their sales than the amount actually being paid by retailers doing a small volume of business. Exhibit 9 shows the situation in Louisville, Kentucky, and Exhibits 10 and 11 show the situation for the country as a whole in regard to department stores.

Thus it seems that, without the retail gross sales tax, the small retailers of Kentucky would be discriminated against. (Exhibit 9 shows, for example, that in Louisville, Kentucky, in 1928, the ratio of taxes to sales of grocery stores doing a business of less than $5,000.00 was over six times as large as the ratio of taxes to sales of grocery enterprises doing over $100,000.00. The retail gross sales tax tends to remedy this situation.

Clyde William Phelps.

STATE OF KENTUCKY,
County of Franklin, sct:

On this the 14th day of February, 1931, personally appeared before me Clyde William Phelps, who signed the foregoing affidavit in my presence and made oath to the truth of the statements therein contained.

B. T. Brewer, Notary Public, Franklin Co., Ky. My commission expires on the 9th day of Aug., 1931. (Seal of B. T. Brewer, Notary Public, Franklin Co., Ky.)

[fol. 669] CLYDE WILLIAM PHELPS, called for defendant, testified that he was the same Clyde William Phelps who testified by affidavit in this case in 1931. He was a graduate of Harvard University, having received his Bachelor of Arts degree there. He also received the degree of Docteur of Laws at Toulouse University in France. He studied at Heidelberg and in Vienna. Since 1925 he had been head of the Department of Economics at the University of Chattanooga with the exception that in 1931 and 1932, for a period of little over one year, he served as economist on the Fed-

eral Trade Commission. He was familiar with the Harvard Bureau of Business Research studies and knew that they were authoritative publications. He was also acquainted with the United States Census Bureau of Retail Distribution reports. He was also familiar with publications on retail chains, with Bradstreet's Weekly, "Chain Stores", "Bjorklund and Palmers Study of Prices of Chain and Independent Grocers in Chicago", and Alexander's "Study of Retail Grocery Prices"; Dowe's "Comparison of Independent and Chain Store Prices", which appeared in Journal of Business; "Chain Store Progress Magazine"; "Fairchild's Financial Manual"—and "Retailing Magazine", all of which publications he regarded as authoritative in their fields. Chain Store Industry he thought contained propaganda, since it advertised the prices of large chains and compared them with independents for the purpose of indicating how the chain stores sell goods at a cheaper price. It is the outstanding organ of the industry.

Witness thought that it was pretty generally recognized that there was a relationship between the size of the establishment as measured by volume of sales and efficiency as indicated by its percentage of expenses and its net profit, etc. He thought the theory was pretty well established regarding this point. One could find it substantiated throughout the text books and economic literature. Investigations [fol. 670] made by other government organizations have supported the theory that as the establishment grows in size, measured by volume of sales, it tends to show more and more advantages over the smaller establishment. That is the result of certain economic principles, certain principles of law in physiology, chemistry and biology, which prevail in the natural and physical world. Among economic principles, there is the principle of indirect cost and the principle of division of labor, which tends to bring about that result that as establishments grow in size as measured by volume of sales, it tends to increase their advantage over smaller firms. The United States Censor's Report shows that among chain store businesses the smaller chain is less effective as measured by volume of sales. They have higher expenses and pay out a higher proportion of their total income from sales for wages and etc. than do the larger ones. The law does not work out perfectly with mathematical precision but it is rare that one finds any theory working out perfectly specially over a short period

of time like twelve months or two or three years. However, the tendency is there. This is widely supported by economic theorists. One can go to a multitude of economic text writers and recognized teachers in the United States and one will find the theory supported and the fact has been discussed and published by impartial organizations like those operated by the United States government. The witness stated that he would say offhand, that big undertakings appear at an advantage compared with small ones. Big chains as measured by volume of sales appear at an advantage as compared with establishments having smaller sales. Big department stores appear at an advantage as compared with small department stores. The tendency is there.

Witness thought that it follows from this that the large scale retailer had the greater tax paying capacity than the smaller retailer in the same line. This was so for two reasons. First of all, the rate of profit tends to increase as the establishment increases in size. That gives increased tax paying capacity and more than a proportional increase. [fol. 671] Consequently, the very fact that the large establishment has a large income, as compared with the smaller establishment would give it an increased tax-paying ability.

Witness stated that it had always seemed to him in theory that the independent cooperative in the so-called voluntary chain had a pretty good chance to rival the chain stores. In other words, by theorizing one can assume that the independents would get together and do this and that, etc., and working it out to the end of the theory it would seem as if they could accomplish all the things and that they will make a pretty close approximation to the efficiency of the real chain, that would be the result, but in practice, the voluntary group do not appear to equal the efficiency of the chain, the main reason for that being the lack of centralized ownership and control. The one great advantage that the real chain has is that it owns every one of the units. Ownership is centralized, each of the units does what it is told to do. On the other hand, in the voluntary group of independents, each one owns his own store. He can buy through the central organization if he wants to, but witness did not know of any case where the merchant bought everything through the centralized office. The member of the voluntary group can follow the advice of headquarters but does not have to do so. The real chain system is a more

or less military organization. Every unit operates in the most efficient manner as determined by the central headquarters, which is able to employ the highest skill. On the other hand, the voluntary group instead of having a military organization, so to speak, at central headquarters, must coax the independent to carry out the scheme. That is not a simple democratic form of organization but it is not as efficient as an autocratic system.

Witness had experience in working closely with wholesalers starting a voluntary chain and he knew from them, as well as from literature on the subject, the difficulty in- [fol. 672] volved in persuading the various independents to carry out the policy made by headquarters, such as keeping their stores clean, keeping their shelves covered with brass tacks, and carrying out sales policies announced by headquarters. Witness further stated that he might refer to the Federal Trade Commission studies on Cooperative Grocery Chains. In that study it was pointed out that the voluntary groups of independents were not able to achieve the efficiency of the regular chain, that they could not distribute merchandise as efficiently.

Other studies had been made, some of them appear in the Chain Store Progress, which bore out that point. Professor Martin had made a study several years ago in Lexington. All of the studies bear out the fact that the voluntary groups do not achieve the efficiency in marketing their goods that the regularly centrally owned and controlled chain stores do.

Insofar as an independent retailer not operating as a voluntary member of a group is concerned, he cannot secure the efficiency of a centrally owned and managed chain. A few exceptions may be discovered where there is an extraordinary genius among independent merchants who is able to compete satisfactorily with the centrally owned and controlled chain and even undersell them, but in general the independent retailer who is operating alone is worse off than the voluntary groups in trying to meet the competition of the centrally owned and organized chains. This is because the large scale establishment tends to have certain advantages in buying and selling, production, financing, and general management which can only be achieved by a large selling firm.

The small retailer usually fails to find himself with a

managing genius to run his store. He cannot have the services of a $25,000 or a $50,000 or a $100,000 a year specialist. Yet that same specialist can be hired by a great store or establishment with a tremendous volume of sales and pay the $25,000 or $100,000,000 and make a tremendous profit out of his employment.

[fol. 673] As an example from another field, the International Harvester Company installed years ago a certain specialized machine do do nothing except to round off the four corners of a wagon tongue. That machine, it was reported, saved them a penny a tongue. The only way by which its use was possible at a profit was by turning out a tremendous volume of tongues. A small plant might have bought that machine and lost money because that small plant did not have enough business to utilize this very efficient machine. So in big retailing establishments, the volume of business makes it possible to hire the very highest type of managing ability and to get such results out of that ability as to make it relatively cheap.

Management plays a large part in the success of a retail establishment. The smaller plant cannot afford the high class management which the larger establishment secures.

Those operating large retailing establishments are able to buy in large quantities and secure extra discounts because they buy in those large quantities. This is reflected in profits. There are also other advantages. A large establishment has other methods of capitalizing upon its buying of supplies. It gets all of the discounts which the smaller establishment can get and in addition to that another discount, and sometimes it is large enough to be able to secure special deals for itself.

Witness stated that he was one of the economists who helped write the Federal Trade Commission reports, and besides his work in Washington upon schedules on information involving chain store organizations and independents, he visited the headquarters of the largest chain in the country in a number of lines of business and in some cases arrangements were made with officials for him to go around with the supervisor or superintendent and he was permitted to spend an entire day accompanying them in their visits to stores and asking questions as to how they supervised and how the stores were running. He secured a great deal of interesting information directly that way, from actual con-

[fol. 674] tact with the chains and with the officials. Witness did not know of any reason why the economic principles about which he had testified would not be effective in Kentucky the same as elsewhere. Economic laws, he stated, did not stop at State lines.

Cross-examination:

Witness had made no examination of the actual operation of the Kentucky Gross Sales Tax Law as it applied to the various taxpayers to whom the law presumptively applied.

[fol. 675] AFFIDAVIT OF B. T. BREWER IN OPPOSITION TO PLAINTIFF'S MOTION FOR INTERLOCUTORY DECREE

The affiant, B. T. Brewer, first being duly sworn states that his name is B. T. Brewer; that he is 37 years of age; that he resides at Frankfort, Kentucky; that he is Secretary of the State Board of Charities and Corrections of the Commonwealth of Kentucky, to which position he was appointed upon the creation of the Board upon March 9, 1920, and which position he has held continuously since that date; that as Secretary of the said State Board of Charities and Corrections he is custodian of its records; and is familiar with the conditions existing at the institutions under its control.

He states that the Kentucky State Reformatory, located at Frankfort, Kentucky, is the penal institution serving that part of Kentucky located east of a line drawn roughly north and south from Louisville, Kentucky; that said institution was established about the year 1797, and that certain of the first buildings constructed at that institution are still in daily use for the housing of prisoners; that there has been no new construction of a material nature at the institution to increase its capacity for many years, and that its present normal capacity is 1,600. He further states that the daily average population at this institution for the fiscal year ending June 30, 1930, was 2,211; that the population on January 31, 1931, was 2,354, and that the population of the institution has doubled within the past ten years with practically no increases in accommodations for prisoners; that because of the increase in population in excess of the capacity of the institution it is necessary to

confine two prisoners in one cell; that the cell blocks are of old type construction; the cells are not equipped with any modern sanitary conveniences; and that no cells have running water or toilet accommodations. He further states that recently in several instances it has been necessary for the authorities in charge of the Kentucky State Reformatory to request Court officials to hold convicted and sentenced men in the several county jails of the State until a sufficient number of prisoners could be discharged at the expiration of their sentences or released upon parole to allow the admission of new commitments. He states that immediate relief from these conditions is imperative in order to provide accommodations for prisoners sentenced by the Courts of the State and to provide sanitary and liveable conditions for the inmates of the institution. He states that the State Board of Charities and Corrections has [fol. 676] planned to remedy these conditions and to provide more adequate and sanitary accommodations from the moneys it anticipated would be derived from the proceeds of the so-called Gross Sales Tax Bill which was enacted by the 1930 Session of the General Assembly; and he further states that there is no other fund or appropriation from which the necessary money can be obtained to relieve the conditions existing at the present time at this institution.

He states that the Kentucky State Penitentiary, located at Eddyville, Kentucky, is the penal institution serving that part of Kentucky lying west of a line drawn roughly north and south of Louisville, Kentucky; that said institution was constructed about 1890; and that there has been no new construction of a material nature at this institution to increase its capacity for many years; that the present normal capacity of said institution is 600. He further states that the daily average population at this institution for the fiscal year ending June 30, 1930, was 1,018, that the population on January 31, 1931, was 1,099, and that the population has practically trebled within the past ten years. He further states that the cells at this institution are of old type construction, containing no running water, toilets or other sanitary conveniences. He further states that it is necessary at this institution to sleep prisoners upon cots, one touching the other, located in rows, in the corridors of the cell houses. He states that immediate relief from these conditions is imperative in order to provide accommoda-

tions for prisoners sentenced by the Courts of the State and to provide sanitary and liveable conditions for the inmates of the institution. He states that the State Board of Charities and Corrections has planned to relieve these conditions from the moneys it anticipated would be derived from the proceeds of the so-called Gross Sales Tax Bill which was enacted by the 1930 Session of the General Assembly; and he further states that there is no other fund or appropriation from which the necessary money can be obtained to relieve the conditions existing at the present time at this institution.

He further states that the Kentucky Institution for the Feeble-Minded, located at Frankfort, Kentucky, is the State Institution for the care and custody of the feeble-minded, and that said institution was established about the year [fol. 677] 1860. He states that the present capacity of this institution is approximately 500; that the average population of the institution for the fiscal year ending June 30, 1930, was 545; and that the population on January 31, 1931, was 635. He states that there are hundreds of feeble-minded persons in the State of Kentucky who should be confined in this institution, and who are entitled to the care and protection of the State, and that the public at large is entitled to protection from these feeble-minded persons upon whom no restraint is exercised, and who are permitted to go at large begetting their kind to become future charges upon the State of Kentucky. He further states that these hundreds of feeble-minded persons cannot be admitted because of lack of room; that the doors of this institution are closed, and have been closed for many years, to new admissions and that new inmates can only be admitted upon the death or discharge of one of the present inmates. He states that there are many Court Orders of admission on file at the institution at the present time for persons who have been properly committed by the Courts but who cannot be accepted because of lack of room. He further states there is no hospital for the care of the sick at this institution and that it is necessary to confine those inmates who are sick in a portion of a dormitory where other inmates sleep; and that there is no provision for the isolation of inmates who are ill of a contagious or infectious disease. He states that immediate relief from these conditions is imperative, and that the State Board of Charities and Corrections has

planned to remedy them from the moneys it anticipated would be derived from the proceeds of the so-called Gross Sales Tax Bill which was enacted by the 1930 Session of the General Assembly; and he further states that there is no other fund or appropriation from which the necessary money can be obtained to relieve the conditions existing at the present time at this institution.

He states that the Kentucky State Houses of Reform, located at Greendale, Kentucky, is the State institution for juvenile delinquents; and that said institution was constructed about the year 1893. He states there has been no construction of a material nature for the purpose of increasing the capacity of this institution for many years. He states that the present capacity of the institution is 350 and that the average population for the fiscal year ending [fol. 678] June 30, 1930, was 678. He states that the population on December 31, 1930, was 669. He states that because of these conditions it is necessary to crowd inmates of all ages, and offenders of all descriptions into the same dormitories without any degree of segregation or classification, the youngest children with the older ones, and those convicted of minor offenses with those who have been convicted on charges of the most serious nature. He states that the institutions for boys and girls are both located upon the same ground; and that there are no adequate facilities or buildings for the education and proper vocational training of these inmates; that there is no Chapel of sufficient size for their religious and moral training; no assembly hall; and no gymnasium or building for necessary physical training during the winter months. He states there are no adequate hospital facilities for the boys, and that there are no accommodations of any character for inmates who are tubercular; nor are there any adequate facilities for the isolation of the venereally diseased. He states that the State Board of Charities and Corrections has planned to remedy these deplorable conditions from the moneys which it anticipated would be derived from the proceeds of the so-called Gross Sales Tax Bill which was enacted by the 1930 Session of the General Assembly; and he further states that there is no other fund or appropriation from which the necessary money can be obtained to relieve the conditions existing at the present time.

He states that there are three State hospitals for the

insane in Kentucky; the Central State Hospital at Lakeland, Kentucky, erected about 1870; the Eastern State Hospital at Lexington, Kentucky, erected at about 1820; and the Western State Hospital at Hopkinsville, Kentucky, established about 1840. He states that there has been no material construction at these institutions for the purpose of increasing their capacity in many years. He states the present capacity of the Central State Hospital at Lakeland, Kentucky, is 1,650; that the average population for the fiscal year ending June 30, 1930, was 2,058, and that the population on December 31, 1930, was 2,177. He states the present capacity of the Eastern State Hospital at Lexington is 1,250; that the average population for the fiscal year ending June 30, 1930, was 1,499; that the population [fol. 679] on December 30, 1930, was 1,618; and that the original building constructed at this institution about 1820 is still standing and in daily use. He states that the capacity of the Western State Hospital at Hopkinsville is 1,500; that the average population for the fiscal year ending June 30, 1930, was 1,677 and that the population on January 31, 1931, was 1,691. He states that each of these institutions is crowded beyond its capacity to an extent where proper medical care and treatment cannot be afforded the patients; that the expedient has been considered from time to time of closing the doors of these institutions to further admissions; that not one of these institutions is equipped with a modern infirmary; nor with a Receiving or Detention Building in which new admissions can be confined for observation; that not one is equipped with hydrotherapeutic or other modern methods of treatment; that because of their type of construction both the Eastern and Western State Hospitals have been repeatedly described as fire traps by Grand Juries and by persons familiar with modern fire prevention methods; that neither the Eastern nor the Western State Hospitals is protected with automatic sprinkling systems. He states that immediate relief from these conditions is imperative in order to provide necessary accommodations and treatment for the helpless inmates of these institutions; and that the State Board of Charities and Corrections has planned to remedy these conditions from the moneys it anticipated would be derived from the proceeds of the so-called Gross Sales Tax Bill which was enacted by the 1930 Session of the General Assembly; and he

further states that there is no other fund or appropriation from which the necessary money can be obtained to relieve the conditions existing at the present time at these institutions.

He further states that in Kentucky there is no institution or hospital for the care and treatment of epileptics and that it is necessary to confine this class of persons with the insane and feeble-minded, indiscriminately, and without regard to their proper treatment and care. He states that at the present time there are approximately 600 epileptics confined in the three State Hospitals for the Insane and at the Institution for the Feeble-Minded. He states it is the plan of the State Board of Charities and Corrections to establish an institution or colony for the epilep- [fol. 680] tics of this State where they can be properly supervised and cared for, and to provide for them methods of treatment. He states it is the purpose of the Board to establish such an institution from the moneys it anticipated would be derived from the proceeds of the so-called Gross Sales Tax Bill which was enacted by the 1930 Session of the General Assembly; and he further states that there is no other fund or appropriation from which the necessary money can be obtained for this purpose.

He further states that neither the Kentucky State Reformatory at Frankfort nor the State Penitentiary at Eddyville owns any land which can be cultivated for the purpose of providing food for the inmates of the institutions and labor for the prisoners confined therein. He states that for the first six months of the fiscal year ending June 30, 1930, there was a daily average of 1,058 idle prisoners at the Kentucky State Reformatory at Frankfort and a daily average of 138 idle prisoners at the Kentucky State Penitentiary at Eddyville; and that this large number of idle prisoners is due to a population in excess of that for which work can be provided within the confines of the institutions as they exist today; and to the general business depression which has resulted in curtailment of production in the factories located within the prison walls. He states that it is the plan of the Board of Charities and Corrections to purchase, from the moneys it anticipated would be derived from the proceeds of the so-called Gross Sales Tax Bill which was enacted by the 1930 Session of the General Assembly, a large farm upon which unemployed prisoners

can be put to work for the purpose of producing food for the penal and other institutions of the State, and to erect thereon, at the proper time, a modern reformatory in which can be housed prisoners convicted of minor felonies. He states there is no other fund or appropriation from which the necessary money can be obtained for this purpose.

Affiant further states that there is no Women's Prison or Reformatory in Kentucky, and that women who are convicted of felonies are confined in a separate department of the Kentucky State Reformatory at Frankfort on a small V-shaped tract of ground, upon which the cell house for women is located, but that the proximity of the men's section renders discipline difficult and conditions unsatisfac- [fol. 681] tory. He states that the cell block in the Women's Department is of old type construction, and that the cells contain no sanitary conveniences; neither do they contain toilets or running water. He states that because of the limited capacity of the Women's Department, it is necessary to confine two women in one cell; and that in some instances it has been necessary to provide beds for women prisoners on the cell block walks, placing the mattresses and bed clothing on the floor of the walk and removing them each morning before the inmates in the cells can leave the cells. He states that the Women's Department, because of its crowded condition, is a serious fire hazard to the entire institution. He states that the State Board of Charities and Corrections has planned to remedy these conditions from the moneys it anticipated would be derived from the proceeds of the so-called Gross Sales Tax Bill which was enacted by the 1930 Session of the General Assembly.

He further states that the increase in population at the seven institutions under the control of the State Board of Charities and Corrections is unprecedented, and that the institutions now house the largest number of inmates in the history of the State; but that the increase in population has been reflected over a period of ten years at an increasing yearly rate, and that there is no immediate prospect of any relief from the growing number of commitments. He submits that the average populations of these institutions by years, beginning with the fiscal year ending June 30, 1921, has been as follows:

Year ending June 30	Average population
1921	6,762
1922	6,998
1923	7,570
1924	7,560
1925	7,877
1926	8,086
1927	8,208
1928	8,351
1929	9,106
1930	9,530
*1931	10,194

* First six months.

[fol. 682] Affiant further states that architects have been employed by the State Board of Charities and Corrections who have drawn plans for the enlargement and improvement of buildings and the construction of new buildings for the purpose of relieving the present existing conditions, but the State Board of Charities and Corrections has been prevented from putting said plans into effect because of litigation which has been commenced affecting the validity of the so-called Gross Sales Tax Bill, enacted by the 1930 Session of the General Assembly, from the proceeds of which it was planned and contemplated to make the improvements which are necessary.

Further the affiant saith not.

STATE OF KENTUCKY,
County of Franklin, Sct.:

On this the 13th day of February, 1931, personally appeared before me, B. T. Brewer, who signed the foregoing affidavit in my presence and made oath to the truth of the statements therein contained.

—— ——, Notary Public, —— Co., Ky. My Commission expires on the — day of ——, 193–.

[Title omitted]

Narrative of Testimony of Walter Burr Given Before Alma Rhead February 7, 1931

WALTER BURR testified as follows:

That he has been professor of Rural Sociology in the University of Missouri since September 1, 1929. That he has been a graduate of Kansas State Agricultural College and of the University of Missouri. That prior to teaching he was connected with the Department of Agriculture in the capacity of Rural Organization Specialist and from time to time during the eight years he has acted as teacher, he conducted research projects for the Department of Agriculture, these research projects including the study of farm families receiving poor relief from County funds. That he is the author of magazine articles and three books, the books being "Rural Organization", "Small Towns and Estimate of Their Trade and Culture", and "Community [fol. 683] Leadership". That he has made a special study of rural trade and has been frequently called in as an advisor in Kansas and Missouri and in surrounding States in regard to problems of community organizations. That he is familiar with the transition which has taken place in the methods of distribution of goods and wares, a phase of which change is found in the introduction of store distributing centers in communities that are controlled from outside the community. That this change is known as the "chain store system", which system undertakes through organized efficiency methods to distribute commodities to the public as distinguished from the retail store owned and managed by a local individual. That the multiple owned store companies attempt through efficiency methods to get the goods to the consumer at the lowest possible price. That these multiple owned store companies come into competition with the individual who has performed other functions in the community in addition to engaging in the merchandise business as coincident with the fact of his permanency, his residence, and his leadership as a business man in the community. That community life developed in the past to a considerable extent on the "mutual aid system". That the merchant group have

borne to a considerable extent the responsibility of the conservation and development of community resources including civic and social resources such as relieving distress of an economic nature in the community, looking after the interests of the school beyond that which is looked after by the responsible leaders and paid out of taxation, the general cooperation and looking after problem people in the community, the support of the churches and the conducting of civic movements. That the individual merchants have borne the major part of the cost in time, money and service in order to keep the good will of the people and to be successful. That as a result of the introduction of the change in the method of distribution the burden carried by the individual merchant is falling upon the State and being met by taxation as for example, the relief of poverty in the health situation which is now coming to be considered as "health prevention". That the County health unit is being introduced, supported partially by the State in matters of vocational training where here-
[fol. 684] tofore they were on an apprenticeship basis and are now being introduced in high schools under support of federal funds under the "Smith-Hughes Act". That the tendency for communities under the less personal system is to be more ready to send their problem people such as insane, feeble-minded, epileptic, and criminal to State institutions rather than to look after them in the community thereby imposing an added burden upon the State, which must be met from the tax funds. That the multiple owned stores are not bearing locally the burden which heretofore was borne by the individual store owner for the reason that the manager of the multiple owned store is likely to be temporary in the community. That transient persons do not get under the civil, social burdens of the community in which they go into. That they devote their time and attention to reach the objective in distributing food at the lowest possible cost and for this reason cannot devote any time for community enterprises. That the managers of the multiple owned stores do not have the power of decision in expending funds of the company for such purposes.

That the service which was rendered and is being rendered by the individual store owner had a decided value in money to the State both from an economic standpoint

in that the problems of such are handled in their origin in a local community and therefore do not become an expense to the State, and also from a social standpoint in increasing the high standards of living and culture thereby creating more progressive and prosperous citizens. That the service rendered by the individual merchant can be reckoned in dollars and cents and is necessarily an expense against his business.

That individual merchants do not sell their goods at the same price as chain stores and that the service rendered by the individual merchant is a factor in this price difference. That insanity, feeble-mindedness, and epilepsy are not actually increasing but that the number of reported cases is larger due to increase in registration.

Cross-examination:

That he graduated from the University of Kansas in 1920 and that prior thereto he was in settlement work in [fol. 685] Chicago, Juvenile Court work in Kansas City, and settlement work in San Francisco. That all his work in these three cities was work done in large industrial centers. That during the years 1914 to 1920 he travelled about the State of Kansas dealing with community problems of various kinds, town-country relations and conflicts, rural High School developments, consolidation of schools and formation of cooperative associations. That he has had no business experience of any kind.

That he has never lived in or been in Kentucky except to pass through. That he has never made any study of business or retail distribution in the State of Kentucky. That he would define a chain as a system of retail distribution so organized that instead of the business being conducted through one store it is conducted through two or more stores.

That in certain places where the owner of the multiple system, lives and has some of his stores, those particular stores may be said to be home-owned even though they are a part of a chain store system and that some chain stores are home-owned and some are not.

That the change in the trend of rural life has been going on for a great number of years and was so marked that when Roosevelt was President he appointed the "Country Life Commission" to make an investigation. That

chain store systems have extended their operation very rapidly in the last few years but that the Great Atlantic & Pacific Tea Company had a great number of stores in 1900. That since the war there has been a development in manufacturing which is characterized by the expression "massed production" which has necessitated mass distribution. That he is not opposed to the chain store system. That he is not opposed to the sending of problem cases to institutions. That we are changing from the dependence upon the individual ownership to dependence upon the State. That coincident in point of time with the growth of the multiple outlet stores there has been a slowing up in the rate of the movement of population from rural areas to urban areas. That individual owned stores are copying such efficiency methods from the multiple owned store operators as they can introduce into their system. That he would not in the long run advocate the retention in our [fol. 686] economic system of any waste or inefficiency in the distribution of merchandise.

That he has had no practical experience in the collection of taxes or in working for any tax body. That he has made a wide study of taxes in order to give advice to rural communities.

That both the individual store owner and the chain store operator purchase their merchandise very largely outside of the community. That there is no difference which can be based upon the fact that one sends in its stock of merchandise and the other orders it in. That the local merchant does purchase certain of his product from surrounding farm areas. That generally speaking, the chain store has developed sales efficiency methods that enable it to undersell the average individual local merchant. That the economic and efficient distribution of food has a value and benefit to the community to the extent that it does not in the long run break down community civic, educational, social and religious organizations.

That efficiency does not necessarily depend in any sense upon whether a man owns one or two stores.

That he is familiar with the development of cooperative or voluntary chains in the United States especially with Independent Grocers' Alliance. That that organization has approximately ten thousand cooperative stores. That all those stores have distinctive and uniform store

fronts bearing I. G. A. labels. That the interior arrangements of these stores are substantially similar and that they use the same color in all ten thousand stores. That they have some peculiar I. G. A. brands. That the ten thousand stores purchase, advertise and distribute cooperatively. That they are advised by men from the central headquarters and that membership in these cooperative stores is open to every individual grocery store. That members of the co-operative or voluntary chain are considered individual home-owned stores. That the difference between the multiple outlet stores and individual stores in regard to buying power does not depend upon the ownership of two or more stores but upon the volume of business. That his chief point in regard to the change from individual home-owned stores to chain store operations is that the individual store owner performs certain civic func-
[fol. 687] tions and that the individual store owner is being supplanted by another system which other system must bear the burdens of individual store owners. That all differences with relation to distribution price and purchasing power have been met by the cooperative or voluntary chain except the difference in regard to civic interest. That there is a variation among individual store owners in regard to whether they are charitable or not. That there is a variation among individual store owner as to their liberality and that there is a variation among men as to their ability to lead the public. That some individual merchants in small towns support churches and some do not. That some individual merchants support the public schools and some do not. That he is familiar with instances where managers of J. C. Penny stores have contributed to charitable, civic, philanthropic, church, and educational movements as liberally as the corresponding competitive merchant. That he would not make any statement that the chain store managers as a whole are uncharitable and lack leadership or interest and do not live in or care about the community. That he knows of no study undertaken to determine how many chain store managers own their own homes in the towns in which they live. That he has no statistics in regard to contributions made by store managers regardless of the ownership of the stores in the State of Kentucky to charitable, philanthropic or civic enterprises. That he has made no study of the part taken

in civil affairs by store managers in the State of Kentucky regardless of the ownership of the stores. That he has made no study and has no facts within his personal knowledge as to whether or not managers of stores regardless of ownership, frequently move from the community where the store is located. That he has no knowledge as to whether managers of stores operated by J. C. Penny in the State of Kentucky have power to spend company funds for philanthropic purposes. That there has been an increase in the rate of commitments to asylums from big cities as well as from small towns and rural communities. That he does not advocate the taking care in the private home of those who require custodial care. That he does not accuse the chain stores or multiple outlet stores of causing insanity or epilepsy.

[fol. 688] That lower prices resulting from economic efficiency and sales increases the purchasing power of the consumer's dollar, and that practically every item that is a member of rural community purchase, including all necessities of life, is distributed through multiple outlet stores.

That in a town of approximately 2500 there would be about 600 families and about 20 to 40 retail stores serving such a community. That the average family would purchase from these stores approximately $900.00 worth of goods per year. That he has no idea what the average contribution of the individual home-owned store proprietor would be in a town of approximately 2500 inhabitants. That in such a town of 2500 inhabitants and 600 families with an average purchase of $900.00 per family, the total purchases would amount to $540,000.00 per year and assuming that efficiency results in a ten per cent saving, there would be a total saving to the community of $54,000.00. That if the saving was only five per cent the total sum saved the community would be $27,000.00.

That in a town of 5000 inhabitants there would be about 1000 families and that upon the same assumption as to purchases and savings due to efficient distribution of merchandise there would be a saving of $90,000.00 or a saving of $45,000.00 if the efficient distribution of merchandise resulted in a five per cent savings.

Redirect examination:

That taking the individual store owner as a class and those who operate multiple outlet stores in various communities, the burden of social service has fallen on the individual merchant owning and managing a store in the small town. That the burden is in the process of shifting and that part of it is still being borne by the individual store operator. That even if one assumed that chain store operation resulted in a saving to the community of some $54,000.00, it does not necessarily follow that the community would be that much better off at the end of the year than if it had made those purchases from the individual store owner. That he has never heard of either the Great Atlantic & Pacific Tea Company or the Kroger Grocery & Baking Company ever donating any hospitals or old homes to the community in which they do business. That [fol. 689] the time and energy expended by the individual local merchant is the greatest contribution to the community. That he found it more profitable in his experience in advising communities in regard to their social problems to call on the individual merchants rather than the chain store managers. That he had received material response from chain store merchants in money but not in time. That he does not favor penalizing the multiple outlet store for subsidizing the home-owned store.

Recross-examination:

That he has discussed the general situation in regard to the matter in question with the Attorney General of Kentucky before he testifi-d but that no discussion was entered into as to the testimony. That he has studied the briefs in the case and that he was invited to come to testify by the Attorney General. That he was promised a reasonable fee for appearing as an expert witness.

It is agreed by and between counsel for the plaintiff and counsel for defendant that the foregoing is a correct narrative statement of the testimony contained in the deposition of Walter Burr taken before Alma Rhead, a Notary Public, on February 11, 1931 in Cincinnati, Ohio and introduced in evidence in the above entitled cause, and it is further agreed that this narrative form may be used as part of the record in the appeal to the Supreme Court of the United

States as a substitute for the deposition introduced in the Three-Judge Court.

—— ——, Attorney for Plaintiff. S. H. Brown, Attorney for Defendant.

[fol. 690] Jerry King

Jerry King called for the defendants testified as follows:

He was bookkeeper in the Treasurer's office of the Commonwealth of Kentucky and as such had charge of the books in that office. The records showed the following receipts in the general expenditure fund for the fiscal year ending June 30 as follows:

1926	$7,706,538.28
1927	8,059,517.85
1928	8,041,609.73
1929	9,970,769.20
1930	11,068,942.30
1931	11,573,065.01
1932	9,560,305.16
1933	9,502,871.52

Refunds for taxes erroneously paid are always paid in cash. Recent payments of refunds have been on inheritance taxes and beer licenses. These amounted to approximately $125,000.00 and are paid in cash without regard to outstanding warrants.

Cross-examination:

The witness has been connected with the Treasurer's office since January, 1932, and he knew nothing about the administration of affairs of the office except through previous records. He had no personal knowledge as to how refunds were handled prior to that time but he has never run across any case where refund was made other than by cash. He did not think that any warrants were ever issued in such cases and he had never run across any. Money is not paid out without a warrant, which is drawn and presented to the Treasurer. In some cases warrants are simply interest bearing. The figures the witness had given in his direct examination did not give account of

the liability outstanding against the general fund through 1926 and 1932. Actually, on June 30, 1933, there were outstanding against the general expenditure fund interest bearing warrants to the amount of $15,197,005.42. There were other outstanding warrants against the school fund and road fund. Beer tax refund has been paid. Before it [fol. 691] was paid it was kept in the general sinking fund and was set up as a beer license tax fund, having been set apart particularly, so much money being kept in the particular account. Witness considered this a minor fund coming under the general head "general expenditure fund." The refund was paid from one fund, the general expenditure fund, except there was a different set up for each account and it was paid out of the general account. Payment was made on warrants which they presented from the Auditor, which the Treasurer honored. The warrants showed that it was drawn against the account for beer license fund.

Witness thereupon exhibited a warrant drawn by the Auditor of Public Accounts upon the State Treasurer of Kentucky, dated June 27, 1933, stamped "Paid July 13, 1933." The warrant was for $7125.00 and was payable to G. J. Sheehan and others, $75.00 being due to each of the persons named. The witness stated that payment was made to the people named on the warrant. These persons had not brought any suit and had not recovered any judgment on the fund. At the time the payment was made there were over Fifteen Million Dollars worth of warrants outstanding. The oldest warrant had been outstanding since July, 1927.

Warrants drawn by the Auditor are all separately numbered. The one exhibited was designated No. F-12104. The witness stated that this warrant showed on its face that it was to be paid and charged to the beer license tax fund. The Treasurer, Mr. Huddleston, directed that payment should be made in cash for this particular warrant. He determined whether they should be paid out of order or not. The practice is to pay a warrant when it is presented if it is possible to pay it. If the money is low the Treasurer declines to pay it and turns it back to the holder, stamping it "interest bearing." To the knowledge of the witness the Treasurer pays warrants according to priority, either paying cash or stamping the warrant "interest bearing."

[fol. 692] There has been no time since January, 1932, when the State Treasurer was able to pay out of the general expenditure fund all of the outstanding warrants against that fund. The Treasurer has made two calls for interest paying warrants during the year preceding the time of the giving of the testimony. He called a couple of hundred thousand of outstanding warrants dated 1927. Calls for presentation of outstanding warrants apply to the oldest warrants. The two calls made by the State Treasurer did not embrace any warrants that were issued later than July, 1927. All warrants since July, 1927, remained unpaid and they are not paid by the State Treasurer except in order of their issuance when funds are available for that purpose. The only warrants which the State Treasurer has assumed to pay out of order are those which are not stamped interest bearing. In the case of those warrants the owner has to take a chance of getting his money when the State Treasurer has the money to pay. The latter cannot pay all the warrants outstanding which are not marked interest bearing and for this reason he must select some for payment.

Re-examination:

A warrant is merely an order of the Auditor of Public Accounts to the Treasurer of the State of Kentucky to issue a check to the designated payee for a given amount of money. Since the witness has been bookkeeper it has been the practice and custom to pay refunds of taxes in cash. Warrants are divided into two general classes. Those stamped "interest bearing" and those that are not stamped "interest bearing." There are approximately Fifteen Million Dollars worth of outstanding interest bearing warrants. Those warrants are not called ahead of claims against the general expenditure fund. A warrant issued in payment of a judgment or a claim for refund of taxes would be given a preference over the other outstanding warrants even though the latter were older. This has been the practice in refunding inheritance taxes, beer taxes and [fol. 693] other taxes that the court decided were improperly paid. The income into the State Treasurer's office runs from Seven Million to Eleven Million Dollars a year. Some money comes in every day. If a warrant for a sum as large as $200,000.00 would be presented sufficient money would be

accumulated in the fund to pay the warrant in cash within a week or ten days, provided no other claims were paid out of the fund during that period. The witness went on to say, however, that he did not know whether such a large warrant would be paid in the event other claims such as salary for State employees were presented.

If the warrant presented was marked interest bearing it would not be paid and might not be paid for a period of five or six years. Since the witness had been in the State Treasurer's office payments had not been made on interest bearing warrants except when there was a call and they were then paid in the order of their issuance.

SELDON R. GLENN, called for defendant, testified that he is collector of internal revenue for the District of Kentucky and has held that position for ten days prior to July 20, 1933 the date on which testimony was taken. Prior to that time he had been State Tax Commissioner for about ten years. As such, it was his duty to become familiar with the income and expenditures of the State Government. He was also familiar with the taxing laws of the State.

All taxes on personal property, all license taxes of every description make up the general expenditure fund. Between $6,000,000 and $8,000,000 of tax money was due the Commonwealth of Kentucky, which funds would go to the credit of that general expenditure fund when collected. These funds were in the process of collection at the time the testimony was given and witness stated there were no preferred claims against the fund. While the witness was State Tax Commissioner there were some refunds of taxes collected. It was the duty of the State Tax Commissioner to approve or reject refunds for inheritance taxes, license taxes, and whiskey taxes. A refund was made on whiskey of about $300,000 and the refund of more than that amount was made on inheritance taxes. The month preceding the time the testimony was given a refund of $140,000 on license taxes on beer was made.

[fol. 694] All of the refunds were made by check. It would be possible for the State Treasurer to refund any amount up to $5,000,000 to any person who improperly paid taxes within a reasonable time after such refund was ordered if

the refund was made a preferred claim against the general expense fund. This statement of the witness was objected to by counsel for the plaintiff.

Refunds have always been treated as preferred claims. The question which led to this reply was objected to by counsel for complainant on the ground that it was a question of law whether the refund was entitled to preference.

Money comes into the general expenditure fund gradually.

Cross-examination:

Witness recalled testifying in the Franklin Circuit Court in the case of Lebus vs. Ruby Laffoon, Governor, et al., on May 23, 1932, which involved the validity of the $14,000,000 proposed bond issue. In that case he was called upon to estimate the amount of taxes that might accrue to the State under the gross sales tax law which was the subject matter of the instant case. Witness' recollection was that he estimated that the State would realize about $500,000 a year from the gross sales tax law. Witness' recollection was refreshed by reference to the answer which he gave which read as follows:

"There is the litigation which is known as the gross sales tax, which has been won in the district federal court and the circuit court of appeals and is now before the Supreme Court of the United States, which involves $400,000 of past due taxes and about $400,000 more which will be due during the next biennial period and the amount of that tax would lessen, etc."

Witness recalled making this statement.

The last call for interest bearing state warrants was issued by the State Treasurer in February, 1933. Witness did not know whether any warrants issued since July, 1927, had been called for payment. During the year 1932 the range in price of interest bearing state warrants drawn against the general expenditure fune ran from eighty-three to ninety-three. During 1932 it was around ninety.

[fol. 695] Tax refunds during the past few years have been made when presented.

R. C. Ilg, called for defendant, testified that he is manager of Ernst and Ernst, public accountants and is —

charge of the Louisville branch. As such he was consulted by the State Tax Commission of the State of Kentucky with reference to making a survey of the books of the Kroger Grocery & Baking Company. On June 20, 1933 his firm was employed to make a survey of the Kroger Grocery & Baking Company to determine the amount of work necessary to arrive at the various figures testified to by Mr. Morrill. The survey was not made. Representatives of his office discussed the matter with the Tax Commission and spent two days in Cincinnati for the purpose of making the survey. On June 22, in connection with Mr. MacArthur, manager of the Cincinnati office, representatives of his firm called on Mr. Ginter of the firm of Nichols, Morrill, Wood, Marx & Ginter, counsel for the Kroger Company who took them over to the general office of the company and introduced them to Mr. Clark, the chief accountant. They discussed the purpose of their visit with Mr. Clark and he furnished them with all the information that they thought was necessary and after looking at the records by four week periods, and various details of the operation of the various Kroger Grocery and Baking Company stores, particularly those branches controlling the operation of Kentucky stores, the examination disclosed that Kroger had five branches doing business in Kentucky. These were located at Carbondale, Ill.; Charleston, W. Va.; Cincinnati, Ohio; Louisville, Ky.; and Nashville, Tenn.

The records that they examined of the general office reflected only the operation of these various stores that were handled at the branches mentioned. For example, the Cincinnati branch office controlled the stores operated in Cincinnati, Hamilton, Covington and Newport and nearby districts. From their examination of the records that were submitted, they could not determine just what the Kentucky stores as a whole were doing in the way of operation. This was one of the purposes of their visit, to determine what [fol. 696] break-down was necessary. By break-down witness meant analysis of sales and various expenses for the purpose of showing gross profits, net profits, etc. They did not go into detail of stores operated 1930, 1931, and 1932, but at the close of 1933 Kroger was operating 249 stores out of the various branch offices, 165 of which had meat departments. The operation in the meat departments were detailed just the same as the store operation. That

meant that the witness had 414 store operations to analyze. Out of all the stores over which the Cincinnati branch had supervision, there were 75 located in Kentucky over which the branch had jurisdiction. The same thing applied to Louisville. That branch had charge of stores located in Indiana. It supervised 152 stores, doing business in Kentucky, 101 of which had meat departments.

Operating statements made up by Kroger would show grocery sales, cost of sales, gross profit, and the meat department would contain the same information. The statement would also show total sales of both departments and gross profits of both departments. The classification covering grocery expenses then follows and there was deducted the grocery expenses from grocery profits. To the grocery and meat departments are applied certain general expenses under the classifications, fixed expenses, total store expenses, and other expenses. The stores are charged with branch operating expenses and branch overhead expenses. Branch overhead includes general expenses, supervisory expenses, transportation expenses, warehouse expenses, sales promotion, advertising purchasing expense, and administrative expense. They estimated 128 accounts represented in every store operation and his firm further estimated that it would take five men at the Cincinnati branch, five at Louisville, two at Carbondale, and possibly one at Memphis approximately forty days to gather up the detailed information and possibly ten to twelve days to compile the data. The cost would run approximately $8,000 to $10,000. When the State Tax Commission was advised of the expense they determined to hold the matter in abeyance.

[fols. 697-669] Elam. Huddleston, called for defendant, testified that he is the Treasurer of the State of Kentucky, having taken office January 4, 1933. His term will expire, January, 1936. As Treasurer he is the disbursing officer of the Commonwealth. All checks given for the State government are written in his office under his directions. Since he has been Treasurer there have been refunds made to persons who pay taxes, when in fact no taxes were due. These refunds were made in cash.

Witness thought that the $1,000,000 which was the approximate amount of the claims from the State which the

plaintiffs would be entitled to in the event they paid and prevailed in a later action, could be refunded immediately. He has impounded or places in escrow all funds of appreciable amount so that he can refund them when the court decides that the payment was wrongfully exacted. This is what he did with the beer money. He impounded it when it was paid and paid it back immediately. So far as he has observed, the general custom of the State with reference to paying refunds has been cash. Recently he had made refunds in the neighborhood of $200,000. Other refunds have been made from time to time and they are being constantly made.

[fol. 700] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION AS TO PRINTING RECORD—Filed October 9, 1934

STATEMENT OF POINTS

The appellant in the above entitled cause states that the points upon which it intends to rely in this court are that the United States District Court for the Eastern District of Kentucky erred in dismissing the plaintiff's bill of complaint in the following particulars:

Point 1. In failing to hold that the challenged act designedly denies to appellant and to other retail merchants similarly situated the equal protection of the laws for the reason that the challenged act imposes upon the appellant a grossly excessive and disproportionate tax burden and at the same time exempts from the burdens of said taxing law competitors engaged in the same business and for the further reasons set forth in assignments of error numbers one to five inclusive.

Point 2. In failing to hold that the challenged act by reason of its classifications, exemptions, credits, disproportionate and widely varying rates of taxation, arbitrarily and unreasonably discriminates against the appellant and other retail merchants similarly situated to such an extent that the appellant is required to pay a higher tax on Thirteen Million ($13,000,000) Dollars of sales than twenty-four [fol. 701] thousand merchants similarly situated are re-

quired to pay upon Three Hundred and Sixty Million ($360,000,000) Dollars in sales. (Assignment of Errors 1 to 5 inclusive.)

Point 3. In failing to hold that the challenged act is unconstitutional and void by reason of the fact that it violates the Interstate Commerce clause of the Federal Constitution by reason of the fact that it imposes a tax upon merchants who sell in the State of Kentucky farm products raised by them outside of that state and exempts merchants selling in the State of Kentucky farm products raised by them in that state. (Assignment of Errors 6, 7 and 9.)

Point 4. In failing to hold that the challenged act is void because it is a burden on Interstate Commerce. (Assignment of Errors 7.)

Point 5. In failing to hold that in the event the construction of the statute adopted by the Court of Appeals of Kentucky in the case of Moore v. State Board of Charities and Corrections, 239 Ky. 729, was binding on the United States District Court in consideration of appellant's case, that under such circumstances the challenged act was void and denied the appellant and other retail merchants similarly situated the equal protection of the laws for the reason that under such construction merchants engaged in selling garden and farm products raised by them are exempted. (Assignment of Errors 10.)

Point 6. In failing to hold that in the event the construction adopted by the Court of Appeals of Kentucky in the case of Moore v. State Board of Charities and Corrections, 239 Ky. 729, was binding on the United States District Court in the consideration of appellant's case, that under such construction the appellant was exempt and was not required to pay the tax. (Assignment of Errors 11.)

[fol. 702] Point 7. In failing to hold that the tax levied by the challenged act is confiscatory and deprives the appellant of property without due process of law. (Assignment of Errors 12, 14 and 15.)

Point 8. In failing to hold that the challenged act is void under the Constitution of Kentucky. (Assignment of Errors 13.)

The Kroger Grocery & Baking Company, by Robert S. Marx, Frank E. Wood, John C. Doolan, James W. Stites, Harry Kasfir.

October 6, 1934.

Service of a copy of the above list of points to be relied upon by appellant in the Supreme Court of the United States of America is hereby accepted and acknowledged on behalf of the several defendants and appellees mentioned hereinabove.

John B. Lewis, W. P. Sullivan and Emerson Beauchamp, individually and as members of the State Tax Commission of the Commonwealth of Kentucky, and J. Dann Talbott, individually and as Auditor of Public Accounts of the Commonwealth of Kentucky, by S. H. Brown.

[fol. 703] STATEMENT OF PORTION OF RECORD TO BE PRINTED BY CLERK

The appellant in the above entitled case states that in its opinion the entire record as filed is necessary for the consideration of this case and should be printed by the clerk for the hearing, with the exception of the following documents, all of which may be omitted:

(1) Order of submission filed February 13, 1931.
(2) Order listing parties protected, filed March 28, 1931.
(3) Order and decree filed December 10, 1931.
(4) Order substituting party defendant, filed March 1, 1932.
(5) Mandate filed December 10, 1932.
(6) Order setting aside former decree, filed December 10, 1932.
(7) Agreed order filed December 20, 1932.
(8) Agreed order filed January 9, 1933.
(9) Order approving bonds filed Feb. 3, 1933.
(10) Order substituting party filed August 31, 1933.
(11) Bond on appeal filed Sept. 12, 1934.
(12) Citation and proof of service, filed September 12, 1934.
(13) From the exhibits attached to the testimony of Albert H. Morrill, omit all pages that are marked "(X—do not print)."

(14) Order approving statement of evidence.
(15) Clerk's certificate.

The Kroger Grocery & Baking Company by Robert S. Marx, Frank E. Wood, John C. Doolan, James W. Stites, Harry Kasfir.

[fol. 704] October —, 1934.

Service of a copy of the above statement of the portion of the record to be printed by the clerk is hereby accepted and acknowledged on behalf of the several defendants and appellees mentioned above.

John B. Lewis, W. P. Sullivan and Emerson Beauchamp, individually and as members of the State Tax Commission of the Commonwealth of Kentucky, and J. Donn Talbott, individually and as Auditor of Public Accounts of the Commonwealth of Kentucky, by B. P. Wootten, Atty. Gen., S. H. Brown, Asst. Atty. Gen.

[fol. 705] [File endorsement omitted.]

Endorsed on cover: File No. 39,085, E. Kentucky, D. C. U. S. Term No. 457. The Kroger Grocery & Baking Company, Appellant, vs. John B. Lewis, W. P. Sullivan and Emerson Beauchamp, individually and as members of the State Tax Commission of the Commonwealth of Kentucky, et al. Filed October 9, 1934. File No. 457, O. T., 1934.

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1934.

No. 454.

THE STEWART DRY GOODS COMPANY,

vs. *Appellant,*

JOHN B. LEWIS, W. P. SULLIVAN AND EMERSON BEAUCHAMP, INDIVIDUALLY AND AS MEMBERS OF THE STATE TAX COMMISSION OF THE COMMONWEALTH OF KENTUCKY.

No. 455.

FRED LEVY ET AL.,

vs. *Appellants,*

JOHN B. LEWIS, W. P. SULLIVAN AND EMERSON BEAUCHAMP, INDIVIDUALLY AND AS MEMBERS OF THE STATE TAX COMMISSION OF THE COMMONWEALTH OF KENTUCKY.

No. 456.

THE J. C. PENNEY COMPANY,

vs. *Appellant,*

JOHN B. LEWIS, W. P. SULLIVAN AND EMERSON BEAUCHAMP, INDIVIDUALLY AND AS MEMBERS OF THE STATE TAX COMMISSION OF THE COMMONWEALTH OF KENTUCKY.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

No. 457.

THE KROGER GROCERY & BAKING COMPANY,
Appellant,
vs.
JOHN B. LEWIS, W. P. SULLIVAN AND EMERSON BEAUCHAMP, INDIVIDUALLY AND AS MEMBERS OF THE STATE TAX COMMISSION OF THE COMMONWEALTH OF KENTUCKY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

STATEMENT AS TO JURISDICTION.

(A) This appeal is taken pursuant to Judicial Code, Section 266, U. S. Code, Title 28, Section 380, from a final decree by a statutory court of three judges convened to hear the above styled cause and all motions therein, after an application had been made for an interlocutory injunction to restrain the appellees from enforcing Chapter 149 of the Acts of the General Assembly of the State of Kentucky at its 1930 session. The statutory court having granted the motion for an interlocutory injunction upon final hearing entered its decree denying a permanent injunction and dismissing the bill of complaint, but continued the interlocutory injunction in effect pending the hearing of this appeal.

(B) The statute of the State of Kentucky, the validity of which is involved herein, is Chapter 149, officially published at pages 475 to 482 of the Acts of the General Assembly of Kentucky at its 1930 regular session. The said statute, commonly known as the Kentucky Gross Sales Tax Law, is

set out in full in the bill of complaint and its substantial provisions are set out in the opinion of the court. The statute undertakes to levy an annual license tax upon retail merchants as defined in the statute, computed on the amount of gross sales of such merchant at rates varying from one-twentieth of one per cent of such merchant's gross sales below $400,000 to one per cent of such merchant's sales in excess of $1,000,000, and permitting such merchant to take credit on the amount of any tax levied under such act for the amount of any other special license, excise, occupational or corporation license tax, not to exceed the amount of the tax levied under said act.

(C) The decree appealed from was entered June 19, 1934. Application for appeal was presented September 12, 1934.

This case was before the Supreme Court on appeal from the previous decree of this court denying an interlocutory injunction and denying a permanent injunction and dismissing the bill of complaint on the ground that the plaintiff had an adequate remedy at law. Upon such previous appeal, the said decree was reversed. *The Stewart Dry Goods Company* v. *Lewis et al.*, 287 U. S. 9.

The former appeal of *The Stewart Dry Goods Company* v. *Lewis et al.* (*supra*) was heard in the Supreme Court together with No. 28, *Levy et al.* v. *Lewis et al.*, No. 29, *The J. C. Penney Company* v. *Same*, and No. 30, *Kroger Grocery & Baking Company* v. *Same*, one opinion having been written for all four cases (287 U. S. 9).

This suit was brought by plaintiff against the defendants, public officials of the Commonwealth of Kentucky, to enjoin them from enforcing or executing against plaintiff and other taxpayers similarly situated the provisions of Chapter 149 of the Acts of the General Assembly of Ken-

tucky at its 1930 session on the ground that such statute was violative of the Federal Constitution and the State Constitution in various respects as set forth in plaintiff's bill of complaint. Plaintiff sought and obtained a restraining order, and pressed to a hearing its application for an interlocutory injunction to restrain the appellees from enforcing said act.

A statutory court of three judges was convened and heard said cause and all motions therein pursuant to the provisions of Section 266 of the Judicial Code, as amended (United States Code, Title 28, Section 380).

Among the many cases believed to sustain the jurisdiction of the Supreme Court on appeal are:

Stewart Dry Goods Co. v. *Lewis et al.*, 287 U. S. 9.
Interstate Busses Corp. v. *Blodgett*, 276 U. S. 245.
Smith v. *Wilson*, 273 U. S. 388.

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Nos. 454-7

Supreme Court of the United States

OCTOBER TERM, 1934

THE STEWART DRY GOODS COMPANY,
No. 454 v. *Appellant,*
JOHN B. LEWIS ET AL.,
Appellees.

FRED LEVY ET AL.,
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J. C. PENNEY COMPANY,
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JOHN B. LEWIS ET AL.,
Appellees.

THE KROGER GROCERY & BAKING COMPANY
No. 457 v. *Appellant,*
JOHN B. LEWIS ET AL.,
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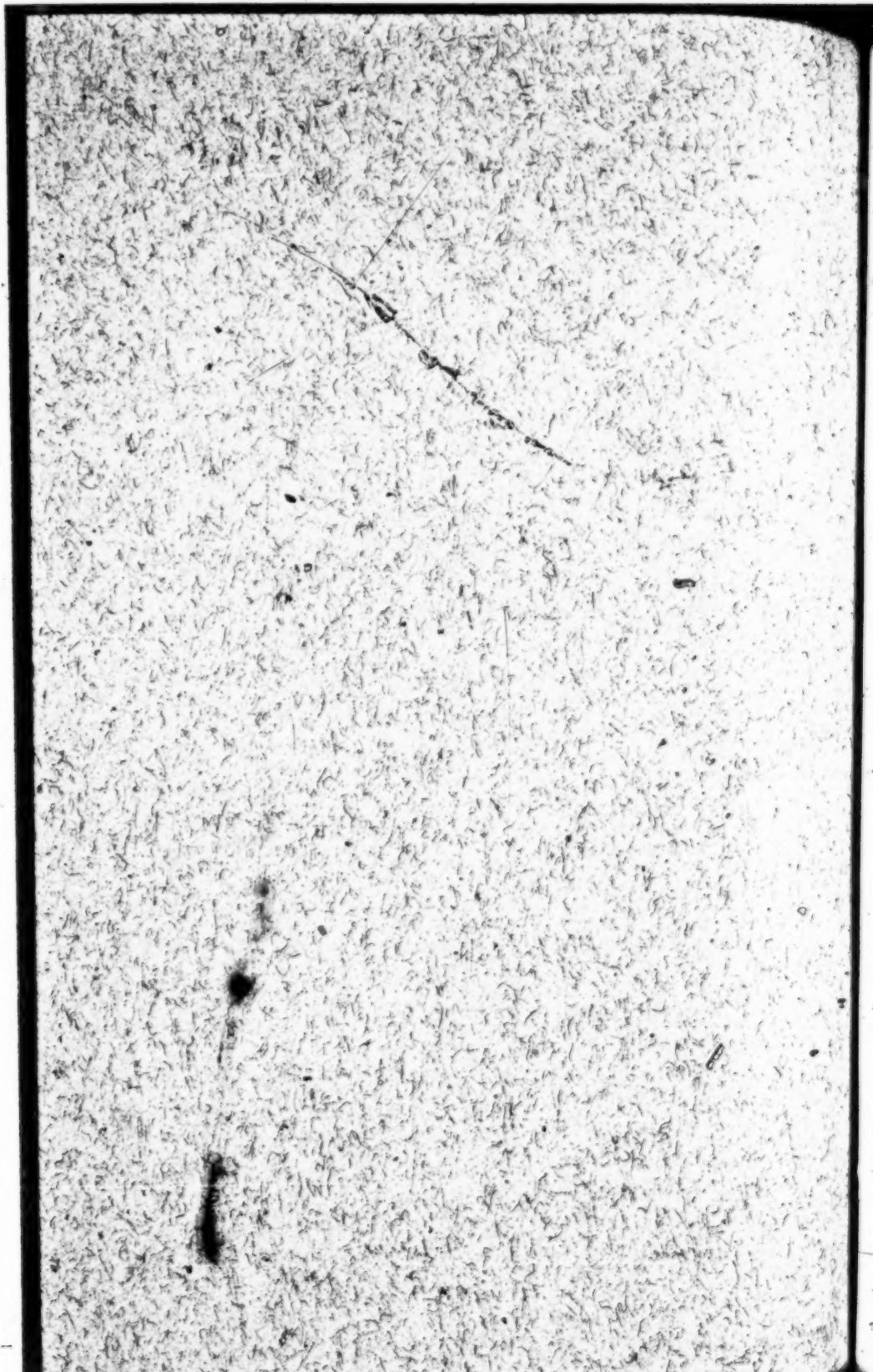

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Supreme Court of the United States

OCTOBER TERM, 1934

THE STEWART DRY GOODS COMPANY,
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No. 454 v.

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Appellees.

FRED LEVY ET AL.,
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Appellant,

No. 456 v.

JOHN B. LEWIS ET AL.,
Appellees.

THE KROGER GROCERY & BAKING COMPANY
Appellant,

No. 457 v.

JOHN B. LEWIS ET AL.,
Appellees.

STATEMENT OF CASE

Appellants, who were plaintiffs below, prosecute these appeals from judgments of a statutory three-judge District Court, one of the Judges dissenting, dismissing four Bills of Complaint in which appellants sought an injunction and

challenged the validity of the Kentucky Gross Sales Tax Law (Acts of 1930, Chapter 149, pages 475 to 482) on Federal and State Constitutional grounds.

The challenged tax is not a chain store tax. It is a gross sales tax. It imposes a tax burden on retail sales transactions and measures the amount of tax on the gross sales price. It is not directed at sales of corporations, but falls on corporations and individuals alike. The tax is not uniform or proportionate. The rate arbitrarily increases with volume. On the face of the act a sale by appellants is taxed at a rate twenty times the rate imposed on the sale of the same article at the same price made by the other merchants of the State. In practical operation and effect, as shown in the record, a sale by one of the appellants is taxed, and a similar sale by another merchant is not taxed.

The appellants represent four different types of retail merchants aggrieved in their own particular way by the act in question.

Upon the first hearing the District Court dismissed the Bills of Complaint on the sole ground that the complainants had an adequate remedy at law. Appeals were prosecuted to this court, and upon a former hearing this court reversed the lower court and remanded the causes for further proceedings in accordance with its opinion. (*Stewart Dry Goods* v. *Lewis et al.*, 287 U. S. 9 [1932].)

The cases were subsequently retried. The court found that the remedy at law was inadequate (Finding of Facts, Stewart R. 393; Kroger R. 143) but dismissed the Bills of Complaint on the merits. A majority of the court, Judges Hicks and Dawson, held that the challenged act was constitutional. 7 Fed. Supp. 438. Judge Cochran dissented. 8 Fed. Supp. 396.

From this decision these appeals are prosecuted under Section 266 of the Judicial Code.

The "Statement as to Jurisdiction" has been duly filed under the rules, and this court has noted probable jurisdiction.

The interlocutory injunctions originally granted to the appellants restraining appellees from collecting the tax assessed under the challenged act have been continued in force in accordance with the customary practice (Stewart R. 403, Kroger R. 152), and the appellants have deposited United States Bonds or given other security satisfactory to the State of Kentucky in the amount of approximately $1,200,000.00, the estimated amount of tax assessable against them under the challenged act for the four years that it was in operation. (Stewart R. 406, Kroger R. 156.)

Findings of Fact and Conclusions of Law were made and are contained in the record and will be subsequently referred to. (Stewart R. 393, Kroger R. 143.)

Since the decision below the challenged act was repealed, effective July 3, 1934. In place of the discriminatory act complained of in the cases at bar, the Legislature adopted a uniform and equal Sales Tax. (Carroll's Kentucky Statutes, Secs. 4281v-1 to 19.) The new law is not subject to any of the constitutional objections which we contend are fatal to the repealed law.

However the Legislature did not repeal the challenged act for the period from March 17, 1930, to July 3, 1934. Hence the appellants are still subject to the heavy punitive provisions of the old law for the period involved and will be required to pay approximately $1,200,000.00, unless the repealed law is held invalid (Carroll's Kentucky Statutes, Sec. 4202a-23).

SPECIFICATION OF ASSIGNED ERRORS AND POINTS RELIED UPON

The statements of points relied upon by the appellants for reversal of the lower court decision have been duly

filed in accordance with the rules. (Stewart R. 413, Kroger R. 575, Penney R. 162, Levy R. 162.) These points are based on appropriate assignments of error. (Stewart R. 407, Kroger R. 158, Penney R. 156, Levy R. 156.)

The assigned errors which we intend to urge may be briefly summarized as follows:

1.

The challenged act deprives the appellants of the equal protection of the laws:

(a) It arbitrarily singles out for taxation every retail sale made by appellants and intervenors, and on the face of the act it levies a tax on the sale at a rate twenty times the rate imposed upon similar sales when made by ninety-nine per cent of the other retail merchants of the State.

(b) Due to the arbitrary credits allowed under Section 4 of the act, in practical operation and effect the discrimination shown on the face of the act is increased, with the result, as shown by the evidence in the record, that every retail sale of appellants is taxed, and the retail sales of nearly all the other merchants in the State are untaxed.

(c) The sales of individuals and partnerships engaged in the business of selling at retail are discriminated against in favor of similar sales made by corporations, for, under Section 4 of the act, corporations are permitted a credit on the sales tax in the amount of the corporate franchise taxes paid.

(d) The attempted classification of sales according to annual volume in eight separate brackets, according to Section 2 of the act, and the levying of a rapidly multiplying rate of taxation on each successive $100,000.00 of sales above $400,000.00 is arbitrary, discriminatory, oppressive and unsupported by any factual basis.

(e) The challenged act exempts from taxation all the sales of retail merchants who are engaged in "gardening

or farming and selling garden or farm produce raised by them in this state." (Section 1.) As written, this exemption discriminates against the sales of farm products raised in other States. Appellant Kroger raises farm products in Ohio and sells them in Kentucky. As construed by the lower court, all the sales of a merchant are exempt from tax if he sells any farm products raised by him. The sale of the farm products is not only tax exempt, but the fact that he sells such farm products exempts all of his other sales.

2.

The challenged act was designed and intended to tax the sales of appellants because their annual sales volume is over $400,000.00, and to exempt from taxation the sales of 99% of the merchants of the State because their annual sales volume is less than $400,000.00. It was designed and intended under the guise of taxation to destroy appellants and aid their competitors, thereby denying the appellants the equal protection of the law and taking their property without due process of law contrary to the Federal Constitution and the Bill of Rights of the Kentucky Constitution.

3.

The challenged act lays an unconstitutional burden on interstate commerce. It discriminates against farm products raised in other States and taxes interstate transactions.

4.

The lower court adopted a construction of the provisions of the challenged act regarding the sales of merchants who sell farm products raised by them (Section 1) which places all the sales of appellant Kroger within the exempted clause since it is actually engaged in selling farm products raised by it. This construction, if approved, would entitle the appellant Kroger to an injunction against the enforcement of the law upon any of its sales, thus resulting in

taxing the sales of the Great Atlantic & Pacific Tea Company, an intervenor, and exempting from taxation the sales of its competitor, Kroger, because Kroger raises farm products and A. & P. does not.

THE CHALLENGED ACT

The challenged act is printed as an appendix to this brief. It also appears in each record at page 6.

According to its terms the act relates to "revenue and taxation," so that it must be considered a "revenue" as distinguished from a "license" measure. The lower court found it to be a revenue act. (Stewart R. 395; Kroger R. 145.) It is called "an excise or license tax" (title of act), and in Section 2 it is termed "an annual license tax." It is also inferentially referred to in the act as an occupational or privilege tax, because it states in Section 2 that every retail merchant shall pay "an annual license tax for the opening, establishing, operating or maintaining of any store or stores." It is universally referred to as the "Kentucky Gross Sales Tax." Whatever it may be called, it is "determined by computing the tax on the amount of gross sales." (Section 2, Stewart R. 7; Kroger R. 6.)

It is contended by appellants that it is an excise tax and that the impost is not laid on the property sold, nor on the merchant for the right to exercise the privilege or occupation, but on the transaction or sale, measured according to the price at which the article is sold. *Panhandle Oil Co.* v. *Knox* (1928), 277 U. S. 218; *Indian Motocycle* v. *U. S.* (1931), 283 U. S. 570. It might very well be considered a tax on the property sold. *Cook* v. *Pennsylvania* (1878), 97 U. S. 566; *Fox Film Corporation* v. *Doyal* (1932), 286 U. S. 123; *Dawson* v. *Kentucky Distilleries* (1921), 255 U. S. 289.

Under Section 1 a retail merchant is generally defined as one who operates a store for the purpose of selling merchandise at retail, but the definition contains the following language:

"except those actually engaged in gardening or farming and selling garden or farm products raised by them in this state."

Although the act purports to tax the sales of every retail merchant not within the above quoted exception, it was purposely designed to tax the sales of plaintiffs and intervening petitioners, fifteen in number, and to exempt entirely or to exact only a nominal tax on the sales of all the other retail merchants in Kentucky, numbering approximately 24,000. This is evidenced by the fact, shown in the record, that the sales of appellants, which amount to approximately Forty-eight Million Dollars, are taxed more than three times as much as all the other sales in the State, which amount to more than Three Hundred and Sixty Million Dollars.

The Three Million Dollars in sales of Stewart are taxed nearly one-fourth as much as the Three Hundred and Sixty Million Dollar sales of 23,163 merchants. The sales of 99.9% of the merchants of the State of Kentucky, enjoying about 80% of the total sales of the State, being over Three Hundred and Sixty Million Dollars in volume, are taxed less than the Thirteen Million Dollars of sales of appellant Kroger.

This intended discrimination was accomplished by grouping merchants in eight arbitrary brackets according to sales volume. The first or low bracket includes sales up to Four Hundred Thousand Dollars. Each One Hundred Thousand Dollars in sales thereafter, until a Million Dollars is reached, is placed in a separate bracket. As evidenced in the record, 99.9% of the merchants in the State and approximately 80% of the sales in the State fall in the first or lowest bracket. Appellants all fall in the eighth, or highest, bracket.

Sales in the second bracket are taxed at double the rate of sales in the first bracket. Sales in the third bracket are

taxed at five times the rate imposed on sales in the first bracket and two and one-half times the rate in the second bracket. Sales in the fourth bracket are taxed at eight times the rate imposed on sales in the first bracket and four times the rate taxed on sales in the second bracket, and so on up until we reach the eighth bracket, wherein appellants fall, in which, on the face of the act, their sales are taxed at twenty times the sales in the first bracket.

Although the act professes to tax the sales of all retail merchants, in actual operation and effect, as shown by the undisputed facts in the record, it exempts from taxation the sales of the $400,000.00 volume merchant and taxes the sales of the so-called large volume merchant irrespective of profit or loss, capital employed, number of stores, or any other economic factor. Under the challenged act the sale of the same or similar article for the same price is either not taxed at all or is taxed at a rate which depends upon the merchant from whom the purchase is made. A sale involving a sack of flour may be taxed 1% if purchased in one store, or it may be taxed 1/20th of 1% or nothing if purchased in another store. The act taxes the sales dollar of a merchant with a large volume nearly twenty times as much as the sales dollar of a smaller competitor.

Section 4 also imposes a discriminatory tax rate on merchants doing business as individuals or as members of a partnership in favor of those doing business as a corporation. A corporation may credit against the tax on its sales the tax which it pays for the privilege of doing business in corporate form. This discriminates against the sales of Levy Bros. and the class represented in the action brought by the Levy partnership.

THE EVIDENCE

The four appellants represent four different types of merchants affected by the provisions of the act. The

Stewart Dry Goods Company operates a department store in the City of Louisville. It has been conducting its business in this fashion for approximately forty years. Its predecessors in interest have operated a store in Louisville since 1846. It sells exclusively at retail, and the merchandise handled is similar to that usually found in department stores. Stewart's store embraces approximately seventy departments. Each handles a special type of goods.

Levy Brothers are individuals who operate a department store in the City of Louisville. This business was founded approximately seventy years ago by the father and uncles of the present operators.

The J. C. Penney Company is a corporation operating a group of department stores throughout the State of Kentucky.

The Kroger Grocery & Baking Company, the fourth appellant, is a corporation operating a chain of grocery stores. Two hundred and eighty-nine stores were located in Kentucky in 1930, at the time of the filing of the Bill of Complaint.

The actions filed by the complainants and the temporary restraining order granted by the court did not interfere with the operation of the challenged act except insofar as these four complainants and the other parties protected by the restraining order are concerned. With that exception, all the merchants in the State of Kentucky coming under the provisions of this act filed their returns for the years 1930, 1931, and 1932. These returns were available for examination and analysis. For the convenience of the court we have copied in this brief a part of the analysis of returns for each year taken from the record (Stewart R. 288-A, 290-A, 292-A; Kroger R. 370-A, 372-A, 374-A) and from the lower court's findings of fact. (Stewart R. 393, Kroger R. 143.)

ACTUAL OPERATION OF THE LAW

Quoted from the Court's Findings of Fact

"Facts Relative to Fourteenth Amendment"

"6. For the year 1930, 24,163 returns were filed by merchants subject to the act, and these returns showed an aggregate of gross sales of $362,848,264.00. 24,128 of these reporting merchants showed gross sales of less than $400,000.00 each, and the aggregate gross sales of these 24,128 was $340,197,497.00. 16,413 of the merchants falling in this group, by reason of credits allowed by Section 4, paid no tax. The total tax levied against this group, after the allowance of credits, amounted to $89,220.76 for the year 1930.

"7. The following is a correct analysis of the report filed by the 24,163 merchants above referred to for the year 1930, showing the number of returns in the various brackets, their gross sales in the same groups, and the net tax after deduction of credits allowed by Section 4, except that there is not shown the effect of the operation of the challenged act upon the business of those merchants (25 in number) who made no report, having availed themselves of the opportunity afforded by the court to post bond in order to secure the protection of the injunction issued in these cases.

1930

TAX REPORTS	NUMBER OF RETURNS	GROSS SALES	NET TAX
Showing Sales less than $400,000	24128	$340,197,497	$89,220.76
Showing Sales between $400,000 and $500,000	13	5,866,935	1,261.37
Showing Sales between $500,000 and $600,000	8	4,416,568	1,317.40
Showing Sales between $600,000 and $700,000	5	3,234,563	1,768.56
Showing Sales between $700,000 and $800,000	4	2,989,019	1,383.09
Showing Sales between $800,000 and $900,000	1	814,559	0
Showing Sales between $900,000 and $1,000,000	0	0	0
Showing Sales in excess of $1,000,000	4	5,329,123	11,391.76
TOTALS	24163	$362,848,264	$106,342.94

"8. The following is a correct analysis of the returns, gross sales and net tax, after the allowance of credits under Section 4, for the year 1931, excluding the operation of the act on the business of those merchants who have posted bond, made no report and paid no tax.

1931

Showing Sales less than $400,000	20351	$290,824,180	$66,769.82
Showing Sales between $400,000 and $500,000	10	4,520,653	1,007.59
Showing Sales between $500,000 and $600,000	9	4,887,385	1,360.02
Showing Sales between $600,000 and $700,000	3	1,927,791	1,461.17
Showing Sales between $700,000 and $800,000	2	1,472,166	905.08
Showing Sales between $800,000 and $900,000	3	2,549,814	3,118.74
Showing Sales between $900,000 and $1,000,000	2	1,895,680	4,128.35
Showing Sales in excess of $1,000,000	2	2,389,404	6,386.22
TOTALS	20382	$310,467,073	$85,136.99

"9. Similarly, the following is a correct analysis of the returns of the same class of merchants for the year 1932, which had been filed up to and including April 17, 1933.

1932

Showing Sales less than $400,000	14582	$178,783,514.26	$35,948.38
Showing Sales between $400,000 and $500,000	4	1,835,261.79	282.28
Showing Sales between $500,000 and $600,000	5	2,764.557.15	1,107.50
Showing Sales between $600,000 and $700,000	1	601,558.29	.....
Showing Sales between $700,000 and $800,000	2	1,522,598.66	1,297.06
Showing Sales between $800,000 and $900,000	1	864,205.61	1,534.44
Showing Sales between $900,000 and $1,000,000	1	939,417.13	.....
Showing Sales in excess of $1,000,000	1	1,001,903.32	2,747.03
TOTALS	14597	$186,313,016.81	$42,916.69"

Discrimination Against Department Store Sales

The discriminatory features of the act are further illustrated with regard to Stewart Dry Goods Company by the fact that that company is required to aggregate the sales

in all of its departments for the purpose of determining the tax rate on its sales. Each department is in purpose and in fact a separate unit distinguished from the other departments and each is charged in bookkeeping with its own floor space, advertising, payroll, taxes and other items of overhead as though they were were so many separate and distinct specialty stores. Each department sells articles which have no relation to the articles handled in other departments. The annual sales in any single department do not exceed $400,000.00. The maximum sales in any department are $250,000.00.

Each department competes with specialty stores in the City of Louisville which sell the same line of goods, and in many instances the sales of a particular department in Stewart's are considerably less than the sales of a specialty store competing in the particular line of goods handled.

Sales at Stewart's are taxed at a rate which varies from the rate imposed on sales of similar articles sold in a specialty store. The rate is higher at Stewart's, not because the sales of a particular item, or department, exceed similar sales made at a specialty store, but because sales of all Stewart's departments are aggregated for the purpose of fixing the tax rate. As a result, sales of $250,000.00 worth of a certain article in one of Stewart's departments would be taxed at a higher rate than an equal amount of sales of the same article made in a neighboring specialty store which handles nothing else.

The District Court recognized the fact that Stewart's does not have any advantage in purchasing. (Finding of Fact No. 19, Stewart R. 399.) It found as follows:

> "The gross sales of the Stewart Dry Goods Company are approximately $3,000,000.00 per year. Without taking account of the credits to which it is entitled under Section 4 of the Act, its annual tax under the Act is approximately $23,000.00, which would fig-

ure approximately 76/100 of one per cent of gross sales. This company operates seventy departments, each bearing its proportionate part of the expense of the whole establishment. No department has annual sales in excess of $400,000.00 and in a considerable number of instances the total sales of a particular department of Stewart's are approximately the same as the sales of specialized stores selling the same line of goods, and in some cases the sales of particular departments do not equal the sales of specialized stores in competition with that particular department. *Department stores such as Stewart's do not enjoy any particular advantage over their specialty store competitors in purchasing, but do have over their specialized competitors some advantage, due to the fact that customers who come to purchase one article are attracted to articles and make purchases in other departments.*" (Italics ours.)

The advantage mentioned certainly does not justify the imposition of a tax on Stewart's sales twenty times higher than a tax on sales made by its competitors.

A further example of the discrimination is referred to in the affidavit of Mr. Levy, which appears in the Stewart record, page 81. Richman Brothers Co., a large chain store organization, maintains a store for the sale of men's ready-to-wear clothing in the City of Louisville. This store competes directly with the department in Levy Brothers handling similar items. The gross sales of the Richman Brothers store does not exceed $400,000.00, and it is therefore taxed in the lowest bracket. The sales of the competing department operated by Levy's are taxed in a much higher bracket. Richman Brothers Co. does not own or operate any other store in Kentucky. Its aggregate volume of sales in all of its stores is many times larger than the volume of Levy Brothers' business, and every advantage which Levy Brothers has in the conduct of its men's clothing department can be found to a much greater extent in the

Richman Brothers Co. organization. In spite of this fact the rate of taxation on the Levy sales is twenty times that imposed on Richman Brothers Co. When the deductions are considered, the Levy Brothers' rate of taxation on sales is forty times that imposed upon its competitor. This is not an isolated case. The National Shirt Co. and Wilson Bros., handling men's furnishings, have one store in direct competition with Levy Bros. (Stewart R. 84; Kroger R. 322.) The Liggett Drug Co., a well-known drug chain, have only one store in Kentucky. (Stewart R. 101; Kroger R. 349.)

DEFENDANTS' TESTIMONY

The defendants undertake to justify the imposition of a higher tax rate upon the sales of appellants than upon the sales of other merchants of the State upon a theory advanced by three professors, namely, Martin, Walradt and Phelps. Although these three professors had an opportunity to study the actual operation of the tax as evidenced by an analysis of fifty-eight thousand returns filed in three calendar years, they did not do so, but justified their conclusions solely upon a theoretical basis.

Professors Martin, Walradt and Phelps did not claim that there is a taxable difference between the sale of a dollar sack of flour by A or by B, but they advanced the theory that a difference arises if the sales of A exceed those of B, because presumably merchants with large gross sales have more taxable capacity than merchants with small gross sales. They did not claim that taxable capacity increased at the rapid rate at which the tax increased, but they contended that in a general way concerns having large gross sales have correspondingly large profits. This theory of the professors disregards the fact that the tax is measured or levied on the sale, and likewise disregards the fact that the taxable capacity of the merchant is not involved. The error

is made more glaring by the fact that the professors themselves referred to the act throughout the record as a "sales act." They even went so far in their discussion of the measure as a "sales act" that they discussed the question of shifting the burden from the seller to the buyer as each transaction took place, and arrived at the remarkable conclusion that the tax could be shifted or passed on notwithstanding the fact that the rate of tax on the sale of the same article at the same price varied according to whether the purchase was made from A or from B. (Stewart R. 330, 346; Kroger R. 509, 525.)

Professor Martin, of the University of Kentucky, was the leading expert employed by the State. He introduced a number of charts and tables which, when properly analyzed, disprove his conclusions. He made no study of the returns filed under the act, although he admitted that this was the best way to find out how the law works. We quote from his testimony (Stewart R. 345; Kroger R. 524):

> "The best way of finding out the distribution of the tax insofar as those who have paid is concerned, would be to examine the returns of the State Tax Commission and the best way of determining just how the law works and exactly the burden it imposes upon the taxpayers under its provisions, would be by examination of the tax returns of those who have made returns. *Such an examination would be better than any theory.*" (Italics ours.)

The actual returns were in the possession of the Kentucky State Tax Commission and were available to Professor Martin. Although he used other records of the State Tax Commission, he chose to disregard the record showing the actual operation and effect of the very tax law in regard to which he was employed to testify, probably for the reason that the actual returns and operation of the law refute the theory for which the professor contended.

Apart from their inapplicability because they disregard the fact that the incidence of the tax falls on the transaction or sale rather than on the merchant, Professor Martin's theories are not supported by his tables. As a matter of fact they show the exact opposite in the only sales brackets involved, namely, between $400,000.00 and $1,000,000.00. We contend that increase in profits is due primarily to better management and not to an increase in sales. This is illustrated by Exhibit 12 (Stewart R. 362-B; Kroger R. 498-A) introduced by Professor Martin. On this exhibit Professor Martin lists companies with a large volume of sales. The table is arranged in such a fashion that the concerns having a large volume of sales appear at the top and the others follow below as their sales decrease. Column five of this table shows the ratio of net profits to net worth and the following startling facts:

Sears-Roebuck, listed second on the table, have less than one-half the sales of The Great Atlantic & Pacific Tea Company, but the ratio of their net profits to net worth is higher. The same is true of Woolworth's, who have only one-third the sales of The Great Atlantic & Pacific Tea Company. First National Stores, which appears eighteenth on the list, has a greater ratio of net profit to net worth than The Great Atlantic & Pacific Tea Company.

It may be presumed that a fairer comparison would be between concerns in a similar line of business although the Kentucky Sales Tax Act does not take into consideration variations in business. If we examine Professor Martin's table for concerns doing the same kind of business (Exhibit 12, Stewart R. 362-B; Kroger R. 498-A), we find the same discrepancies. Safeway Stores have lower sales than Kroger, but their ratio of net profit to net worth is five per cent higher. Loblaw Grocery Stores, which is one-twentieth as large as Kroger, has a ratio of net profit to net worth double that of Kroger. These facts do not show

an increased ability to pay as sales increase. Diamond Shoe Company has a ratio of 21.18, although its sales are much lower than Kinney Shoe Company, which has a ratio of only 12.32. Reliable Shoe also have a higher ratio than Kinney, although their sales are lower.

Numerous other illustrations can be picked from Martin's exhibit and from the supplemental exhibit which he added at the time the additional testimony was taken. (Exhibit 12-B, Stewart R. 362-B; Kroger R. 540-B.) These illustrations are so numerous that they cannot be explained away by saying that the results in individual cases do not affect the general rule.

Our contention that management and not increase in sales leads to an increase in profit is illustrated in Mr. Schachter's testimony. (Stewart R. 314; Kroger R. 438.) He showed that in 1932 the Emporium of San Francisco was third in volume of sales and eleventh in net profits to sales. In that same year Lazarus of Columbus was twelfth in sales but fourth in per cent of profits. Burdine's of Miami, Florida, was eighteenth in volume of sales and sixth in profits to sales.

Bamberger's, in 1931, was second in the list of department stores in amount of sales and ranked seventh with regard to profits. That same year Lazarus of Columbus was again eleventh in order of sales but it was third in order of profit. The Outlet of Providence, Rhode Island, was first in profit that year but ranked fourteenth in sales.

In 1930 Rike-Kumler of Dayton was nineteenth in sales and third in per cent of profit. Lazarus, in the same year, was twelfth in sales and fourth in per cent of profits, and the Outlet Company of Providence again was first in per cent of profits, although it was sixteenth on the actual list by amount of sales. (Stewart R. 313, 314; Kroger R. 438, 439.)

The fact that Lazarus and Outlet stores, having smaller sales than many of their competitors, appear year after year to lead in profits, shows that there is no relation between sales and profits.

Figures of Bureau of Business Research of Harvard University show that there is no relation between increase in sales from $400,000.00 to $1,000,000.00 and Profit or Losses.

We call attention to another table covering stores having sales between $400,000.00 and $1,000,000.00—the only brackets where the tax is graduated. On page 46 of the Bureau of Business Research of Harvard University publication dealing with the operating results for department and specialty stores in 1929 (Bulletin No. 83) appears a tabulation for department stores by sales volume. The net profit or loss for department stores of various sales volume appears as follows:

SALES	Less than $150,000	$150,000-$299,000	$300,000-$499,000	$500,000-$749,000	$750,000-$999,000
Net profit or loss	Loss 0.9%	Loss 1.1%	Loss 0.8%	Loss 0.4%	Loss 0.5%
Net gain % of net worth	6.3%	5.0%	6.0%	6.8%	6.6%

This shows that the percentage of net gain to net worth is lower in the highest class listed than it is for the preceding class. The net loss is also higher. Here we have average figures for sales closely corresponding to the brackets which are subject to the graduations of the taxing statute. These standard figures of the Harvard Bureau prove that increased sales in these brackets do not show any increased ability to pay a higher tax. Instead we have a decreased ability to pay. In 1930 we find a similar result:*

* Bureau Business Research, Harvard University, Bulletin 85, page 6.

1930

SALES	Less than $150,000	$150,000-$300,000	$300,000-$500,000	$500,000-$750,000	$750,000-$1,000,000
Net profit or loss	Loss 5.2%	Loss 2.4%	Loss 2.3%	Loss 1.7%	Loss 2.3%
Net gain % of net worth	L. 3.3%	0.1%	1.5%	2.3%	0.6%

The same is true in 1931 and 1932—

1931

*SALES	Less than $150,000	$150,000-$300,000	$300,000-$500,000	$500,000-$750,000	$750,000-$1,000,000
Net profit or loss	Loss 8.0%	Loss 6.6%	Loss 5.2%	Loss 4.5%	Loss 5.8%
Net gain % of net worth	Loss 7.0%	Loss 8.0%	Loss 3.0%	Loss 3.5%	Loss 4.0%

1932

†Sales (000 omitted)	Less than $150	$150-$300	$300-$500	$500-$750	$750-$1,000	$1,000-$2,000	$2,000-$4,000	$4,000-$10,000
Net profit or Loss	L. 10.3%	L. 8.7%	L. 6.2%	L. 8.2%	L. 9.5%	L. 6.8%	L. 7.8%	L. 7.4%
Net gain % of net worth	L. 12.2%	L. 9.0%	L. 5.0%	L. 10.0%	L. 6.0%	L. 4.0%	L. 6.7%	L. 3.5%

From these figures it appears that as sales increase, there is no increased ability to pay.

To summarize, Professor Martin's theory is not supported by the factual testimony he introduced. When sales increase between $400,000.00 and $1,000,000.00, there is no increase in ability to pay, as shown by Martin's own figures. Furthermore, the whole of Martin's testimony, as stated previously, is based on theoretical tabulations and completely disregards the actual operation of the tax as shown by the analysis of the returns. Taxation is a practical matter, and, where possible, the court should decide the validity of the tax measure on the basis of actual returns and not on a theoretical hypothesis.

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* Bureau Business Research, Harvard University, Bulletin 88, page 2.

† Bureau Business Research, Harvard University, Bulletin 91, page 2. Stewart R. 324A; Kroger R. 448A.

Professor Phelps, like Professor Martin, admitted that he made no examination of the returns to ascertain the actual operation of the law.

We quote from Phelps' testimony (Stewart R. 369; Kroger R. 553):

> "Witness had made no examination of the actual operation of the Kentucky Gross Sales Tax Law as it applied to the various taxpayers to whom the law presumptively applied."

Professor Phelps merely expressed some general theories in an effort to support the theories of Professor Martin. We submit that a taxing measure of this character should not be decided on the basis of assumption or theory—particularly when we have the complete evidence of the actual, as distinguished from the theoretical, operation and effect of the law for the entire period that the law was in force.

Professor Walradt devoted himself largely to an alleged comparison of the arbitrary rates in the challenged act with the graduations of the Federal income tax law. It is obvious that a tax on net income wherein the rate increases as net income increases is based solely upon ability to pay. The Kentucky Act makes no reference to income—net or gross. The tax is based upon "gross sales" irrespective of receipts or collections, returns or profits. In *Sims* v. *Weldon,* 165 Ark. 13, 263 S. W. 42, the Supreme Court of Arkansas appropriately said:

> "A sales tax is the antithesis of an income tax."

This important distinction between a tax on net income and a tax on gross sales was clearly set forth by this court in *U. S. Glue Co.* v. *Oak Creek,* 247 U. S. 321 (1918). Mr. Justice Pitney said:

> "The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial,

> and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. *A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise.* Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large." (Italics ours.)

Professor Walradt, in an endeavor to smooth into a gradually increasing line the sharp jumps of the challenged tax, has invented and charted the theory of an "effective rate."

These are not the rates provided by the act, which levies a flat tax on each bracket so that every dollar of sales from one dollar to four hundred thousand dollars pays a flat rate of 1/20th of 1%, less credits, and every dollar in the next hundred thousand dollar bracket pays double. Each successive hundred thousand dollars up to a million pays at the flat rate provided for that hundred thousand. Every dollar of sales above a million is taxed at a flat rate of twenty times the rate on the first four hundred thousand dollars' worth of sales. However, Professor Walradt is guilty of presenting certain misleading charts in connection with the presentation of the non-existent effective rate. On his Exhibit A (Stewart R. 164-A; Kroger R. 464-A) he has plotted the line of the so-called "effective rate" on logarithmic chart paper. This makes the tax rates in the lower brackets appear steeper than they actually are in comparison with the increase of the tax rates in the upper brackets, which appear to be more gradual than they actually are.

When Professor Walradt on his Exhibit D (Stewart R. 170-A; Kroger R. 470-A) charts his so-called effective rate on arithmetic chart paper, he deliberately fails to include the entire first Four Hundred Thousand Dollar bracket, presumably because this line would be absolutely flat and would seriously damage the presentation of his theory.

A further criticism of the testimony of the professors and the charts they introduced can be based on the fact that a large part of their testimony and a number of their charts were predicated on graduated taxes recently adopted by Vermont and New Mexico. Both of these acts were modelled after the Kentucky Act. They are both being contested in the state courts and have been held to be invalid by the lower courts of both states. See note p. 34 *infra*.

Mr. Brewer (Stewart R. 212; Kroger R. 553), Secretary of the State Board of Charities & Corrections, testified that the State needed money to repair its prisons and reformatory institutions. Granting the needs of the State, it can hardly be claimed that this justifies placing the entire burden of repairing the State's penal and charitable institutions on the sales of a few arbitrarily selected retail merchants.

King, Glenn and Huddleston (Stewart R. 325, 369, 373; Kroger R. 568, 571, 574) testified concerning the financial condition of the State of Kentucky as bearing upon the adequacy of the remedy at law. Since the court below found the remedy inadequate (Stewart R. 393; Kroger R. 143) and the State has not taken any appeal from this finding, we do not think it necessary to discuss the evidence on this point.

SUMMARY OF ARGUMENT

I. Nature of Act.

II. Nature of Sale.

III. The Challenged Act Deprives the Appellants of the Equal Protection of the Laws.

A. *Denial of Equal Protection of the Laws is shown on the face of the act.*

B. *Denial of Equal Protection of the Laws is shown in the actual operation and effect.*

C. *The credits granted by Section Four of the act intensify the discrimination and make it vindictive and deceptive.*

D. *The act discriminates in favor of corporations as against individuals.*

E. *The rate increases are arbitrary and bear no relation to the alleged value, if any, of the privilege of making larger aggregate gross sales.*

F. *The opinion of the court below ignores the evidence of the actual tax returns showing the discriminatory, punitive and unequal operation of the law.*

G. *The cases relied upon by the State do not uphold the arbitrary inequalities and discriminations of the challenged act. Clark* v. *Titusville, 184 U. S. 329; Magoun* v. *Illinois Trust Company, 170 U. S. 283; State Board of Tax Commissioners* v. *Jackson, 283 U. S. 527; Pacific American Fisheries* v. *Alaska, 269 U. S. 269; Moore* v. *State Board of Charities and Corrections, 238 Ky. 243, 239 Ky. 729, distinguished.*

IV. The Farm Exemption Provision Renders the Challenged Act Unconstitutional.

A. *The act as written discriminates against farm products raised in states other than Kentucky and violates the commerce and equal protection clauses of the Federal Constitution.*

B. *The construction of this clause adopted by the lower court exempts retail merchants selling farm products raised by them from any tax. This construction denies the equal protection of the laws to merchants selling farm products not raised by them and is an unconstitutional discrimination.*

C. *The lower court erred in following the construction placed upon the law by the Court of Appeals of Kentucky in Moore* v. *State Board of Charities & Corrections.*

D. *If the construction of the farm exemption provision adopted by the District Court is approved, then The Kroger Grocery & Baking Company is not subject to tax, and the discrimination against its competitors, including the intervenor, The Great Atlantic & Pacific Tea Company, renders the law unconstitutional.*

V. The Challenged Act Violates the Bill of Rights and Section 181 of the Kentucky Constitution.

ARGUMENT

I. Nature of the Act.

The act is not a chain store tax. Its burden is not measured or graduated according to the number of stores or retail outlets, as was the case in *Tax Commissioners* v. *Jackson* (1931), 283 U. S. 527; *Great Atlantic & Pacific Tea Co.* v. *Maxwell*, 199 N. C. 433, 154 S. E. 838, affirmed per curiam (1931), 284 U. S. 575; *Liggett* v. *Lee* (1933), 288 U. S. 517; *Fox* v. *Standard Oil Co.* (1935), — U. S. — (Decided Jan. 14, 1935).

The act is not aimed at curbing the growth or size of corporations, for it applies with equal force against individuals such as Levy Brothers, appellants.

The act is not directed at large profits because it falls just as heavily upon one who suffers loss as upon one who makes inordinate profits.

It is not a license tax, for no license is required and there are no provisions for inspection, suspension, revocation or other regulatory features.

It is not a police measure, for it has no reference to the public safety, welfare or morals.

It is a revenue measure. It is so stated in the preamble, and so considered throughout the act. The revenue derived is appropriated in the act and divided one-half to the State's charitable institutions and the other one-half to liquidate the public debt. (Section 9.) The lower court declared it a revenue measure in its findings of fact. (Stewart R. 395; Kroger R. 145.)

It seems to be well established that the nature of a tax is to be determined not by "some form of words" used in its enactment or name given to it, but by an examination of its "nature and effect."

Pollock v. *Farmers Loan & Trust Co.* (1895), 157 U. S. 429, 581.

Stockard v. *Morgan* (1902), 185 U. S. 27.

Galveston, H. & S. A. R. Co. v. *Texas* (1908), 210 U. S. 217.

Choctaw, O. & G. R. Co. v. *Harrison* (1914), 235 U. S. 292.

Dawson v. *Kentucky Distilleries & Warehouse Co.* (1921), 255 U. S. 288.

St. Louis Cotton Compress Co. v. *Arkansas* (1922), 260 U. S. 346.

The Macallen Company v. *Mass.* (1929), 279 U. S. 620.

The use of the words in Section 2: "Every retail merchant . . . shall pay an annual license tax" for "opening, establishing, operating or maintaining" a store, does not, we submit, make it a license tax on the merchant. This is a "form of words" used in nearly all sales tax laws as a feature of the administration of the law facilitating the collection of the tax and not for the purpose of designating

the kind or nature of the tax. Sales taxes cannot be effectively collected from the purchaser for obvious reasons, though they are inevitably passed on to the purchaser if the tax is proportional. It cannot be passed on if one merchant pays it and another does not, for equally obvious reasons.

In sales taxes the burden is laid, so far as the "form of words" is concerned, in three different ways, i. e.:

(1) Upon the merchant making the sale.
(2) Upon the article sold.
(3) Upon the sales transaction.

An example of the first type, that is, upon the merchant making the sale, is the Mississippi Gasoline Tax Statute considered by this court in *Panhandle Oil Co.* v. *Knox* (1928), 277 U. S. 218. Under that statute (Chapter 116, Laws of Mississippi 1922) it was provided that:

> "Any person engaged in the business of distributing gasoline, or retail dealer in gasoline, shall pay for the privilege of engaging in such business an excise tax of 1¢ (one cent) per gallon. . . ."

To decide the point of law involved in that case it was necessary for the court to determine the nature of the tax as well as to determine the thing that was taxed. The court said:

> "It is immaterial that the seller and not the purchaser is required to report and make payment to the State. Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests. . . . To use the number of gallons sold the United States as a measure of the privilege tax is in substance and legal effect to tax the sale."

An example of the second type of sales taxes, that is, where the "form of words" lays the tax on the article sold, will be found in the Revenue Act of 1924, considered by

this court in *Indian Motocycle Co.* v. *U. S.* (1931), 283 U. S. 570. The words in that statute provided that the tax "shall be levied, assessed, collected and paid upon" the motorcycle by the manufacturer "equivalent to the following percentage of prices for which so sold."

As in the preceding case, it was necessary for this court to determine the nature of the tax and to say upon what the tax burden was laid. The court said:

> "Both parties rightly regard the tax as an excise, and not a direct tax on the articles named. But they differ as to the transaction or act on which it is laid. Counsel for the plaintiff insist it is laid on the sale. Counsel for the government regard it as laid on manufacture, production or importation, or, in the alternative, on any one of these, and the sale. We think it is *laid on the sale, and on that alone.* It is levied as of the time of the sale and is measured according to the price obtained by the sale. . . .
>
> "Counsel for the government base their contention on the requirement that the tax be paid by 'the manufacturer, producer or importer'; but we think this requirement is intended to be no more than a comprehensive and convenient mode of reaching all first or initial sales, and that it does not reflect a purpose to base the tax in any way on manufacture, production or importation." (Italics ours.)

The third type of sales tax, that is, where the "form of words" in the act specifically designates the transaction of sale as the thing to be taxed, places the tax where it rightly belongs. Such sales tax acts will be found in Oklahoma and Utah.*

These sales tax laws vary in other ways in the "form of words" for purposes of convenient administration, but the words employed should not be considered, and were not in-

* Oklahoma, Chap. 196, 1st Special Session of 1933; Utah, Chap. 63, Laws of 1933, as amended by S. B. No. 6, 2nd Special Session, Laws of 1933.

tended, to determine what is taxed. In every instance regardless of the "form of words" the thing taxed is the sale, and in every instance regardless of the "form of words" as to who shall pay the tax, the instrumentality through which the tax is collected is the retail merchant.

Under the Ohio Retail Sales Tax, for instance (Ohio Gen. Code, § 5546-1 et seq.), the tax is "levied on each retail sale" (§ 5546-2). But the law further provides (§ 5546-3) that the "tax hereby imposed shall be paid by the consumer."

In Michigan, the sales tax (House Enrolled Act 167, Public Acts of Michigan of 1933), by the form of words, is levied upon the merchant as "an annual tax for the privilege of engaging in such business." (Section 2.) This law forbids the merchant to hold out to the public that the tax is not absorbed in the price. (Section 3.)

We submit that in every sales tax, regardless of the language of the act, the tax imposed is an excise, and the burden is laid upon the sale transaction.

The challenged act in "form of words" would fall in the first class mentioned above, i. e., upon the merchant making the sale. The words used are almost identical to the words used and considered in *Panhandle Oil Co.* v. *Knox, supra.* The "form of words" of Section 2 of the challenged act denominates it an annual license tax for the privilege of operating a store. So did the Mississippi statute considered in *Panhandle Oil Co.* v. *Knox, supra.* The challenged act computes the tax on the amount of gross sales. The Mississippi Act computed the tax on the quantity of gasoline sold. If the tax in the gasoline case is "laid on the sale," it must be true in the case at bar. If the fact that the tax is to be paid or collected from the seller is immaterial in determining what is taxed in the one case, it must be true in the other. If the fact that it is called a privilege tax for engaging in business may be disregarded

in determining what is taxed in one case, it must be disregarded in the other. If "measured according to the price" constitutes it a sales tax in the one case, "computing the tax on the amount of gross sales" must make it a sales tax in the other case.*

II. Nature of a Sale

Since the sale transaction and not the property, the buyer, or the seller, is the subject of taxation, i. e., the thing taxed, it is necessary to determine just what a sale is. Furthermore, it is necessary to determine whether there is any substantial difference affording a just and reasonable ground for a classification which results in taxing a sale by A at a different rate than a sale by B of the same article at the same price.

If there is any substantial difference justifying the classification according to who is the seller, it would be equally

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* Numerous other cases might be cited involving taxes which were license or privilege taxes in form but which this court held were in actual operation and effect taxes upon the thing used as a measure of the tax. For instance, in *Galveston & H. R. Co.* v. *Texas* (1908), 210 U. S. 217, a tax upon railway corporations measured by or "equal to 1% of their gross receipts" was held to be a tax upon the gross receipts regardless of the language used in the act. In *Northwestern Mutual Life Insurance Co.* v. *Wisconsin* (1927), 275 U. S. 136, a Wisconsin "annual license fee" measured by the gross income of the corporation was held to be a tax laid directly on the gross income, regardless of the form of the taxing act. In *New Jersey Bell Telephone Company* v. *The State Board* (1930), 280 U. S. 338, a New Jersey statute was in form a franchise tax measured by 5% of gross receipts. Here, too, this court held that the form of the tax was immaterial and that the tax had to be treated as a tax upon the gross receipts.

As has been pointed out by this court, there is a vast difference between a tax measured by a *gross* and one measured by a *net* amount. This distinction was clearly stated in *U. S. Glue Company* v. *Town of Oak Creek* (1918), 247 U. S. 321, discussed *infra*. p. 38.

Since in the case at bar the tax is measured by the *gross* sales, the validity of the tax must be determined by treating the tax as upon the sale and not upon the merchant.

true that the classification could be made to depend upon who is the buyer. The establishment of such a legal principle would be unique, and yet, if such a classification is justified in Kentucky, where the rate depends upon how many other sales have been made in the calendar year by the seller, it would be permissible to fix the rate of a tax on a sale according to the number of other purchases made by the buyer during the calendar year.

The Uniform Sales Act defines a sale as:

> "A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price." (Section 1, Uniform Sales Act, 1 Williston on Sales, 2nd Edition.)

Since a sale is an agreement, it would seem to be elementary that two separate agreements for the sale of two sacks of the same kind of flour at the same price would be similar, if not identical, in legal contemplation. If one were a conditional and the other an absolute sale, the agreement would, of course, be different.

The challenged act, however, seeks to differentiate between the two sales not because of any difference in the sale agreements, but upon the sole fact of a claimed distinction in the *character* of the seller. There is no difference in the property sold or the price paid. There is a difference between the sellers, A having effected a greater volume of sales than B of other property to other persons in a given calendar year. This difference does exist, but it bears no reasonable relation to the subject of the legislation, i. e., the taxing of the sale of the sack of flour.

III. The Challenged Act Deprives the Appellants of the Equal Protection of the Laws

A. Denial of equal protection of the laws is shown on the face of the act.

On its face the act classifies a merchant's aggregate annual sales into eight different brackets, the first or low bracket including all sales up to $400,000.00. Each $100,000.00 in aggregate annual sales beyond $400,000.00 is a separate bracket up to $1,000,000.00. Aggregate annual sales in excess of $1,000,000.00 constitute the top bracket. Sales in the top bracket are taxed twenty times as much as sales in the first bracket. Sales in the second bracket are taxed twice as much as sales in the first bracket.

In making the contention that this kind of a sales tax denies to the appellants and intervenors, all of whom are in the highest bracket and are the only merchants in Kentucky in that bracket, the equal protection of the laws, we have given due consideration to the most liberal construction of the equal protection clause of the Fourteenth Amendment. Conceding that the State has power to classify both persons and property for purposes of taxation, conceding further that this power of classification is very broad and flexible, nevertheless, the classification must be reasonable and not arbitrary; it must rest upon some real ground of difference having some real relation to the legitimate purpose of the legislation. *Louisville Gas Co.* v. *Coleman* (1928), 277 U. S. 32. The classification cannot amount to a clear and hostile discrimination against particular persons or property. (Mr. Justice Brandeis, dissenting, *Louisville Gas Co.* v. *Coleman, supra.*) The equal protection clause is intended, it seems to be agreed, as a guarantee that all persons and all property similarly situated shall be treated alike.

The discrimination intended here is clear and hostile. It was so stated in the act as originally introduced. It stated not only one, but two clear and hostile discriminations: (1)

"To restrain the unfair competition of chain stores," and (2) "In aid of individual merchants." *.

It is true that before the final adoption of the act, an innocent-looking title was substituted, but as adopted, the act upon its face shows a clear and hostile intent to discriminate between the aggregate gross annual sales of merchants with sales of less than $400,000.00 and those with aggregate sales in excess of $400,000.00, basing the classification solely on gross volume of business done.

We must recognize now that a State may classify retail merchants for purposes of taxation according to the number of stores or retail outlets he operates. *Tax Comm.* v. *Jackson, supra.* We must also recognize that having the power so to classify, it may lay taxes on the different classes graduated so as to tend to discourage a merchant

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* The challenged act was introduced under the following title:

"H. B. 111, An act to restrain the unfair competition of chain stores and in aid of individual merchants of the commonwealth."

On February 14, 1930, the bill was read in the House by the above title. On February 18th it was made a special order and was read a second time by the above title only. Subsequently, the title was amended to its present form, but was apparently enrolled and signed by the Speaker of the House under its original title, which also appears on the manuscript copy of the bill. (Kroger R. 449.) Also see extracts from Senate and House Journals (Stewart R. 220-234) put in evidence by defendant (Stewart R. 235, 236).

Shirley Haas, Secretary of the Wholesale and Retail Grocers Association, who sponsored the bill in the Legislature, issued a circular to the members of his association in which he pointed out that the measure would relieve all retail merchants from the payment of anything but nominal taxes and would heavily penalize department and multiple store owners. He pointed out that this would be achieved by means of the graduated scale and by application of the provision regarding deductions of the credits permitted by Section 4, which "the association was successful in writing into the bill." He concluded that

"Our investigation has shown that very few independent retailers enjoy business in excess of $400,000.00. Our further inveatigation indicates that . . . 92% of the independents will pay nothing under this new law and 8% will pay a very small tax. What a wallop the chains get by having to pay the maximum 1% under the sliding scale.

"We know that one chain institution alone (and in the grocery business by the way) will be subject to tax under this new law in excess of $150,000.00." (Stewart R. 95; Kroger R. 357.)

from operating a large number of stores and to encourage or aid the merchant with a single store. *Fox* v. *Standard Oil Co., supra.* The challenged act, however (although originally intended as a chain store tax), accomplishes no such purpose. It strikes at single and multiple store merchants alike, and places the classification squarely and solely on aggregate volume of gross sales, assessing a tax upon the sales of large volume merchants many times the tax assessed upon the sales of merchants in the $400,000 class.

Sales taxes have been enacted in almost every State since the challenged act was adopted.* We have (1) retail sales taxes; (2) wholesale sales taxes; and (3) manufacturers sales taxes. The rates vary from one to five per cent. Having seen gasoline sales taxes begin at one cent per gallon and increase year by year until now in most States the rates are at least five cents a gallon, and, in several States, six, seven and eight cents per gallon, one is not altogether a dreamer who anticipates at least a four or five per cent

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* See California, Chap. 1020, Session Law of 1933;
Connecticut, Rev. Code 1930, Chap. 75, Sections 1340-1351;
Delaware, Code 1915, T. 3, Chap. 6, Art. 12, Sections 159-161, Laws 1917. Chap. 11, Laws 1919, Chap. 23;
Georgia, Code of Georgia, 1930, Supplement, Act of 1929, Section 993 (316);
Illinois, Laws of Illinois, 58th General Assembly, 1933, p. 924;
Indiana, Burns Indiana Statutes, 1933, Chap. 26, Sec. 64-2601;
Iowa, Chap. 82, Laws 45th G. A., Extraordinary Session, Section 37, etc.;
Kentucky, Carroll's Code of Kentucky, Section 4281v-3;
Michigan, Public Act No. 167, Acts of 1933;
Mississippi, Acts of 1934 (H. B. 70);
Missouri, Laws of Missouri, Extra Session, 1933-34, p. 155;
New Mexico, Chap. 33, First Special Session Laws of 1934;
New York, Cahill's Consolidated Laws of New York, 1933, Supplement, Chap. 61, Section 390, etc.;
North Carolina, Acts 1933, Chap. 445, p. 768;
North Dakota, Laws 1933, Chap. 261;
Ohio, General Code, Sec. 5546-1, etc.;
Oklahoma, Chap. 196, First Special Session of 1933;
Oregon, Laws 1933, H. B. 110, Second Special Session;
Pennsylvania, Act No. 53, Acts 1932, Second Special Session, as amended by Act No. 126, Laws of 1933;
Utah, Chap. 63, Laws of 1933, as amended by S. B. No. 6, Second Special Session, Laws of 1933;
Vermont, Public Act No. 24, Laws of 1933;
Washington, Chap. 191, Laws of 1933;
West Virginia, Chap. 66, Second Extraordinary Session, 1933, p. 146.

sales tax. It is true that the top rate in the challenged act is only one per cent, but, if the principle of taxing the sales of one merchant at a higher rate than similar sales by other merchants is recognized by judicial decision as consistent with the equal protection clause of the Fourteenth Amendment, you will see the sales of so-called large merchants taxed at five per cent, whereas similar sales of the small competitors will be untaxed. This would simply bring economic chaos.

It is an obvious economic fact that a merchant cannot pass on to, or collect from, the purchaser a sales tax which is imposed upon him but not imposed upon his competitor. It is equally obvious that he cannot absorb it in the cost, or in his overhead. Such a tax puts him on an unequal basis with his competitor, and we contend that the spirit and purpose of the equal protection clause was to assure him the right to conduct his business on an equal basis with his competitor. If he absorbs the tax as a part of the cost of the merchandise, he cannot meet the competitive price of his neighbor who is untaxed. If he attempts to pass the tax on to his customer, the customer will shun him and deal with the neighbor who has no tax to pass on to his customer or to absorb in his cost. In States like Ohio where the tax is imposed directly upon the purchaser, one who would patronize a so-called large merchant and pay a tax for the privilege of doing so, when he could purchase from the so-called small merchant and not be subjected to any tax, would be very foolish. Under such a system of sales taxes, a great store like Stewart's, forty years in the building, could be destroyed over night. Levy Brothers, appellants, a partnership which operates another great store and which represents the fair dealing of three generations of the same family, would meet a like fate.

The result prophesied is not fanciful,* it is a real danger because of the fact that the challenged act lays the tax on the gross sales and not on the net profits. The record clearly shows, and it is an economic fact of which a court will take judicial notice, that there is no fixed relation between gross volume and net profits. The margin of profit on the sale of some commodity, like jewelry, is usually large. The margin of profit on the sale of a commodity like sugar is very small. A large jewelry store might be able to absorb a small sales tax in its cost or overhead and still compete with a smaller competitor. But if the sales of the large jewelry store and the sales of the small jewelry store could be classified differently, a five or ten per cent tax could be laid upon the sales of the large store and the sales of the small store could be untaxed. In such an event, on the sale of a commodity such as jewelry, even where the ordinary margin of profit is high, the large jewelry store, being unable to absorb the tax or pass it on, would be destroyed.

On sales of commodities such as sugar, flour, and nationally advertised products such as Ivory Soap, Del Monte Peaches, and Quaker Oats, the retail merchant could not pay even the smallest sales tax on the sales price and compete with a neighbor whose sales were untaxed.

If the principle is once established that the volume of sales may be the sole ground for classification in retail sales taxes, the same classification would be permissible in wholesale and in manufacturing sales taxes. Wherein would

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* A tax graduated up to 4% has already been levied.

Sales tax rates are proportionate in all the sales tax acts with the exception of the challenged act, the Vermont Act (No. 24, Acts of 1933), and the New Mexico Act (Chapter 73, Laws of 1933).

The New Mexico act was recently held invalid in the case of *Safeway Stores, Inc.* v. *Vigil*, State Comptroller, First Judicial District Court, County Santa Fe, New Mexico.

In the Vermont Act, the rate is graduated from 1/8 of 1% to 4%. It was held unconstitutional in the case of *The Great Atlantic & Pacific Tea Co.* v. *Harvey*, Washington County Chancery Court, Vermont, Jan. 23, 1935.

a wholesaler be given the equal protection of the laws if his sales were taxed at one per cent or more and his competitor's sales were not so taxed? What would happen to any manufacturing establishment, and the men in its employ, if a manufacturer's sales tax were imposed upon its product and not upon its smaller competitors'?

In some States such as Michigan (House Enrolled Act No. 167, Public Acts, Michigan, 1933, Sec. b-2) the sales of electric current are subject to tax. An electric light plant in a large city necessarily has a larger volume of sales than a similarly situated plant in a small community. An electric light plant, being more or less a monopoly, could, of course, pass the tax on either directly or by absorption in the cost. If the sales tax on electric current were graduated according to volume, as is done in the challenged act, the consumer would be taxed higher in the larger city than if he lived in the smaller city. Stores in large cities necessarily sell more than competitive stores in suburban or rural centers. Should the city consumer be arbitrarily forced to pay a higher tax on food, clothing, drugs, etc., than his suburban or rural neighbor?

Is gross volume of sales sufficient as the sole basis of classification under the equal protection clause of the Fourteenth Amendment?

This court stated in *Louisville Gas Co.* v. *Coleman* (1928), 277 U. S. 32, at page 39:

> "The difference relied upon is no more substantial, as the sole basis for the present classification, than a difference in value between two similar pieces of land would be if invoked as the sole basis for a like classification in respect of such property."

Mr. Justice Holmes, in *Engle* v. *O'Malley* (1911), 219 U. S. 128, at page 138 stated:

> "It is true, no doubt, that where size is not an index to an admitted evil the law cannot discriminate between the great and small."

Can there be any evil in a retail merchant or in his department store because his aggregate annual sales exceed

$400,000.00, or even a million dollars? If his profits become too great, they can be reduced by an income tax, with the higher rates in the higher brackets justified by this court's decisions because the rate applies to net income and does not apply to gross income. See *Brushaber* v. *Union Pacific R. R.* (1916), 240 U. S. 1; *U. S. Glue Co.* v. *Town of Oak Creek, supra; Shaffer* v. *Carter* (1919), 252 U. S. 37. If he operates too many stores he can be discouraged by a chain store tax. *Fox* v. *Standard Oil Co., supra.* With these well-recognized limitations upon him the equal protection clause of the Fourteenth Amendment surely permits the retail merchant to offer his merchandise to the public on a competitive basis and permits the public to deal with him without paying a larger tax.

Classification based solely on gross volume was expressly disapproved in *Cotting* v. *Kansas City Stock Yards Co.* (1901), 183 U. S. 79, under the equal protection clause. It is true in the Cotting case that the discrimination claimed was a regulation rather than a tax, but it would seem that if a regulation were bad because the attempted classification was based solely on gross volume, a tax classification so based would be equally obnoxious. In the Cotting case, the court said at page 103:

> "The express and only basis of classification is in the amount of business done by the two classes."

The court also states at page 109:

> "May we not rightfully accept this declaration of law . . . an act which imposes regulations upon corporations doing business over a certain amount and leaving all corporations doing a like business less than that amount free from such regulations, is equally obnoxious to constitutional prohibition."

And at page 112:

> "This statute is not simply legislation which in its indirect results affects different individuals or corporations differently, nor with those in which a classification is based upon inherent differences in the character of the business, but is a positive and *direct*

> discrimination between persons engaged in the same class of business and based simply upon the quantity of business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would." (Italics ours.)

This court in dealing with the commerce clause of the constitution and in questions involving the right of a State to levy a tax which infringes upon Federal sovereignty, or vice versa, has many times pointed out the distinction between a direct and indirect burden on interstate commerce, or challenge to Federal or State sovereignty. This court has many times said that taxing gross receipts, which is equivalent if not synonymous with gross sales, is a direct burden on commerce, while a tax upon net income is not. In *U. S. Glue Co.* v. *Town of Oak Creek*, 247 U. S. 321, at page 328, Mr. Justice Pitney stated:

> "The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. *A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce.* A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large." (Italics ours.)

It is this difference between taxing gross receipts and taxing net profits which makes the challenged act, in the

(Insert page 38.)

See also *Crew Levick Co.* v. *Commonwealth of Pennsylvania* (1917), 245 U. S. 292, in which a gross sales tax levied at a flat rate on the whole volume of appellant's business "*½ mill on each $1.00 of the whole volume, gross of business transacted annually*", was held invalid as a direct regulation of foreign commerce and an impost on exports. This Court said, page 297: "It (the tax) bears no semblance of a property tax, or a franchise tax in the proper sense; nor is it an occupation tax except as it is imposed upon the very carrying on of the business of exporting merchandise. *It operates to lay a direct burden upon every transaction in commerce by withholding, for the use of the State, a part of every dollar received in such transactions.* * * * That portion of the tax which is measured by the receipts from foreign commerce necessarily varies in proportion to the volume of that commerce, and hence is a direct burden upon it." (Italics ours.)

words of Mr. Justice Brewer in *Cotting* v. *Kansas City Stock Yards Co., supra,* "a positive and direct discrimination between persons engaged in the same class of business."

The interstate commerce clause of the Federal constitution forbids a State to levy an impost on interstate commerce just as the equal protection clause forbids a State from adopting a tax measure which denies the equal protection of the laws. Both provisions are limitations on the powers of the State.

In considering the question whether a particular tax measure is invalid because it affects interstate commerce, this court has made a distinction between taxes measured by gross income and taxes measured by net income. If the tax is measured by the gross income, the State has overstepped its powers, and the law is invalid. *Galveston & H. R. Co.* v. *Texas* (1908), 210 U. S. 217. A contrary result is reached when the tax is on net income. *U. S. Glue Co.* v. *Town of Oak Creek, supra.* The basis for the distinction is the fact that the former is a direct charge upon interstate commerce and the latter is only indirect and incidental.

The distinction should apply with equal force to the power of the State to levy a graduated tax under the equal protection clause of the Fourteenth Amendment. If the tax is on net income, then it may be graduated since it is only an indirect charge on the thing that bears the burden of the tax. In the event the tax is measured by gross receipts, as here, there is a direct charge on the thing, or transaction, which bears the incidence of the tax and in such cases the State's power, it is submitted, should be limited to levying a proportionate rate.

The same parallel may be drawn and the same distinctions noted in cases involving foreign commerce. A State can no more levy an impost on foreign commerce than adopt

a tax measure which denies the equal protection of the laws. In considering the question whether a particular tax measure is invalid because it affects foreign commerce, this court has made the same distinction between taxes measured by gross income and taxes measured by net income pointed out in the interstate commerce cases. If the tax is measured by the gross income, the State has overstepped its powers and the law is invalid. *Crew Levick Co.* v. *Pennsylvania* (1917), 245 U. S. 292. If the tax is measured by net income, it is valid. *Peck & Co.* v. *Lowe* (1917), 247 U. S. 142. The former is a direct charge upon foreign commerce; the latter is only indirect and incidental.

This distinction should apply with equal force to the power of the State to levy a graduated tax under the equal protection clause of the Fourteenth Amendment. In such a case a tax based on net income may be graduated since the burden does not fall directly on the transaction; however, a tax based on gross receipts cannot be graduated because the burden is direct and falls on each transaction. Since there is no difference between the transactions, a tax which falls with unequal force upon them denies the equal protection of the laws to the persons consummating them.

The court's finding illustrates the discrimination shown on the face of the act.

The court found (Finding No. 16 under Facts Relating to Equal Protection, Stewart R. 399, Kroger R. 148) as follows:

> "16. Sales made by merchants taxed under any of the brackets of the act are in competition with sales made by merchants selling the same character of goods who are taxed under other brackets of the act."

Bearing in mind that "a tax upon gross receipts affects each transaction" (*U. S. Glue Co.* v. *Town of Oak Creek, supra*), we have here a finding by the court of discrimina-

tion. Sales of the same character of goods fall into different brackets, or in other words, similar transactions are taxed at different rates. Since this is a tax on gross receipts, it should affect similar transactions in the same way. The fact that it does no do so renders the law invalid.

B. Denial of equal protection of the laws is shown in the actual operation and effect.

The record contains a complete analysis of the actual operation of the challenged act for a period of three taxable years. (Stewart R. 285 et seq.; Kroger R. 370 et seq.) The lower court made specific findings regarding the actual operation of the law. (Stewart R. 396, Kroger R. 146.) There are approximately 25,000 retail merchants in the State of Kentucky. 24,163 filed returns, of which 24,128 reported sales of less than $400,000.00. This was in the year 1930. In the year 1931, out of 20,382 filed returns, 20,351 were in the low bracket. In the year 1932, 14,597 filed returns, of which 14,582 were in the low bracket. Complete details are in the testimony of Brendel, beginning at page 285 of the Stewart record, and page 367 of the Kroger record. A fair summary of the facts relating to the operation of the act is given in the dissenting opinion of Judge Cochran as follows: (Stewart R. 387, Kroger R. 121.)

> "*The arbitrary and unreasonable character of the Act seems to me to be demonstrated by the operation of the Act.* The returns for the year 1930, 1931 and 1932 are in the record. Mention will be made only of the returns for 1930, as they are the most complete. 24,163 retail merchants made returns for that year. Their gross sales amounted to $362,848,264.00 and the tax paid by them to $106,342.94. It is reasonable to assume that these returns cover all retail merchants in the state except plaintiffs and those not plaintiffs but protected by the temporary injunction, twenty-

five in number. The gross sales of the plaintiff, Stewart Dry Goods Company, a corporation operating a department store containing seventy-seven departments in Louisville amounted to $3,000,000.00 the tax upon which is a little over $23,000.00. Those of the plaintiffs, Levy Brothers, a partnership operating a department store in Louisville, amounted to $1,250,000.00, the tax upon which is almost $5,500.00. The gross sales of the plaintiff, J. C. Penney Co., in this state, a corporation, a chain store operating department stores in and out of this state, twenty-one of which are located in this state, are not before me. The tax thereon seems to be about $10,000.00. And the gross sales in this state of the plaintiff, The Kroger Grocery & Baking Company, a corporation, a chain store operating retail groceries in and out of this state, 263 of which are located in this state, amounted to $14,500,000.00 in round numbers, the tax upon which is approximately $124,000.00. The tax of the Great Atlantic & Pacific Tea Company, one of the twenty-five protected by the injunction, is estimated at approximately $120,000.00 and the taxes of the other merchants so protected is placed at about $50,000.00. This makes the whole tax not over $450,000.00. Of this tax The Kroger Grocery & Baking Company and The Great Atlantic & Pacific Tea Company pay more than one-half though their aggregate gross sales are only 8% of the gross sales in the state. The tax of The Kroger Grocery & Baking Company on $14,500,000.00 gross sales is more than $18,000.00 in excess of that paid by 24,163 merchants on $362,000,000.00 gross sales. The Stewart Dry Goods Company operating a single department store in Louisville pays $23,000.00 taxes on $3,000,000.00 of gross sales, nearly one-fourth as much as the 24,163 merchants making returns upon gross sales amounting to $362,000,000.00. Of those 24,163 merchants only 35 of them made gross sales in excess of $400,000.00. The sum yielded by the tax is a measly sum as compared with the needs of the state and twenty-nine merchants out of over 24,000 pay three-fourths of this sum. In the case of the plaintiff,

> The Kroger Grocery & Baking Company, its profit in this state was in round numbers $172,000.00. Deducting from this the tax leaves $48,000.00 as net profit, or 1/3 of 1% of the gross sales. The net profit in 1931 would have been less than $40,000.00 and in 1932 there would have been a loss of $9,000.00. The same tax applied to its entire system would turn a profit of $1,400,000.00 into a loss of $700,000.00.
>
> "Apparently the sum yielded by the tax is contributed to generally by the retail merchants throughout the state. As a matter of fact, by reason of the credits against the tax, which the act authorizes, and which possibly of itself may render it unconstitutional, more than two-thirds of the retail merchants of the state make no contribution whatever to that sum. *The Statute is both vindictive and deceptive.*" (Italics ours.)

The actual operation of the challenged act, as evidenced by reports filed under it, shows that the discrimination is much greater than the discrimination shown on the face of the act. On the face of the act, it would appear that all sales are taxed slightly and that large sales are taxed at a high rate. In actual operation, however, virtually all sales in the State of Kentucky are untaxed except the sales made by the plaintiffs and intervenors, which are taxed at the highest rate.

C. The credits granted by Section Four of the act intensify the discrimination and make the act vindictive and deceptive.

Section 4 provides that the merchant may deduct from his tax an amount equal to the sums paid by him for special license taxes to the State. By payment of these special license fees, a merchant secures a special privilege from the State. He is permitted to sell something that other merchants are not allowed to sell, or else he may operate in a manner which cannot be adopted by those who have not paid the special license fees. Under the challenged act

the merchant has not only the advantage of this special privilege, but is also accorded a special advantage over his competitor by being permitted to use the sum which he pays for the special privilege to wipe out his obligation under the sales act. The result is that his sales remain untaxed while those of his neighboring competitor are taxed.

Probably the best illustration of the discrimination resulting from this provision is the case of the exemption allowed the sales of individuals selling prescription whiskey. A druggist selling 400 pints of prescription whiskey per year at $3.00 per pint would receive $1,200.00 therefor. He would be permitted by virtue of such sales to secure exemption from the payment of the tax on any other sales up to $400,000.00. He would be required to pay a special tax to the State of 50¢ per pint. (Section 4214b-1, Carroll's Kentucky Statutes.) This would amount to $200.00 and would be exactly equal to the tax on $400,000.00 worth of sales. A druggist selling $400,000.00 worth of goods, therefore, of which amount $1,200.00 would represent the receipts from sales of 400 pints of prescription whiskey, would not be required to pay any tax on his other sales of $398,800.00 worth of goods. Yet sales of similar articles by his neighbor would be subjected to the tax. The Stewart Dry Goods Company, one of the appellants in this case, sells many articles commonly handled by drug stores. Sales by Stewart would be taxable, but the same sales would be exempt in the neighboring drug store because a small amount of prescription whiskey was sold in the same establishment.

In actual operation, therefore, *all* of the sales of the merchants who handle particular products for which they pay a special license tax are exempted from the sales tax. Since the act purported to be a general sales tax law, it follows that there can be no justification for such an exemption. The exemption has no relation to the purpose for which it was made. (*Smith* v. *Cahoon* [1931], 283 U. S. 553.)

In its operation the deductions allowed actually exempt practically all merchants from the payment of any tax on their sales. The Legislative history shows that this was known and intended and was included in order to discriminate against the sales of the few merchants who were arbitrarily selected to bear the onerous burdens of the act. (Stewart R. 93, Kroger R. 354.)

D. The act discriminates in favor of corporations against individuals.

Among the credits which a merchant is permitted to take under Section 4 of the act is an amount equal to his payment for the corporation license tax. Necessarily the only merchant who can take advantage of this credit is the corporate merchant. He can secure a virtual exemption for his sales because he pays a corporation license fee for the privilege of operating in a form which gives him limited liability and other advantages over the individual merchant. The individual merchant, as a result, is forced to compete with the corporation on an unequal basis. Sales made by the individual merchant are subject to full tax, but sales made by the corporate merchant are free from tax to the extent of the corporate credit.

This discriminatory feature of the act is illustrated by the fact that Levy Brothers, who operate their business as a partnership, do not receive the deduction for corporation license fees which is given to merchants who operate in the form of corporations.

In the case of *Quaker City Cab Co.* v. *Pennsylvania* (1928), 277 U. S. 389, the court held unconstitutional a statute which imposed a tax upon corporations operating taxicabs but which exempted individuals so engaged. Such discrimination was denounced as *unusual*. In striking down the tax the court said:

> "The character of the owner is the sole fact on which the distinction and discrimination are made to depend. The tax is imposed merely because the owner

> is a corporation. *The discrimination is not justified* by any difference in the source of the receipts or in the situation or character of the property employed. . . . . No decision of this Court gives support to such a classification. In no view can it be held to have more than an arbitrary basis. As construed and applied by the State Court in this case, the section violates the equal protection clause of the Fourteenth Amendment. (Citing authorities.) The tax cannot be sustained." (Italics ours.)

In the case of *Garysburg Mfg. Co.* v. *Pender* (1930), 42 Fed. (2d) 500, reversed on other grounds by the Circuit Court of Appeals, 56 Fed. (2d) 732, a three-judge court held void a North Carolina statute for intentional discrimination between individuals and corporations in the matter of taxation of shares of stock owned by them in foreign corporations.

Thus discrimination *against* a corporation was held to violate the equal protection clause. *A fortiori,* discrimination *in favor of* corporations against Levy Bros. and other individuals and partnerships is not only *unusual,* but wholly unjustifiable.

In *Frost* v. *Corporation Commission* (1929), 278 U. S. 515, Mr. Justice Sutherland said (p. 522):

> **"A classification which is bad because it arbitrarily favors the individual as against the corporation, certainly cannot be good when it favors the corporation as against the individual."**

The lower court met this contention with the statement that the Commonwealth of Kentucky could repeal those provisions of its statute which impose special license fees on corporations, and Levy Brothers could not object to such action. They inferred that the credit system was a *pro tanto* repeal insofar as competitors of Levy Brothers were concerned. Such a conclusion is not justified by the act. Section 4 itself provides that the sales tax shall not

be "in lieu of any . . . corporation license tax due under provisions of any law now in force." This certainly would not indicate any intention to repeal the corporation license tax.

It is well known and has been recognized by this court that corporations have decided operating advantages over operation by individuals. *Flint* v. *Stone Tracy Co.* (1911), 220 U. S. 107 at 163. Certain individuals, however, for reasons of their own, continue to conduct their business without incorporating. They are willing to forego limited liability in order that their business may not lose the personal relationship which exists between the individual and his customers. Except for certain businesses, such as banking, where the State can require incorporation, the individual cannot be forced to operate in corporate form. Retail selling is one of such businesses, and the right of an individual or a partnership to sell goods without incorporating is one of the rights protected by the Fourteenth Amendment, which provides that no individual shall be deprived of his "liberty" without due process of law. Merchants who desire to pay a special fee for the permission to operate in the form of corporations should not be permitted to use this special privilege to exempt their sales from taxation. If they are permitted to do so, then the only way the individual competitor can compete with them would be to incorporate.

The statute and the credit system provided by Section 4 discriminate against individuals in favor of corporations or force them to incorporate in order to meet the competition of their corporate competitors. Under the first alternative the merchant is deprived of the equal protection of the laws; under the second he is deprived of his liberty without due process of law.

E. The rate increases are arbitrary and bear no relation to the alleged value, if any, of the privilege of making larger aggregate gross sales.

The record shows that an increase of sales from $400,000.00 to $1,000,000.00 does not have any relation to increased profits or increased net gain. The increase in tax cannot be justified on the basis of the evidence in the record; nor can it be justified on the ground that there is a tendency for profits to increase progressively as sales increase. That there is no such tendency is shown by the facts. A popular belief cannot be used as a basis for sustaining the measure when that belief is shown by the appellees' own evidence to be incorrect.

The very fact that the tax is on *gross* sales and not on *net* earnings demonstrates that "ability to pay" was not considered as a basis for the classification.

The finding of the court that there is some evidence supporting this theory (Finding No. 10 under Facts Relative to Fourteenth Amendment, Stewart R. 398, Kroger R. 147) is rendered meaningless by the finding of the court which immediately follows it. The court decided that (Finding No. 11, Stewart R. 398, Kroger R. 147) "The rate of profit realized from sales at retail generally *varies with the character of the goods sold.*"

Disregarding the fact that there is no relation between gross and net receipts and assuming that there is an economic law to the effect that large volume inherently insures a large percentage of profit, there is nothing in the record and no economic law to justify the multiplying rates fixed in the challenged act. In the first place, fixing the lowest bracket at $400,000.00 in sales is certainly arbitrary, and particularly so when more than ninety-nine per cent of the merchants are in that class.

Is there any justification for saying that the privilege of selling a piano is worth twice as much after you have sold

$400,000.00 worth of pianos and other merchandise than it is before you have sold $400,000.00 worth of such merchandise? Certainly no one can justly say that the privilege of selling a piano is worth twenty or forty times as much after you have sold $1,000,000.00 worth of merchandise, than it is before you have sold $400,000.00 worth of such merchandise.

This act, both upon its face and in actual operation, does not evidence an intent to increase the rate in proportion to the value of the privilege of making sales; rather, there is a clear manifestation of a hostile determination to destroy the business of the plaintiffs and intervenors under the guise of classification.

Surely there is no evil in sales exceeding $400,000.00 requiring their destruction. Large cities must have large buildings, large stores and large factories.

Even if we were to grant that volume or size alone is a sufficient ground for classification, certainly the size or volume of Stewart's, with three million dollars of sales, and Levy Brothers, with a million and a half dollars of sales, is not sufficient in law to constitute a menace to the public, even in the Commonwealth of Kentucky. But if that were true, there is no justification in law or morals for such an outrageous discrimination as taxing their sales twenty or forty times as much as the sales of their competitors.

In *Airway Appliance Co.* v. *Day* (1924), 266 U. S. 71, in speaking of a franchise tax, the court said:

> "Without holding that such a charge must be measured by the value of the privilege for which it is imposed, it may be said that some relation to such value is a reasonable requirement."

It is submitted that the privilege of making a sale at retail would under no circumstances warrant the imposition of a tax twenty times the tax imposed upon a competitor for making the same sale.

F. Opinion of the court below ignored the evidence of the actual tax returns which show the discriminatory, punitive and unequal operation of the law.

The majority opinion in the lower court completely disregarded and ignored the data regarding the actual operation and effect of the tax, although the court found that the evidence introduced by appellants correctly showed its operation and effect. (See Findings of Fact Nos. 6, 7, 8, and 9 under heading "Facts Relative to Fourteenth Amendment." Stewart R. 396; Kroger R. 146.) *No reference is made to these facts in the court's opinion.* Instead, the court relied on a so-called *theory* of economics that "as a general proposition, ability to pay increases with volume of business because, generally speaking, increased volume of business means increased profits." The court declared that there were theories to the contrary but that the tax measure could be justified on the ground that it was a "good faith exercise of legislative judgment and discretion."

In the recent case of *Borden's Farm Products Company* v. *Baldwin,* 75 L. Ed. 130, 55 Sup. Ct. 187 (1934), Mr. Chief Justice Hughes discussed the weight which should be given to the presumption which attaches to legislative action. He said:

> "Respondents invoke the presumption which attaches to the legislative action. But that is a presumption of fact, of the existence of factual conditions supporting the legislation. As such, it is a rebuttable presumption. . . . It is not a conclusive presumption, or a rule of law which makes legislative action invulnerable to constitutional assault. *Nor is such an immunity achieved by treating any fanciful conjecture as enough to repel attack.*" (Italics ours.)

In *Nichol* v. *Ames,* 173 U. S. 509 at 516 (1899), this court said:

> "Taxation is eminently practical, and is in fact, brought to every man's door, and for the purpose of

deciding upon its validity a tax should be regarded in its actual, practical results, rather than with reference to those theoretical or abstract ideas whose correctness is the subject of dispute and of contradiction among those who are experts in the science of political economy."

Similar language has been used in numerous cases. In *Shaffer* v. *Carter*, 252 U. S. 37 (1920), it is said that:

> "The constitutionality of such a tax depends upon its practical operation and effect, not on mere definitions or theoretical distinctions respecting its nature and quality."

The necessity for the consideration of actualities rather than theories was recently referred to by Mr. Chief Justice Hughes in the *Borden's Farm Products Company* case, *supra*. He stated:

> *"With the notable expansion of the scope of governmental regulation, and the consequent assertion of violation of constitutional rights, it is increasingly important that when it becomes necessary for the court to deal with the facts relating to particular commercial or industrial conditions, they should be presented concretely with appropriate determinations upon evidence, so that conclusions shall not be reached without adequate factual support."* (Italics ours.)

Judge Cochran in his dissent rejected theory in favor of the facts as to the practical operation of the tax. He said "the statute is both vindictive and deceptive." It is deceptive because it purports to tax the sales of all retail merchants when in actual operation and effect and by means of the increased rates provided by Section 2 and the deductions provided by Section 4, it actually exempts the sales of practically all merchants and lays a heavy impost on sales made by a handful of their competitors. It is vindictive because of its severity; a few merchants pay practically the entire tax.

The attention of the lower court was called to the discrimination against department stores. The only justification for the discriminatory difference in the tax mentioned by the lower court is that "this unitary classification of department stores . . . undoubtedly conduces to simplification in the collection of the tax."

No argument of convenience of collection can justify the imposition of a tax on the sales of one merchant. (Stewart) one-fourth as large as the tax assessed against 24,163 competing merchants whose aggregate sales are more than 120 times greater. (Stewart's sales, $3,000,000.00; 24,163 competitors, $362,000,000.00.)

G. The cases relied upon by the State do not uphold the arbitrary inequalities and discriminations of the challenged act.

Clark v. Titusville, 184 U. S. 329 (1902)

The above case involved the constitutionality of an ordinance of the City of Titusville imposing a small license tax upon merchants in that city. It was an occupational tax in different amounts (not percentages) measured by sales. The amount of the tax per dollar of sales was somewhat less as the volume increased. ($5.00 for a merchant who did a business of $1,000.00, to $100.00 for a merchant who did a business over $60,000.00.) The attempt was to levy the tax proportionately to sales so that every one would pay a relatively similar percentage. The gradation was not worked out with mathematical certainty, but the net result was that the merchant with large sales paid a somewhat smaller sum in proportion to sales than a merchant with smaller sales. This inequality was incidental, and there was no material or intended discrimination such as exists in the cases at bar.

(Insert page 53.)

We find that the ordinance involved in the Titusville case, which is not fully printed in the report, is printed in full in the record of the case (Record No. 91, October Term 1901, Office of the Clerk of this Court). An examination of the ordinance will quickly demonstrate its entire lack of similarity with the sales tax law under attack here and render inapplicable the opinion in that case to the case at bar. That ordinance was adopted June 28, 1888. It required the license fee to be paid before July first of the same year and that the Mayor, upon being shown the receipt, should issue the license for the ensuing year. The license fee was fixed by the Ward Assessor, the amount depending upon what he "esteemed" or estimated the annual sales of the merchant amounted to. Apparently the assessor based his estimate on the sales of the preceding year.

The amount of the license fee did not fall upon each sale transaction. It was not measured as of the time of sale or according to the price obtained by the sale but bore an incidental or indirect relation to the general sales volume for the preceding year. This is necessarily true for two reasons. In the first place, in each class the license fee was exactly the same, whether a merchant's sales barely exceeded the maximum amount permitted in the next lower class or almost reached the minimum amount in the next higher bracket. See Class 6 (sales between $10,000.00 and $20,000.00—tax $35.00) as an example. If a merchant is in this class his license fee is $35.00 whether he sells $1.00 more than $10,000.00 or $1.00 less than $20,000.00. In the second place, when he gets his license for the ensuing year there is no restriction on the amount that he can sell during that year under that license. He may sell a million dollars worth of merchandise for the license fee of $35.00.

The Kentucky cases referred to on pp. 62-63 of appellee's brief are similar. For example, in *Gordon* v. *City of Louisville*, 138 Ky. 442, a small privilege tax was imposed upon the occupation of merchandise broker, on exactly the same plan as the Titusville license. The Kentucky cases were decided under Kentucky law and no Federal questions were raised or passed upon.

It will be noted that above $10,000.00 of sales, both retail and wholesale, the percentage was practically the same, no matter how much the sales increased. In other words, it was proportionately equal.

The ordinance involved in the *Titusville* case merely imposed a small license fee approximating the cost of inspection. While it may cost more to inspect a large concern than it does to inspect a small concern, the percentage of the cost to the size of the business decreases as the business increases. This was recognized. Concerns with large sales were charged a greater amount in dollars than concerns with small sales, but large concerns were charged a lesser sum in proportion to sales than the small concerns. The proportionate difference between the amount charged concerns with large sales and concerns with small sales was slight—but a few hundredths of a per cent.

In the *State Railroad Tax Cases*, 92 U. S. 575, 612 (1875), the court said apropos of such small differences:

> "Perfect equality and perfect uniformity of taxation as regards individuals or corporations, or the different classes of property subject to taxation, is a dream unrealized."

There is a vast difference between a small tax of from $5.00 to $100.00, proportioned according to the cost of inspection in an effort to assess the license fee equally, and a sales tax which practically exempts the sales of 99.9% of all retail merchants.

There is a vast difference between a case where the legislative body, in its efforts to be fair and equal, graded a small license fee downward with some incidental inequalities, and the case at bar where the legislative body made a conscious effort to effect a clear and hostile discrimination against the appellants.

The *Titusville* case is a typical case of a small license fee imposed on the merchant to pay the cost of inspection and regulation and borne by all in equal proportions. The Gross Sales Tax Law is not a license measure but a sales tax weapon to "aid" some merchants at the expense of others imposed on the transaction at disproportionate rates.

The status of Clark, the plaintiff in the *Titusville* case, is not clearly shown in the Supreme Court report of the case. It can be determined, however, by a reference to a report of the decision in the case handed down by the Supreme Court of Pennsylvania, when it had the case under consideration. The Pennsylvania decision is reported in *Commissioners, etc., to The Use of the City of Titusville,* v. *Clark,* 195 Pa. 634, 46 Atl. 286, 57 L. R. A. 348. The briefs of the counsel are digested in the L. R. A. report. From this digest, it appears that counsel conceded that classification was proper, but Clark complained that under the ordinance as drawn, he might be required to pay $35.00 on $10,100.00 worth of business while another taxpayer would only have to pay $25.00 on $9,900.00 worth of business. The court held that the increase was proper since it was an attempt to create uniformity. In other words, it was an attempt, in a rough way, by increasing the amount of tax to make the tax proportionate. The case did not involve one in which the rates increased.

Magoun v. Illinois Trust, 170 U. S. 283 (1898)

The above case sustained a graduated inheritance tax law. Inheritance taxes stand apart from other taxes. The court said, at page 288:

> "They are based on two principles: 1. An inheritance tax is not one on property, but one on the succession. 2. The right to take property by devise or descent is the creature of the law, and not a natural right—a privilege, and therefore the authority which

confers it may impose conditions upon it. From these principles it is deduced that the States may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions; and are not precluded from this power by the provisions of the respective state constitutions requiring uniformity and equality of taxation."

Again, at page 290, the court says:

"And if a State may deny the privilege altogether, it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy."

The Illinois inheritance law under consideration graded the tax on inheritances by the amount of the inheritance. In justification of this provision Justice McKenna said, at page 300:

"The tax is not on money; it is on the right to inherit; and her[illegible] condition of inheritanee, and it may be graded accor[illegible]g to the value of that inheritance."

There is no natural right to inherit. It is a privilege conferred by the State. The State may take all or such percentage of the inheritance by escheat or taxation as it chooses. Furthermore, a graded inheritance or estate tax has the further justification that it is based upon the ability of the taxpayer to pay the tax. The ability of a man who inherits more property or who has a large income to pay a higher rate of tax than a man with less property or less income is the principal justification for graded income and inheritance taxes. The Kentucky sales tax entirely disregards the ability of the taxpayer to pay the tax. As previously pointed out, a taxpayer with large sales may sustain a loss, while a taxpayer with much smaller sales may make a profit. Nor are sales a measure of the amount of property owned by the taxpayer. The volume of sales may

depend upon the character of the business and the number of times the capital invested in such business is turned.

While there is no natural right to inherit property, the taxpayers in the cases at bar, have a natural, lawful and constitutional right to engage in their respective businesses in the State of Kentucky. They can not be deprived of that right by the State and the State is not free to condition that right as it chooses.

It can hardly be urged that inheritance taxes graded in accordance with ability to pay, and taxing the privilege of inheritance or succession, are a precedent for arbitrary and discriminatory sales taxes.

State Board of Tax Commissioners v. Jackson, 283 U. S. 527 (1931)

This case is known as *The Indiana Chain Store Tax* case. It decides one point—*and one point only*—that chain stores may be classified for taxation separately from department stores and other stores singly owned or operated in the same place and under the same roof.

An analysis of both the majority and minority opinion in the *Jackson* case shows that the court was dealing solely with a chain store measure. The court goes so far as to point out the difference between department stores (such as the Stewart Dry Goods Co. and Levy Bros.) and separate stores conducted as a chain under common ownership and management. On this point it says at page 536:

> ". . . it is, nevertheless, evident that, whereas a department store spreads its efforts over a number of different sorts of shops under one roof, the chain store owner concentrates its energy upon the conduct of but one kind of stores located in many neighborhoods. Obviously, greater specialization in management and methods is possible in the latter type of enterprise than in the former, whose management, however capable, *must after all consist of many separate types*

each devoted to a single store similar to an independent retail store. The mass buying done *by a chain store owner* for a number of units selling the *same goods* is not comparable to the *individuated* purchasing of a department store for its grocery, its shoe, its drug, and each of its other departments. It is not to be expected that the management problems of stores, *essentially separate,* and differing entirely in the character of their business, under the aegis of a single department store, will be the same as those involved in the intensive selling of a *chain store* owner operating an equal number of units all devoted to a *single line* of business." (Italics ours.)

This language used in the majority opinion might well have been taken from the affidavits of Mr. McKim and Col. Levy respectively in their cases (Stewart R. 70, 81; Kroger R. 297, 319) showing that in the matter of buying power their respective department stores come into active competition with individualized specialty stores buying and selling a much larger volume of shoes or books or various other articles handled by a department store and yet taxed in the lower brackets of the act.

Thus the majority opinion is in fact as well as in effect an authority in support of the contentions made in this case by the Stewart Dry Goods Co. and Levy Bros. and other department stores similarly situated.

In the majority decision handed down in the case of *Liggett Co.* v. *Lee,* 288 U. S. 517, Mr. Justice Roberts pointed out "that the conduct of a chain of stores constitutes a form and method of merchandising quite apart from that adapted to the practice of the ordinary individually operated small store *or department store.*"

Bearing in mind the fact that the measure under consideration at the present time is not a chain store law but strikes seriously at department stores and at the same time exempts their competitors, one can readily see that the *Jackson* case is not in point.

Fox v. *Standard Oil Company,* decided by this court January 14, 1935, is another chain store tax case in which this court followed the *Jackson* case and the principles therein established. The tax in question in that case was not levied on sales.

Pacific American Fisheries v. Alaska, 269 U. S. 269 (1925)

In the above case an act of the territory of Alaska regulating and taxing canneries was assailed. Under the terms of that law a large pack of fish was taxed at a higher rate than a small pack. No question of the Fourteenth Amendment or the equal protection of the laws was involved. The claim was made that the territorial taxing act was contrary to the act of Congress of August 24, 1912, creating a Legislative Assembly in the territory of Alaska. Some claim was made that the tax contravened the Fifth Amendment and denied due process of law, but the latter claim does not seem to have been particularly stressed in argument. The act was sustained as being within the territorial power and within the sovereign right to protect fishing in the territory of Alaska and to prevent large packs, which would have a tendency to injure fishing. The court said at page 277:

> "Any tax is a discouragement and therefore a regulation so far as it goes, and the most plausible reconciliation of this power with the restrictions upon amending or modifying the laws in force is that the only purpose of the restrictions was to prevent the Territory from doing away with all protection, in a short-sighted rush for fish. . . .
>
> It is not unworthy of notice that in Section 9 of the Act of August 24, 1912, an earlier statute of July 30, 1886, C. 818, Sec. 1, 24 Stat. 170, is taken up, in which the power of the territorial legislatures to pass laws for the protection of game and fish is recognized, and also that the latest revision of the fish law by

Congress was passed after the present tax law had been enacted and had been upheld by the District Court; that it provided that nothing therein contained should curtail the powers of the Territorial Legislature of Alaska, and that it showed no sign of dissatisfaction with the way in which those powers had been used. Act of June 6, 1924, c. 272, Sec. 8; 43 Stat. 464, 467."

The above is the heart of the decision, which holds that the taxing act was a proper exercise of a granted power to protect *ferae naturae*.

Moore v. State Board of Charities & Corrections, 238 Ky. 243, 37 S. W. (2d) 41; 239 Ky. 729, 40 S. W. (2d) 349 (1931).

This case is discussed under the second heading of this brief where we show from the record that the issues in the State Court case were feigned for the purpose of prejudicing the rights of appellants who were contesting these cases in the Federal Court. No taxpayer was a party to the State Court suit and the decision must be disregarded in the consideration of this case.

IV.

The Farm Exemption Provision Renders the Challenged Act Unconstitutional.

Section 1 of the Kentucky Gross Sales Tax Law defines who are merchants subject to the tax. It reads in part as follows:

"The words 'retail merchant' as used in this act, shall mean and include every person, firm, association, co-partnership or corporation opening, establishing, operating or maintaining any 'store' as defined herein, for the purpose of and selling goods, wares or merchandise at retail in this State; **except those actually engaged in gardening or farming and selling garden or farm products raised by them in this State.**"

The above quoted language is a clear discrimination against the sales of farm products grown in other states. Similar attempts by one State of the Union to erect a tax barrier against products raised in other States of the Union have frequently been declared invalid by this court. The above language is clear and unambiguous. It requires no construction. It means what it says. Merchants actually engaged in farming and selling farm products *raised by them in Kentucky* are exempt from taxation. All of their sales are exempt. They are not within the class which the legislature intended to tax. Merchants engaged in farming and raising farm products in other States and selling such farm products in their stores in Kentucky, are not within the language of this exemption and were intended to be taxed. Kroger *raises* farm products in *Ohio.* (Finding of fact, Stewart R. 401, Kroger R. 150.) It *sells* these products in its stores in *Kentucky. Its sales are not exempt.*

The Gray-Von Allmen Sanitary Milk Company *raises* similar farm products *in Kentucky* and *sells* the same in its *Kentucky stores. All of its sales are exempt.* (Kroger R. 293.) This is one of the examples of the intended discrimination shown in the record.

The State apparently recognized that the discrimination made by the legislature could not be successfully defended in court and would render the entire law unconstitutional under the authority of *Connolly* v. *Union Sewer Pipe Company,* 184 U. S. 540 (1902). The State, therefore, sought to obtain a construction diametrically opposed to the plain language of this exemption which would save the act from invalidity on this ground. For this purpose the State picked a plaintiff (Forrest Moore) friendly to the State to bring a suit against the State. (Stewart R. 96; Kroger R. 358.) Moore was not a taxpayer, did not raise farm products and was merely a useful tool. The Court of Appeals of Kentucky held that Moore had no interest and

refused to pass upon the feigned case. *Moore* v. *State Board of Charities & Corrections*, 238 Ky. 243, 37 S. W. (2d) 41 (1931).

In dismissing the suit the court said:

> "The plaintiff below and appellant here is Forrest Moore who brings the suit as a general taxpayer. *SO FAR AS THIS RECORD SHOWS, HE IS NOT ONE OF THAT CLASS WHICH WILL BE COMPELLED TO PAY ANY TAX UNDER THE ACT IN QUESTION.* . . .
>
> On the hearing the appellant introduced one short affidavit. The appellees took proof by witnesses heard orally in court. Thereupon the case was submitted. . . . It is obvious from our statement of the case that the appellant in no true sense represents the class of taxpayers upon whom the burden of the Gross Sales Tax Law, if constitutional, will fall, and should we, on the showing made in this record, hold the act to be unconstitutional, we would affect in a most serious way the rights of those who, after all, are the real parties in interest and who would never have been given an opportunity to be heard." (Our emphasis.)

The court then cited the following Kentucky cases in which it was held improper to decide a controversy which would affect the rights of genuine litigants not made parties to the case:

Town of Beaverdam v. *Vincent*, 223 Ky. 490, 3 S. W. 2nd 1090

Fiscal Court of Carter County v. *Strother*, 199 Ky. 825, 251 S. W. 1003

Commonwealth, etc., v. *Farmers State Bank*, 225 Ky. 759, 10 S. W. 2nd 274

White v. *Walker*, 226 Ky. 326, 10 S. W. 2nd 1071.

The Civil Code of Practice of Kentucky specifically provides in Section 28 as follows:

> "The court may determine any controversy between parties before it, *if it can do so without prejudice to*

> *others;* if it cannot do so, it must require such other persons to be made parties, *or must dismiss the action without prejudice.*" (Italics ours.)

The Kentucky Court of Appeals then continued (37 S. W. 2nd 42):

> "Under these authorities and the section of the Code itself, it is manifest that a representative of the class of taxpayers which will have to bear the burden of this tax should be made a party to this suit. . . . The judgment of the lower court is therefore reversed for proceedings consistent with this opinion."

After the Court of Appeals held that Moore could not maintain a contest of the law because he had no interest adverse to the State, Moore obliged the State by making the D. T. Bohon Company a cross-defendant. This was after the cases at bar were filed and submitted in the Federal Court, and temporary restraining orders against the enforcement of the act issued.

The Bohon Company did not complain because it had been picked out of 25,000 retail merchants as a party defendant. It answered that it was a taxpayer and continued the prosecution of the *Moore* case. *The State admitted that Bohon was a taxpayer.* However, the Bohon Company did not claim to raise farm products in Kentucky or elsewhere. It was not engaged in interstate commerce. It subsequently developed that Hanley Bohon, who operated the company, had a financial interest in upholding the law which he pretended to attack. Upon this feigned issue *in which the State, Moore and Bohon had the same purpose, namely, to sustain the law and to secure a construction thereof by the Court of Appeals which would relieve it from the infirmity apparent on its face,* the case again went to the Court of Appeals. *That court was not apprised of the true facts and decided the case upon the assumption that Bohon was a tax-*

payer and was engaged in a genuine contest of the law. Moore v. *State Board of Charities & Corrections*, 239 Ky. 729.

Subsequently, the tax returns were audited for appellants by certified public accountants, who **discovered that the D. T. Bohon Company was not a taxpayer and was one of those benefited by the law, instead of injured as it had falsely alleged. Its tax return showing "No tax due," audited and approved by the State Tax Commission, is reproduced in its entirety in the record** (Stewart R. 284-A and B; Kroger R. 366-A and B) **and is reproduced in this brief as Appendix A. (See page 96.)**

It further developed in a suit brought by the Louisville Courier-Journal against Bohon that he not only was benefited by the act **but at the very time he pretended to contest the law he had a contract with the State Board of Charities and Corrections by which that Board agreed to pay Bohon $110,000.00 for certain land to be used for State purposes, provided the law was sustained. Case No. 34807, Franklin Circuit Court. The petition and answer in this case are printed as Appendix B to this brief. (See page 98.)**

Bohon had a direct financial interest in helping the State secure a favorable decision on all points.

It is obvious that since Bohon was not a taxpayer, he was not in a position to urge any discrimination, and since his business was in the lower brackets of the tax, he could not complain of the severity of the tax as applied to him. Since Bohon did not raise or sell farm products, he was in no position to complain of the discriminatory operation of the farm exemption provisions. No one except the three conspirators, to-wit: the State Board of Charities & Corrections, Moore, and the Bohon Company were parties to this trumped-up case, which was taken to the Court of Appeals without disclosing to that court that the alleged attack was a sham promoted by the State for the purpose

of affecting the real controversy which had been previously brought in the Federal court with the appellants and intervenors as parties. The District Court in this case by a finding of fact has affirmatively found that Bohon represented in the Court of Appeals that he was a taxpayer and that the Court of Appeals was thus innocently misled into deciding the case upon that false assumption. (Finding of Fact No. 2. Stewart R. 401; Kroger R. 151.) This also appears in the second opinion of the Kentucky Appellate Court, 239 Ky. 729, 40 S. W. 2nd 349.

Referring to the first case, the court said (40 S. W. 349, 350, Col. 1):

> "We reversed the judgment of the court solely on the ground that the record failed to show that Moore was one of the class of taxpayers who would have to pay the gross sales tax if the law were upheld and that a decision on the constitutionality of that law *should not be had without some taxpayer who would have to pay the tax being made a party.*" (Italics ours.)

The court then said that on the return of the case to the lower court "D. T. Bohon & Company, one of the class of taxpayers who will have to pay the gross sales tax if that law be held constitutional, was made a party defendant to the suit."

We have proved without contravention that the above allegation of Bohon and Moore that Bohon was a taxpayer was deliberately false and constituted a fraud upon the Court of Appeals of Kentucky. That court would not have decided the case had it known that Bohon was no more a taxpayer than Moore and stood to benefit by helping the State sustain the law on which he simulated an attack.

The intention of the parties in the Moore-Bohon sham suit to embarrass this genuine proceeding in the Federal courts is proved by the claim asserted by Bohon, admitted by the State and adjudged by the lower court, that the

State of Kentucky had given its consent to be sued *in the Federal courts.* This was one of the issues in the Federal Court. It was not involved in the state action. A ruling was sought which would prejudice the action of complainants, who chose the Federal tribunal.

No question of interstate commerce was involved, yet the parties jointly persuaded the court to devote three and a half columns of its opinion to a discussion of this question. This could have had no other purpose than to prejudice the genuine controversy then pending in the Federal courts, where interstate commerce questions had been raised by parties engaged in such commerce and vitally affected by the tax on interstate transactions.

It is too clear for argument that a case decided under such circumstances upon issues feigned by the parties should have no consideration here. Furthermore, none of the parties in that case disclosed or made available to the Court of Appeals the facts with reference to the actual operation of this tax law. The Kentucky Court of Appeals did not have before it any analysis of the tax returns filed by 24,000 retail merchants and did not know the facts with reference to the appellants and the intervenors in this case. Hence the reasoning of the Court of Appeals was based upon premises which were assumed without foundation in the record and which were presented by agreement of the parties without oral argument in the Court of Appeals. For these reasons we submit that the *Moore* case is not worthy of further consideration.

The only consideration to which the *Moore* case is entitled is as a reflection of the extremity to which certain representatives of the State or the Independent Merchants Association were put in their effort to sustain an unconstitutional law. When parties are forced to resort to a sham controversy for the purpose of effecting adversely a genuine controversy then pending in the Federal courts, the

sham case should recoil like a boomerang upon the heads of those guilty of having misled the Court of Appeals of Kentucky.

We believe that the facts contained in this record and the arguments advanced in this brief are a sufficient answer to the reasoning of the Court of Appeals in the *Moore* case since that decision was not based upon a true record or upon a real controversy between the adverse parties.

In its consideration of the exemption provision in the first section of the act, the Court of Appeals was misled by the litigants, when it was urged that the language *"raised by them in this State"* meant *"raised by them anywhere and sold in this State."* This astounding construction cannot otherwise be accounted for. The Court of Appeals in the last *Moore* case said:

> "We are of the opinion that the phrase 'in this State' was meant to modify the word 'selling' and not the word 'raised.' . . . It was plainly the purpose of the act to exempt from its operation those (merchants) engaged in gardening and farming and selling their own products. Such sales the legislature intended to be without the operation of the act, and it was of no moment to that body where the produce sold was raised. . . . We conclude that the act must be construed as to exempt those engaged in gardening and farming and selling in this state their own products no matter where grown. With this construction placed upon the act, the criticism of its constitutionality based upon the ground now urged falls."

In making this construction the court had in mind the question whether the exemption resulted in discrimination against foreign-grown products which would violate the interstate commerce clause of the Federal Constitution. However, the construction of the Court of Appeals, although intended to relieve the act of one constitutional objection, makes it subject to a more serious objection, be-

cause, as construed by the Kentucky court, all retail merchants who raise farm products anywhere and sell such products in Kentucky are exempt, while competitors who sell farm products not raised by them are subject to tax on all of their sales.

For the peculiar reasons stated above, it becomes necessary to discuss the farm exemption provision of the challenged act from several different angles.

First, we contend that the construction placed upon the act by the Kentucky court was not made in a *bona fide* case. It is not binding in this case for various reasons, hereinafter discussed, and is patently wrong. Hence we first discuss the unconstitutionality of the exemption contained in the act as it is written, disregarding the construction of the lower court.

Second, assuming that the Kentucky court and the lower court were correct (which we deny) in construing the law to exempt all of the sales of all merchants selling farm products raised by them anywhere and to tax the sales of all merchants selling farm products not raised by them, we contend that this construction also renders the law unconstitutional.

Third, we urge that the lower court erred in following the construction of the Court of Appeals in *Moore* v. *State Board of Charities & Corrections, supra.*

Fourth, we submit that if the construction adopted by the lower court is approved, then the appellant Kroger is exempt from tax on all of its sales because it raises farm products which it sells in its stores in Kentucky. We further contend that to exempt Kroger and to tax the sales of The Great Atlantic & Pacific Tea Company, which sells farm products not raised by it, plainly denies the equal protection of the laws to competitors in the same class.

A. The act, as written, discriminates against farm products raised in States other than Kentucky and violates the commerce and equal protection clauses of the Federal Constitution.

The exemption of all of the sales of merchants selling farm products raised by them in Kentucky is an integral part of the legislation under consideration.

If this exemption is invalid, the entire act falls because the exception cannot be eliminated without imposing a tax on a large class of merchants whom the legislature did not intend to tax. *Connolly* v. *Union Sewer Pipe Company,* 184 U. S. 540 (1902). In that case Section 9 of the Illinois Anti-trust Act provided:

> "The provisions of this act shall not apply to agricultural products or livestock while in the hands of the producer or raiser."

This court held, first, that the exemption was invalid, and, second, that the entire act was rendered unconstitutional by this invalid exemption. On the second point, the court said:

> "If the latter section be eliminated as unconstitutional, then the act, if it stands, will apply to agriculturalists and livestock dealers. Those classes would in that way be reached and fined, when, evidently, the legislature intended they should not be regarded as offending against the law. . . ."

There can be no question that the entire tax act must fall if the exemption of merchants selling farm products is invalid. The law as written raises a tax or tariff barrier against garden and farm products raised outside of Kentucky. Similar laws have been held unconstitutional in the following cases:

Welton v. *Missouri,* 91 U. S. 275 (1875).

Guy v. *Baltimore,* 100 U. S. 434 (1879). The syllabus of this case reads:

> "A State cannot, in the exercise of her taxing power, impose upon the products of another State, brought within her limits for sale or use, a more onerous burden of tax than upon like products of its own territory, nor discriminate against a citizen by reason of his being engaged in thus bringing or in selling them."

Webber v. *Virginia,* 103 U. S. 344 (1880). In this case an agent for the sale of articles manufactured outside of the State was required to pay a license tax, but an agent for the sale of articles manufactured within the State was not required to pay a license tax. The court held that this was a tax upon the foreign character of the goods to be sold and was an unconstitutional regulation of commerce between the state. The court said at page 350:

> *"It matters not whether the tax be laid directly upon the articles sold or in the form of licenses for their sale. If by reason of their foreign character the State can impose a tax upon them or upon the person through whom the sales are effected, the amount of the tax will be a matter resting in her discretion. She may place the tax at so high a figure as to exclude the introduction of the foreign article and prevent competition with the home product. It was against legislation of this discriminating kind that the framers of the Constitution intended to guard when they vested in Congress the power to regulate commerce among the several States."* (Italics ours.)

Walling v. *Michigan,* 116 U. S. 446 (1885).

Ex parte Smith, 100 Fla. Part 1, page 1; 128 So. 64. This case demonstrates that the rule applies not only to manufactured articles but also to agricultural products produced outside the State and offered for sale within the State. The law involved in the Florida case discriminated

against dairy, poultry and farm products of other States in favor of similar products of Florida. The court held that this was unconstitutional. The syllabus reads:

> "A town ordinance requiring 'each and every person, firm or corporation,' selling or delivering merchandise by truck, and who does not conduct and pay a license upon an established business in the town, to pay a designated license tax, but exempting from the operation of the ordinance, dairy, poultry or farm products, raised, grown, or manufactured 'within the State of Florida,' but not elsewhere, held, invalid as a denial of equal protection and an abridgement of the privileges or immunities of citizens of other states, contrary to the Fourteenth Amendment of the Federal Constitution, as well as to Section 2, Art. 4, thereof."

The language of the Kentucky law is almost verbatim the language of the Florida law, which exempted from its operation "farm products raised . . . within the State of Florida." Following the same rule as that applied by this court in *Connolly* v. *Union Sewer Pipe Company, supra,* the Florida Supreme Court held that this exemption rendered the entire ordinance unconstitutional.

Additional cases holding discriminations against the products of merchants of other states unconstitutional are:

Ward v. *Maryland,* 12 Wall. 418 (1870).
Robbins v. *Shelby Taxing District,* 120 U. S. 489 (1886).
Minnesota v. *Barber,* 136 U. S. 313 (1890).
Brimmer v. *Rebman,* 138 U. S. 78 (1891).
New York State v. *Roberts,* 171 U. S. 658 (1898).
Bethlehem Motors Co. v. *Flynt,* 256 U. S. 421 (1921).
Boyce v. *French,* 293 Fed. 43 (1923).

In *Bethlehem Motor Corporation* v. *Flint,* 256 U. S. 421 (1921), this court held that a discrimination against products of other States violated *both* the equal protection *and* commerce clauses of the Federal Constitution.

B. The construction of this clause adopted by the lower court exempts from the tax all of the sales of retail merchants selling farm products raised by them anywhere. This construction denies the equal protection of the laws to merchants selling farm products not raised by them.

The lower court held that it was bound by the interpretation of the farm exemption clause made by the Court of Appeals of Kentucky in *Moore* v. *State Board of Charities,* 239 Ky. 729, 40 S. W. (2d) 349 (1931). The Kentucky court interpreted the language *"raised by them in this State"* to mean raised by them *anywhere* and said that retail merchants selling farm products in Kentucky "no matter where grown" by them, *were exempt from taxation,* but merchants selling farm products not raised by them *were subject to taxation.*

The exact language of the Court of Appeals in Kentucky in *Moore* v. *State Board of Charities, supra,* reads as follows:

> "Does the act violate the commerce clause of the federal Constitution?
>
> "It is argued that it does, because in defining a retail merchant it exempts those 'actually engaged in gardening or farming and selling garden or farm products raised by them in this State.' Appellants say that under this definition the tax must be collected from those who raise their farm products elsewhere but bring them into this State to sell, which, being true, we have a tax laid on interstate commerce, a thing which the State cannot do. However, we are of the opinion that the phrase 'in this State' was meant to modify the word 'selling' and not the word 'raised.' The whole import of the act is the levy of a tax measured by sales made in this State. It is the sales which count, not the place where the goods sold are produced. *It was plainly the purpose of the act to exempt from*

> *its operation those engaged in gardening and farming and selling their own products.* Such sales the Legislature intended to be without the operation of the act, and it was of no moment to that body where the produce sold was raised. We must always presume that the Legislature intended to write a constitutional act and must construe its law with that end in view. With this principle controlling us, and being convinced that it was the sale the Legislature had in mind and not the place of production, *we conclude that the act must be construed as to exempt those engaged in gardening and farming and selling in this State their own products no matter where grown.* With this construction placed upon the act, the criticism of its constitutionality based upon the ground now urged falls." (Italics ours.)

Under the next heading we show why the lower court was not bound by this case and why the construction of the act by the Court of Appeals of Kentucky does not fall within the general rule that the Federal Courts are bound to follow the interpretation of State statutes by State courts. However, assuming *arguendo* that the rule applies and that the statute is to be given the construction placed upon it by the Kentucky court, we submit that the exemption of retail merchants selling farm products raised by them anywhere discriminates against retail merchants selling farm products not raised by them. This point was assigned as error in the court below but was not passed on in the majority opinion. (Stewart R. 410; Assignment of Errors 10 and 11.)

Although the majority chose to ignore this discrimination, it was fully considered and discussed by Judge Cochran in his dissenting opinion, as follows (Stewart R. 387; Kroger R. 121); (8 Fed Supp. 396, 397 [1934]):

> "Another particular in which it seems to me that the Act is unconstitutional is that it discriminates against garden and farm products raised in other states, and in that it excepts from its provision retail

merchants selling garden and farm products raised by them in this state. A retail merchant who sells such products raised elsewhere is subject to the tax. The plaintiff, The Kroger Grocery & Baking Company, comes within that category. It operates a farm of 360 acres in Ohio named 'Country Club Farm' after the 'Country Club' brand, one of its best known brands. On that farm it produces cattle, sheep, hogs, poultry, milk and garden and other farm products which are sold at retail in this state. The language of the exception is 'those actually engaged in gardening or farming and selling garden or farm products raised by them in this state.' The Court of Appeals of Kentucky in the case of *Moore* v. *State Board*, 239 Ky. 729, construed this exception as follows:

> "However, we are of the opinion that the phrase 'in this state' was meant to modify the word 'selling' and not 'raised.' The whole import of the act is the levy of a tax measured by sales made in this state. It is the sales which count, not the place where the goods sold are produced. It was plainly the purpose of the act to exempt from its operation those engaged in gardening and farming and selling their own products, such sales the Legislature intended to be without the operation of the act and it was of no moment to that body where the produce sold was raised."

"The construction placed on the exception is as if it read 'those actually engaged in gardening and farming and selling in this state garden or farm products raised by them.' **It seems to me that construing it to mean as if it so read is taking unauthorized liberty with the language of the act. There is one consideration, however, which makes it certain that the legislature had no such meaning. To so read the statute exempts the plaintiff, The Kroger Grocery & Baking Company, from the act. The exemption is not of persons, but of retail merchants so engaged in selling and that plaintiff is such a merchant. It is inconceivable**

> **that the legislature intended to make such an exemption. Then, if it be taken that it did, this circumstance of itself would seem to affect the validity of the act. It will hardly do to hold that the plaintiff, The Kroger Grocery & Baking Company, shall not pay the tax and The Great Atlantic & Pacific Tea Company shall. This is a case, as I see it, where this court is not bound to follow the state court in its construction of the act. It is governed by the statement on this subject in the case of Edward Hines, Trustees, v. Martin, 268 U. S. 458, 463.''** (Boldface ours.)

The point that the interpretation of the farm exemption provision made by the Court of Appeals, while it relieved the act from the discrimination against foreign-grown farm products, created a still greater discrimination against the sales of merchants selling farm products not raised by them, was not called to the attention of the Kentucky Court of Appeals and was not discussed by that court. It was called to the attention of the Federal District Court below, but was not considered except by Judge Cochran.

We submit that there can be no justification for taxing the sales of merchants engaged in selling farm products not raised by them and exempting all the sales of merchants selling a small quantity of like products raised by them. Kroger, Gray-Von Allmen and numerous others are in the former class, The Great Atlantic & Pacific Tea Company and others are in the latter class.

In *Smith* v. *Cahoon*, 283 U. S. 553 (1931) this court held that a statute of Florida was repugnant to the Fourteenth Amendment because it did not apply to those "engaged exclusively in transporting agricultural products." The Florida law required common carriers to give a bond to protect the public against injuries resulting from negligence in the operation of such vehicles and for the protection of the persons and property carried, but it exempted

> "those who carry for hire farm products, or milk or butter, or fish or oysters, and those who carry for hire bread or sugar, or tea or coffee, or groceries in general, or other useful commodities."

The court said that the above classification was not based on anything having relation to the purpose for which it was made. The court cited: *Airway Corp.* v. *Day,* 266 U. S. 71, 85; *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540, 563, 564; *Southern Railway Co.* v. *Greene,* 216 U. S. 400, 417; *Truax* v. *Corrigan,* 257 U. S. 312, 332, 333; *Louisville Gas & Electric Co.* v. *Coleman,* 277 U. S. 32, 37.

In like manner the exemption of all of the sales of retail merchants who happen to be engaged in farming and selling farm products raised by them from a license tax for selling merchandise in a store and the taxation of the sales of other merchants not engaged in farming but selling like farm products in similar stores, have no relationship to the alleged purpose of the legislation, which is stated in the title to be an "excise or license tax on retail stores" and which from its very nature is a tax on sales. Furthermore, Section 2 provides—

> "Every retail merchant, as defined herein, shall pay an annual license tax for the opening, establishing, operating or maintaining of any store or stores, as defined herein."

A definition that excludes retail merchants who are engaged in farming and selling some of their products in their stores, resulting in the exemption from tax of all his sales, is purely arbitrary.

This was the holding of the Supreme Court of Illinois in *Winter* v. *Barrett,* 352 Ill. 441, 186 N. E. 113 (1933). Illinois adopted a uniform sales tax at a flat rate on the retail sales of all tangible property, as defined therein. Farm

products were not included in the definition of tangible property. Section 1 of the Illinois Act read:

> "For the purposes of this Act 'tangible personal property does not mean or include farm products or farm produce sold by the producer thereof or motor fuel.'"

The Supreme Court of Illinois said (186 N. E. 113, at page 122, col. 1, bot.):

> "The purpose of such provision in this act is therefore clearly to exempt from the application thereof those engaged in the business of selling farm products or farm produce or motor fuel to the consumer at retail. Appellee therefore contends that such provision and purpose deny to those engaged in the business of selling tangible personal property at retail equal protection of the laws and renders the act void, as in violation of the provisions of section 1 of article 9 requiring that taxes levied on occupations shall be by general law and uniform as to the class upon which it operates.
>
> * * * *
>
> Counsel for the people argue that, since by section 2 of article 9 of the Constitution the Legislature may tax not only the occupations enumerated in section 1 of that article but other occupations, and may leave still others untaxed, it may put all persons engaged in the business of selling tangible property at retail in a class, and may except therefrom those engaged in the business of selling farm products or farm produce or motor fuel at retail. It will be observed, however, that this act does not purport to be a tax upon the butcher, the baker, or like occupations, as such, to the exclusion of those engaged in other occupations. There is created but one class to whom the tax is to be applied, and that class is 'persons engaged in the business of selling tangible personal property at retail.' There is in this provision no limitation upon the word 'persons' and it must be construed to include all persons en-

gaged in such business; the only exemption therefrom being inferred by the above-quoted language of the statute declaring that certain property shall not be included within the meaning of the term 'tangible personal property.' The tax levied by the act must be uniform on all of the class upon which it operates. The question therefore arises whether there is any basis for taking those engaged in the business of selling farm products or farm produce or motor fuel at retail from this class. But for the exemption sought to be made by the act, those engaged in the business of selling farm products or produce or motor fuel at retail come within the terms of the act, for they are selling tangible personal property at retail. Uniformity of taxation and equal protection of the laws require that they, too, pay this tax, unless there be a valid basis for discrimination in their favor or for considering them a different class or vocation from that into which they naturally fall."

The Illinois court then discussed at length the arguments urged to support the farm exemption and concluded:

"He is in the business of selling tangible personal property at retail in addition to the business of producing, and the exclusion of such business from the operation of the act, under such circumstances, finds no basis in fact upon which he may be reasonably placed in a different classification from the general class of those engaged in the selling of tangible personal property at retail created by the act. He is of the class to which the act applies, just as the druggist who compounds and produces the proprietary remedies which he sells at retail is in that class, and, so far as the act attempts to exclude him from its provisions, it is not uniform in its application to the class on which it operates and cannot be sustained."

The farmer exemption in the Illinois sales tax act is on all fours with the exemption in the Kentucky act.

The exemption contained in the Illinois and Kentucky Sales Tax Acts is also similar to that condemned in *Connolly* v. *Union Sewer Pipe Company*, 184 U. S. 540, previously quoted.

The arbitrary classification complained of appears upon the face of the Kentucky Act. The evidence as to the operation of the act merely emphasizes the discrimination made by the terms of the act whether read as it was written by the legislature or read as it was re-written by the Court of Appeals. *Borden's Farm Products Company* v. *Baldwin*, 79 L. Ed. 130 (1934), citing *Smith* v. *Cahoon*, 283 U. S. 554.

C. The lower court erred in holding that it was bound by the decision of the state court in Moore v. State Board of Charities & Corrections.

A majority of the lower court held that they were bound by the decision of the Court of Appeals in *Moore* v. *State Board of Charities & Corrections, supra.* In doing so the lower court disregarded both the proof in this record showing that Bohon was not a taxpayer and the statement by the Court of Appeals in the first *Moore* case that the rights of real parties should not be affected by what they might say in a case where real parties are not represented. In the first *Moore* case the court pointed out that Moore was not one of the parties subjected to the burdens of the tax. The court said:

> "It is obvious from our statement of the case that the appellant in no true sense represents the class of taxpayers upon whom the burden of the Gross Sales Tax Law, if constitutional, will fall, and should we, on the showing made in this record, hold the act to be unconstitutional, we would affect in a most serious way the rights of those who, after all, are the real parties in interest and who would never have been given an opportunity to be heard. *Indeed, it might be argued, with what soundness we expressly do not say, that*

they would not even be bound by the decision in this case because of the lack of representation." (Italics ours.)

All parties to the Court of Appeals case, namely: Moore, who, strangely, remained in the case after the first ruling by the Court of Appeals; Bohon, who intervened, and the State Board of Charities & Corrections, were actually seeking to have the Court of Appeals sustain the law although Moore and Bohon *pretended* to attack it. The Court of Appeals was innocently led into making an erroneous decision in a framed case in which, to use its own language in its first opinion, the real parties of interest "never have been given an opportunity to be heard."

None of the appellants or intervenors and no other taxpayer having any tax to pay under the challenged act was a party to the Moore case and did not appear therein. It follows that, again quoting the language of the Court of Appeals in the first case, the appellants and real parties in interest *should not be bound "by the decision in this case because of the lack of representation."*

We print as Appendix A, page 96, of this brief the report of the gross sales of the D. T. Bohon Company showing **"No tax due"** (lower right-hand corner) opposite "Net amount of tax," establishing the falsity of the representation made to the Court of Appeals that Bohon was a taxpayer and the admission of the State that this was true. Under these circumstances the decision of the Court of Appeals obtained by false and fraudulent representations should be disregarded.

Ward v. *Alsep,* 100 Tenn. 619, 46 S. W. 573 (1898), is directly in point. In that case, suit was filed in the Federal court attacking the validity of a tax act of Tennessee. The plaintiffs in the Federal court had large taxes to pay. Thereupon suits were brought in the State court in a colorable action to effect the case pending in the Federal court.

When this was brought to the attention of the State court that court declared:

> "When a suit is brought with a view of affecting the rights of third parties and it is apparent that this is the sole object, the suit is not adversary but collusive and should be dismissed.
>
> "It has also been held that a suit prosecuted for the purpose of obtaining a judgment that may by way of precedent affect the rights of third parties should be dismissed."
>
> "It is not sufficient that the parties be real and not fictitious, but the controversy must be real and not pro forma; nor is it sufficient that the parties exist as they are set out in the petition; nor that the plaintiff has a cause of action; beyond that the question arises: is the suit prosecuted to redress the grievance of plaintiff, *or to effect third persons who may be interested in the same question already pending in another suit and which is the primary and real object of the proceeding;* if the latter, the suit should be dismissed. Courts cannot be used for the purpose of deciding even real questions in pro forma suits, especially where the object is to affect important litigation between other parties." (Italics ours.)

Williams v. *Van Dusen,* 203 Missouri Appeals 162, 219 S. W. 395 (1920), was an action to cancel tax bills issued for street paving, on the ground of delay in completing the work. The defendant relied for defense on a decision of the State court approving the delay.

The case in the State Court was brought by a taxpayer entitled to bring suit against a proper defendant, but the plaintiff was represented by an attorney who was paid by the defendant contractor and the apparent purpose was to get a decision approving the delay. The court permitted this to be shown by way of collateral attack and said:

> "The suit was a sham, not because there was no conflict of interest between the apparently opposite

> parties had the plaintiff therein chosen to assert her interest, but because there were in fact no contesting parties: the plaintiff was none other than the contractor himself *masquerading as McQuinn.*" (Italics ours.

In *Calhoun* v. *Railroad Company*, 121 N. Y. 69, 24 N. E. 27 (1890), a taxpayer brought suit to cancel bonds of New York City issued in aid of defendant. Plaintiffs relied on a decision of the Court of Appeals of New York holding these bonds invalid. The defendants showed that this decision was obtained in an action brought at the instigation of the City. The court held:

> "An adjudication obtained under such circumstances ought not to stand in the way of a re-examination by the court of the grounds on which it proceeded."

This court had occasion to consider a comparable situation in *Bartemeyer* v. *Iowa*, 85 U. S. 129 (1873), in which this court on its own motion refused to pass on the question involved because it was satisfied that a moot case had been made to raise the particular point and the real facts would not have done so.

In *Lord* v. *Veazie*, 49 U. S. 251 (1850), an issue was framed between litigants, both of whom desired the same result (as in the *Moore* case). The purpose was to affect the claim of other parties in another case. This court said in the syllabus:

> "Where it appears to this court from, affidavits and other evidence filed by persons not parties to a suit, that there is no real dispute between the plaintiff and defendant in the suit, but, on the contrary, that their interest is one and the same, and is adverse to the interests of the parties who filed the affidavits, the judgment of the Circuit Court entered pro forma is a nullity and void, and no writ of error will lie upon it. It must, therefore, be dismissed."

Mr. Chief Justice Taney in his opinion says—

> "And any attempt, by a mere colorable dispute, to obtain the opinion of the court, upon a question of law which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended, and treated as a punishable contempt of court. . . .
>
> "**The objection in the case before us is, not that the proceedings were amicable, but that there is no real conflict of interest between them; that the plaintiff and defendant have the same interest, and that interest adverse and in conflict with the interest of third persons, whose rights would be seriously affected if the question of law was decided in the manner that both of the parties to this suit desire it to be.**" (Boldface ours.)

The language of the Chief Justice in *Lord* v. *Veazie* fits the *Moore* case like a glove. There was no real conflict between Moore, Bohon and the State Board of Charities. Plaintiffs and defendants had the same interest. Both plaintiffs and defendants stood to profit financially from a decision upholding the law. The interest of the parties in the *Moore* case was adverse only to the interest of appellants and intervenors in the Federal case whose rights it was intended to seriously affect.

The deception practiced on the Court of Appeals in the *Moore* case is the only reasonable explanation of the interpretation of the words "raised *in this State*" to mean raised *anywhere*. The clear intention of the legislature was to exempt merchants selling farm products raised in Kentucky, and the law could not have been passed except for this exemption. If a genuine controversy had been presented to the Court of Appeals and this question had been argued by adverse interests, the interpretation complained

of would not have been made by that court. The construction is so palpably erroneous that it should not be followed, and the court is not bound to follow a construction obtained under circumstances such as are shown in this record.

Furthermore, the rule that the Federal courts are bound to follow the construction of State statutes by State courts is not applicable where the Federal court has obtained jurisdiction prior to any construction by the State court and where the construction urged in the State court is a single decision made thereafter in a case framed for the purpose of securing such decision.

It has been repeatedly held that where the jurisdiction of the Federal court attaches and causes are submitted to that court prior to any applicable decision in the State court, the Federal courts will follow their own independent judgment and are not bound by decisions subsequently made in actions thereafter brought in the State court involving similar questions. *Kuhn* v. *Fairmount Coal Company,* 215 U. S. 349 (1910).

In this connection it should also be noted that the *Bohon* intervention and the case which went to decision in the Court of Appeals *was filed after the cases at bar had been argued and submitted to the three-judge Federal court:*

Finding of Fact No. 2

> "The D. T. Bohon Company, cross-petitioner in the Forrest Moore case, represented to the State courts of Kentucky in that action that it was a taxpayer under the Act, and the case was decided on the theory that such a statement was true, but the Bohon cross-petition was filed in the Moore case after the institution of these actions and after their submission on plaintiffs' motions for temporary injunction." (Kroger R. 151; Stewart R. 401.)

Not only was the case in the State court a sham but Bohon did not even claim that he was within either the class taxed or the class exempted by the exception of merchants selling farm products raised by them. He did not claim to be engaged in farming or in interstate commerce. Hence, there was no occasion for the Court of Appeals of Kentucky to discuss that feature of the case. What was said was pure dicta, which is not binding.

Another important reason for disregarding the decision in the *Moore* case is that the parties purposely kept from the court the facts with reference to the practical operation and effect of the law. The Court of Appeals did not know what this court knows as to the actual discriminatory operation of the tax and did not discuss the actual returns which were not called to the attention of that court. This court has previously held that a State court decision which does not take into consideration the actual operation of an alleged discriminatory law is not binding.

In *Johnson* v. *Wells Fargo & Company*, 239 U. S. 234 (1915), the Supreme Court held that a tax statute of South Dakota was unconstitutional, although the State court had previously sustained the measure. This court held it was not bound by the decision of the South Dakota court wherein the actual operation of the law was not discussed or considered.

D. If the construction of the farm exemption provision adopted by the District Court is approved, then all of the sales of the Kroger Company are not subject to tax and the discrimination against its competitors, including the intervenor, The Great Atlantic & Pacific Tea Company, renders the law unconstitutional.

The decision of the Kentucky Court of Appeals exempts the sales of retail merchants "actually engaged" in farming and selling farm products raised by them in this State.

This was construed to mean that the sales of retail merchants actually engaged in farming anywhere and selling in Kentucky farm products raised by them were exempt. The construction of the Court of Appeals followed by the lower court reads:

> "It was plainly the purpose of the act to exempt from its operation those (merchants) engaged in gardening and farming and selling their own products. . . . We conclude that the act must be construed so as to exempt those engaged in gardening and farming and selling in this State their own products no matter where grown."

Under the foregoing construction the appellant, The Kroger Grocery & Baking Company, is entitled to the benefit of the exemption, because (1) it is a retail merchant; (2) it actually engages in farming; (3) it actually sells its own products in its own stores in Kentucky. True these farm products are a comparatively small proportion of the total retail sales of all products sold by appellant, but the exemption is not limited either by the language of the act or by the construction placed thereon to merchants exclusively engaged in farming, but is granted to all merchants who actually engage in gardening or farming and selling their own products in their own stores. In this connection the court made the following finding of fact:

> "3. The Kroger Grocery & Baking Company operates a farm in Ohio, where it raises farm and garden products, a portion of which is placed in some of its stores in Kentucky and sold by retail from such stores. The amount of such farm and garden products, however, is relatively small as compared to the total of such products handled by such stores." (Kroger R. 150, Stewart R. 401.)

This finding is amply supported by the evidence. The Kroger Grocery & Baking Company operates a farm in

the State of Ohio. This farm consists of 370 acres and is named "Country Club Farm" after the "Country Club" brand, one of the best known of the Kroger brands. The Kroger Grocery & Baking Company raises and produces on this farm, cattle, sheep, hogs, poultry, milk and other garden and farm products which are sold at retail in the Kentucky stores. (See Kroger R. 190, 287, 290 and 291.)

The Kroger Company in its separate assignment of errors (No. 11, Kroger R. 161) urged that the court erred in "failing to hold that Kroger was exempt under the construction of law adopted by the District Court." Kroger also lists in its separate statement of points to be relied upon in this court the failure to grant it the exemption accorded to other merchants in the same class (Point 6, Kroger R. 576). The other appellants urged that to grant the exemption provided in the act to merchants selling their own farm products denies the equal protection of the laws to merchants selling farm products not raised by them. (Assignments of Error 10 and 11; Stewart R. 410; Points to be Relied Upon, Stewart R. 414, Point 3.)

The exemption provision renders the law invalid

No extended argument is required to demonstrate the discriminatory operation of the farm exemption provision —no matter how it is interpreted. As written it creates a tariff against the importation of foreign-grown garden and farm products. As construed it exempts from taxation all of the sales of retail merchants who sell in retail stores some farm products raised by them, and taxes the sales of merchants who sell in like stores and under similar circumstances farm products raised by others. To exempt the sales of some of these merchants and to tax Kroger sales is discriminatory. To tax A. & P. sales and to exempt Kroger sales is equally discriminatory. We submit that the exemption, no matter how it is treated, renders the law invalid.

V. THE CHALLENGED ACT VIOLATES THE BILL OF RIGHTS AND SECTION 181 OF THE KENTUCKY CONSTITUTION

Where jurisdiction exists in the Federal courts to hear and determine a controversy, it has been held that the court will proceed to determine the whole case, including any rights asserted or questions raised under the constitution and laws of the State in which the controversy arises. *Silver* v. *L. & N. R. R. Co.* (1909), 213 U. S. 175-191; *Ohio Tax Cases* (1914), 232 U. S. 576-587; *Green* v. *L. & I. R. R. Co.* (1917), 244 U. S. 499; *Texas Co.* v. *Brown* (1922), 258 U. S. 466; *Risty* v. *C. R. I. & P. Railway Co.* (1926), 270 U. S. 378-387.

The Constitution and Bill of Rights of the State of Kentucky have been recently construed by this court in the case of *Glenn* v. *Field Packing Company*, 290 U. S. 177 (1933). In that case an injunction was granted against the State Tax Commission to restrain the taxing officials of the State of Kentucky from enforcing an act of the General Assembly of Kentucky which imposed a tax of ten cents per pound on oleomargarine sold within the State. The statute was assailed as being in violation of the Bill of Rights of the Constitution of Kentucky and the due process clause of the Federal Constitution. The District Court held that the statute, although in the form of a taxing law, was in reality a prohibition of the sale of oleomargarine and hence was invalid under the State Constitution. The question presented under the Federal Constitution was not decided.

This court said that:

> "Upon the facts found, the decision appears to be supported by principles laid down by the Court of Appeals of Kentucky, but, so far as the application of the state constitution is concerned, the ultimate deter-

mination of the validity of the statute necessarily rests with that court."

The Attorney General will probably claim, so far as the application of the State Constitution is concerned, that the validity of the statute was determined by the Court of Appeals of Kentucky in *Moore* v. *State Board of Charities & Corrections*. We have previously shown on page 60 of this brief that the *Moore* case was not a *bona fide* controversy and that the parties feigned an issue. No taxpayer was involved in that case and no question as to the prohibitory and oppressive nature of the law was properly before the court. Although the court undertook to discuss this phase of the case, it is inconceivable that the appellants should be precluded by the Court of Appeals' opinion in the *Moore* case, when it is admitted that *Moore* was not a taxpayer and it was proved that *Bohon* was not a taxpayer. Bohon falsely alleged that he was a taxpayer but only to the extent of $250.00. Even under this false allegation no question of the excessive amount of the tax was presented to the court, so there has never been a judicial determination by the Court of Appeals of Kentucky of the validity of this law as applied to merchants with large sales volume such as The Kroger Grocery & Baking Company, The Great Atlantic & Pacific Tea Company, Stewart Dry Goods Company and others.

The profit of the Kroger Company in Kentucky in 1930 was $172,000.00 before the tax. The tax takes 75% of this profit. The profit of this company in Kentucky in 1931 was $151,000.00 before the tax. The tax absorbs 75% of this profit and leaves but $39,000.00 profit on a volume of $13,000,000.00. In 1932 the Kentucky profit was $86,000.00. This entire profit was taken by the tax, which operates to turn a profit of $86,000.00 into a loss of $9,000.00 (Kroger R. 378).

Both Federal and State courts have construed the Bill of Rights and Section 181 of the Kentucky Constitution to forbid so oppressive a burden upon lawful business. In *Field Packing Co.* v. *Glenn,* 5 Fed. Supp. 4 (1933), affirmed 290 U. S. 177, (1933), the Federal District Court said:

> "This section (181) of the Constitution has been frequently considered by the Court of Appeals of the state, and it is now well settled that this section must be read in connection with the Bill of Rights contained in the state Constitution, which forbids the exercise of arbitrary power over the lives, liberty, and property of citizens, and secures to all the inalienable right of acquiring and protecting property, and that, when so read, section 181 confers no power to prohibit or substantially prohibit, by taxation, a legitimate business, and any such prohibitory tax violates the Bill of Rights. *Fiscal Court of Owen County* v. *F. & A. Cox Company,* 132 Ky. 738, 117 S. W. 296, 21 L. R. A. (N. S.) 83; *City of Louisville* v. *Pooley,* 136 Ky. 286, 124 S. W. 315, 25 L. R. A. (N.S.) 582; *Sperry & Hutchinson Co.* v. *Owensboro,* 151 Ky. 389, 151 S. W. 932, Ann. Cas. 1915A, 373."

The court added (Page 6, Column 2):

> "It is not within legislative competence, by taxation, to destroy a legitimate business in times of depression any more than in normal times, and, as we are living in subnormal times, the validity of the tax in question must be measured by its effect during these times. Under improved economic conditions it is conceivable that the tax complained of here would not be prohibitive. We are satisfied from the record that it is prohibitive now."

For these reasons the three-judge court held that the oleomargarine tax violated the Kentucky constitution. That holding was affirmed by reason of the State constitution, although a similar tax was upheld as not violating the con-

stitution of the State of Washington. *Magnano* v. *Hamilton,* 292 U. S. 40 (1934).

Kentucky cases show that the Court of Appeals of that State has strictly construed Section 181 and the Bill of Rights of the Kentucky Constitution to forbid the levy of taxes on lawful business which absorb a large percentage of the normal profits of such business.

In *Louisville* v. *Pooley* (1910), 136 Ky. 286, 124 S. W. 315, 25 L. R. A. (N.S.) 582, the court held unconstitutional an ordinance of the city of Louisville passed in order to put out of business people whose occupation was lending money on salaries. The court declared that the imposition of a license tax upon the business of lending money on salaries and chattels which equals eighty (80%) per cent of the average earnings of all persons engaged in such business was so unreasonable, oppressive and prohibitive as to be void.

In the case of *Fiscal Court of Owen County* v. *Cox, Court of Appeals of Kentucky* (1909), 132 Ky. 738, 117 S. W. 296, 21 L. R. A. (N.S.) 83, the court held unconstitutional a license tax on wagons. Syllabus 3 of the case reads (21 L. R. A. [N.S.] 83):

> "A license tax on a four horse wagon used for hauling freight for hire, which is nearly three times as much as that imposed on three horse wagons, is void for discrimination."

In the body of its opinion the court declared:

> "It may be conceded that, ordinarily, the reasonableness of a license fee imposed as a tax is a question for the taxing power, and the courts will not interfere with its discretion. *Hall* v. *Com.*, 101 Ky. 382, 41 S. W. 2. This rule we think, however, is subject to the limitation that the tax imposed shall not amount to a prohibition of any useful or legitimate occupation. (Citing cases.) While there are numer-

ous authorities to the contrary, it will be found that the license fee involved in those cases was not prohibitive, and the courts simply declared the general rule that the reasonableness of the tax was a matter within the discretion of the taxing power. We can hardly believe that the same courts that announced that doctrine would hold to be valid an ordinance or statute imposing upon every physician and attorney at law an annual license tax of $10,000.00, or imposing upon every merchant a license of $5,000.00, or upon every washerwoman a tax of $1,000.00 per year. If a prohibitive license tax could be imposed upon the professions and occupations mentioned above, the same character of tax could be imposed upon every profession and occupation. It may be answered that no legislative or municipal body would ever do this. The question, however, is not what it would do, but what it might do. The question is one of power. A powerful organization of men engaged in different pursuits might prevent the imposition of a prohibitive license tax upon their respective callings or occupations; *but what is to become of the man without political power, whose means of livelihood are taken away by the imposition of a prohibitive tax?* Shall we still say that the amount of the tax is within the discretion of the taxing power, or shall we say that *among the inalienable and inherent rights guaranteed by our Constitution to every law-abiding citizen is the right to live and enjoy life, and the right to acquire property; and that these rights necessarily carry with them the right to gain a livelihood and acquire property by following any useful or legitimate occupation,* the pursuit of which is not injurious to the public weal? In our opinion there is but one answer to this question: If you deprive a man of the means of livelihood, you necessarily deprive him of the right to live and enjoy his life. *Great as is the taxing power, it can never rise superior to the inalienable rights guaranteed by our Constitution.* As the evidence in this case shows that the license tax in question is *prohibitive, we have no hesitancy in declaring it invalid."*

In the case of *Sallsbury* v. *Equitable Purchasing Co.* (1917), 177 Ky. 348, 197 S. W. 813, L. R. A. 1918A, 1114, the court held unconstitutional a license tax upon the business of lending money on salaries. The syllabus of the case reads:

> **"A license tax upon the business of lending money on salaries which is equal to one-third of the net earnings of the largest business of any individual engaged in such occupation is prohibitive, and therefore illegal."**

At page 353 the court said:

> ". . . when it is admitted, as is done here, that the license fee exacts practically *one-third of the net earnings* of the largest business of any individual engaged in the taxed occupation within the taxing district, we cannot get away from the impression necessarily created that the license is prohibitive and therefore illegal."

Concluding, the court says, at page 355:

> "In short, we hold that no municipality under a free government like ours, has the power, either through the guise of regulation under the exercise of its police power, or in the imposition of license taxes, to so burden a legitimate business as to render it wholly unprofitable and to necessitate its abandonment."

In the case of *Hagar* v. *Walker* (1908), 128 Ky. 1 (9), 107 S. W. 254, the court declared:

> "Nor does the Constitution undertake to place any limitation upon the amount of tax that may be imposed, although it may be conceded that, if it should be so unreasonable or arbitrary as to amount to a confiscation of property or a denial of the right to engage in a particular trade, occupation or profession, the Courts would interpose to protect the class of persons

> affected from this oppressive burden, on the ground that it was a violation of the principles recognized and established in the Bill of Rights, declaring that all men have 'the right of seeking and pursuing their safety and happiness' and 'the right of acquiring and protecting property.' "

In dealing with particular taxes the Court of Appeals of Kentucky has frequently passed on the question whether they were so oppressive as to be unconstitutional.

In *City of Lexington* v. *McQuillan* (1839), 9 Dana 513, 39 Ky. 513, the court said:

> "The legislature, in the plentitude of its taxing power, cannot have constitutional authority to exact from one citizen, or even one county, the entire revenue for the whole Commonwealth."

The above language applies directly to the facts in the instant case which show that more than 80% of the entire revenue produced by the challenged tax will be paid by 19 merchants. Two merchants having less than 8% of the total sales will be required to pay more than 50% of the tax levied by the act.

In *Sperry* v. *Owensboro* (1912), 151 Ky. 389, 151 S. W. 932, the court struck down as unconstitutional a city ordinance imposing a tax of $300.00 on a trading stamp company on the ground that the tax was prohibitive. In the opinion, the court said, at page 393:

> ". . . . courts will not sustain prohibitive regulations made under the guise of taxation. The plaintiff's business is not unlawful. It is a business which the state itself licenses. And while the city may also tax it, the tax must be imposed in good faith under the taxing power, and not for the purpose of prohibiting the business. . . . We think it evident from the ordinance as a whole that the tax of $300.00 on stamp companies was intended to be prohibitive and break

up the business. Appellant's gross business per annum under the evidence amounts to about $5,000.00, and its net profits amount to about $500.00 per annum. To tax such a business $300.00 per annum must have been intended to break it up."

Again at page 394:

"It is true the business may increase, and there may be more profit in it than is shown by the evidence; but the ordinance was evidently aimed at it as it is. . . ."

The Kentucky decisions cited and quoted above clearly show that the challenged act violates the State Constitution.

The lower court found that the average profit to sales during the past three tax years for Kroger has been as follows:

1930	.55 of 1%
1931	.9 of 1%
1932	1.15%

The one per cent tax imposed on Kroger, which does not fall on the 24,000 competing retail merchants, takes practically all of this profit. Measured by the rules laid down by the Court of Appeals of Kentucky the act must fall.

Kroger's experience is similar to that of the other appellants affected by the act. (See Kroger R. 248, 258. See testimony of Byck and Schachter to the effect that profits in department stores during the three-year period average one per cent when compared to sales. Stewart R. 85, 482; Kroger R. 324, 435.)

The mere fact that the State has the power to levy taxes does not permit the exertion of that power to its fullest extent under the limitations of the Kentucky Constitution. In this respect the State rule differs from the Federal rule. In the instant case the sales of a few persons are selected for heavy taxes and the sales of 24,000 competing merchants

are not subjected to any burden. Unlike the ordinary sales tax the burden cannot be shifted. The sales of The Kroger Grocery & Baking Company are subjected to a greater aggregate tax than the combined and total tax on the aggregate sales of 24,000 other merchants although Kroger's sales are only a small percentage of the sales in Kentucky. The Stewart Dry Goods Company, with sales of three million dollars, is required to pay a tax on their sales which is one-fourth as large as the tax paid by 24,000 competing merchants on all their retail sales. Under the rules above cited such a tax violates the Constitution of the State of Kentucky.

CONCLUSION

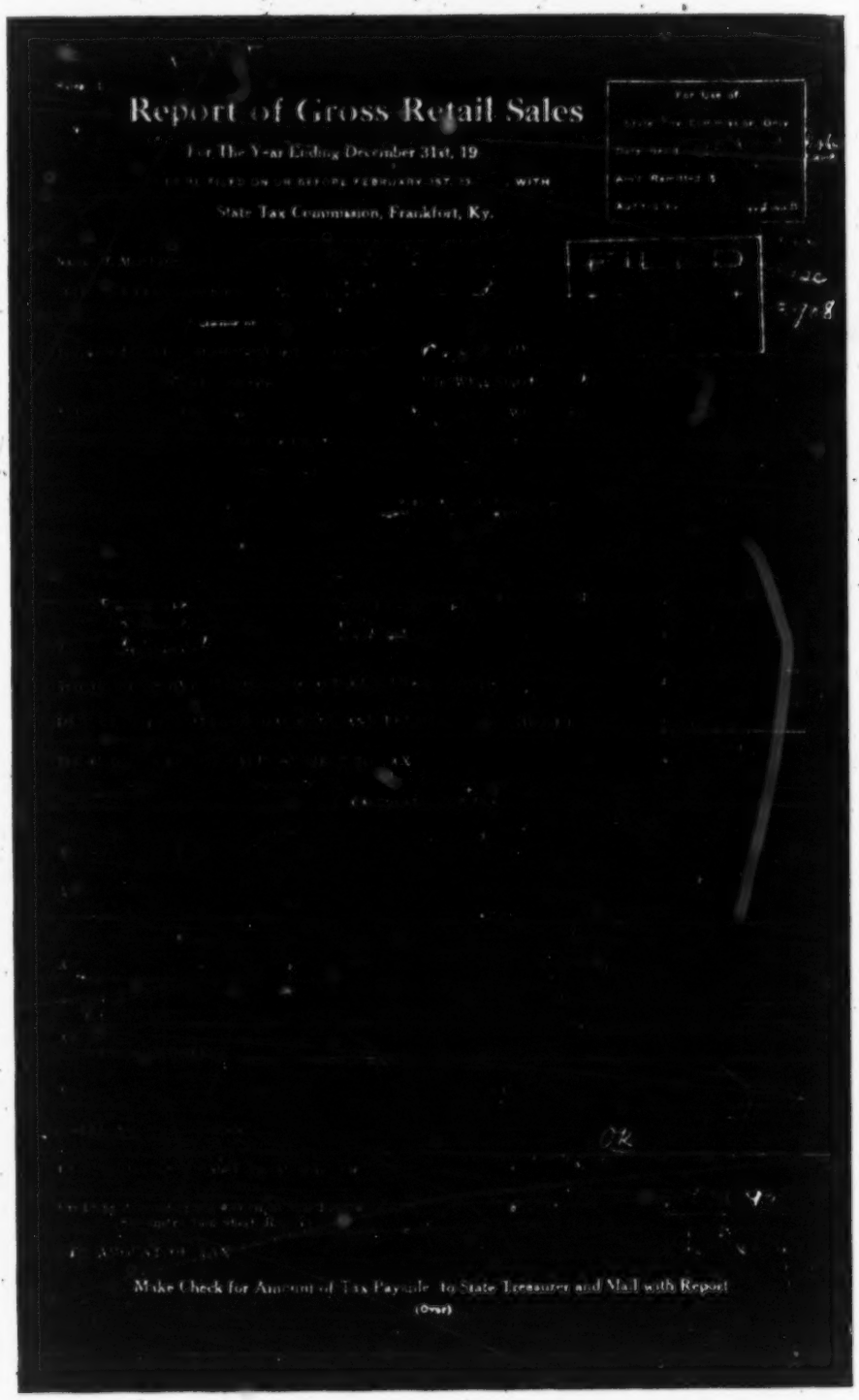
For the reasons herein stated, we submit that the decree of the lower court should be reversed and that the Kentucky Gross Sales Tax Law from the time of its enactment until its repeal was unconstitutional and should be so pronounced by this court.

Respectfully submitted,

ROBERT S. MARX,
FRANK E. WOOD,
JOHN C. DOOLAN,
HARRY KASFIR,
JAMES W. STITES,
Solicitors for Appellants.

Of Counsel,
NICHOLS, MORRILL, WOOD, MARX & GINTER,
TRABUE, DOOLAN, HELM & HELM.

APPENDIX A



Report of Gross Retail Sales

For The Year Ending December 31st, 19

WITH

State Tax Commission, Frankfort, Ky.

Make Check for Amount of Tax Payable to State Treasurer and Mail with Report

(Over)

STATE OF
COUNTY OF

I, do solemnly swear that the statements made in the foregoing report are true to the best of my knowledge and belief.

Name

Subscribed and sworn to before me by this day of 19

No.

REPORT
OF
GROSS RETAIL SALES

For the Year Ending Dec. 31, 19

To be Filed on or before January 20th Following Close of Year for Which Report is Made

State Tax Commission

APPENDIX B

No. 34807

FRANKLIN CIRCUIT COURT

LOUISVILLE COURIER-JOURNAL COMPANY,
Plaintiff,

v.

STATE BOARD OF CHARITIES AND CORRECTIONS,
JOHN P. HASWELL (LOUISVILLE, KY.)
VERNON RICHARDSON (DANVILLE, KY.)
JOHN SKAIN (LEXINGTON, KY.)
JOHN T. STAMPER (BARBOURVILLE, KY.)
C. ROY STEINFORT (COVINGTON, KY.)
CHARLES DAVIDSON (BEREA, KY.)
MRS. SHIRLEY BURNS WELLMAN (LOUISA, KY.)
MISS NANCY A. DAY (CLINTON, KY.)
HANLY BOHON AND KATHERINE BOHON, HIS WIFE (HARRODSBURG, KY.)
MINNIE B. RAINE, WIDOW (HARRODSBURG, KY.)
D. T. BOHON, JR. AND MARY WARD BOHON, HIS WIFE, (HARRODSBURG, KY.) AND
LILLIAN K. BOHON, WIDOW (HARRODSBURG, KY.),
Defendants.

PETITION IN EQUITY

Plaintiff, Louisville Courier-Journal Company, states that it is a corporation duly organized under the laws of the State of Kentucky, with power to sue and be sued, contract and be contracted with, and all powers incident and necessary to publishing and distributing a newspaper.

Plaintiff states that it is a taxpayer of the City of Louisville, County of Jefferson, and State of Kentucky, and that it has for many years paid taxes to the County of Jefferson and State of Kentucky and has paid its taxes to said County of Jefferson and State of Kentucky up to date.

Plaintiff states that the defendant, State Board of Charities and Corrections, is a body politic and corporate created by the Legislature of the State of Kentucky and has power to sue and be sued, contract and be contracted with.

Plaintiff states that the defendants, John P. Haswell, Vernon Richardson, John Skain, John T. Stamper, C. Roy Steinfort, Charles Davidson, Mrs. Shirley Burns Wellman, and Miss Nancy A. Day, are members of the said State Board of Charities and Corrections.

Plaintiff states that at a recent meeting of the members of said State Board of Charities and Corrections, said Board by a majority vote decided to purchase certain real estate and buildings thereon in Mercer County, Kentucky, which real estate and buildings include the settlement known as Shakertown, for the purpose of establishing an epileptic colony and said Board is threatening to make a contract with the defendants, Hanly Bohon and Katherine Bohon, his wife, Minnie B. Raine, D. T. Bohon, Jr. and Mary Ward Bohon, his wife, Lillian K. Bohon, all of Harrodsburg, Mercer County, Kentucky, for the purchase of the aforesaid land buildings for the aforesaid purpose. Plaintiff states that said property is approximately thirty-five miles from Frankfort, Kentucky, and that the Counties of Woodford and Jessamine intervene between Frankfort and said property.

Plaintiff states that the defendant, State Board of Charities and Corrections, has no authority to purchase said site, or any part thereof, for said purpose, nor have the defendants, John P. Haswell, Vernon Richardson, John Skain, John T. Stamper, C. Roy Steinfort, Charles Davidson, Mrs. Shirley Burns Wellman, and Miss Nancy A. Day, composing said Board, authority to authorize the purchase of said property, and that the action of said Board in voting to purchase said property for said purpose is illegal and void for the following reasons, to-wit:

(1) Plaintiff states that if said Board were to purchase said land for the aforesaid purpose, it would, for all practical purposes, have to establish a new institution thereon for the care of epileptics separate from the Feeble Minded Institute at Frankfort, Kentucky, and that the law by which said defendant, State Board of Charities and Corrections, is governed does not contemplate the establishment of a new institution for the care of epileptics separate from the institution at Frankfort; that if the said law does

contemplate the establishment of a new constitution separate from and in addition to the Feeble Minded Institute at Frankfort, then so much of said law as attempts to authorize the State Board of Charities and Corrections to do so is unconstitutional and void, in that it violates Section 51 of the Constitution of Kentucky.

(2) Plaintiff states that said Board of Charities and Corrections has not sufficient revenue to pay for the land which it proposes to buy at Shakertown, hereinabove described, and that were it to contract to purchase said land at Shakertown it would have to use its general funds for that purpose, which it has no authority to do, nor has it authority to use its general funds for said purpose, even though **it intends to reimburse itself later out of its part of the collections from the Gross Sales Tax**; that it has already anticipated part of its revenue from said Gross Sales Tax by expending the sum of $24,000.00 for the purchase of a tract of land adjoining the State Reformatory at Frankfort; **that the constitutionality of said Gross Sales Tax Law is being contested in the United States District Court for the Eastern District of Kentucky, it being claimed that the same is unconstitutional** and void and that until said suit is finally disposed of it will be impossible to know whether said Gross Sales Tax Law is constitutional and enforcible.

Plaintiff says further that the defendant, State Board of Charities and Corrections, and the defendant members thereof do not know just what revenue they will derive from said Gross Sales Tax, even though the same be upheld as constitutional, and that they have no right or authority to use any part of their general funds for the purchase of the aforesaid land at Shakertown, or to bind themselves to do so by the contract which they propose to sign.

(3) Plaintiff states that even if the Court should decide that the defendant, State Board of Charities and Corrections, has authority to establish and maintain a new institution for epileptic persons, separate from the Feeble Minded Institute at Frankfort, said Board of Charities and Corrections only has authority to establish such an institution "if convenient to do so", and that it is not con-

venient for the said Board to expend the sum of $110,000.00, or any part thereof, for the purchase of said property at Shakertown, because it has not sufficient funds to pay therefor and because the other institutions under its control are so greatly in need of funds for their improvement and maintenance, and particularly the State Reformatory at Frankfort, and that its action in proposing to purchase said property at Shakertown is arbitrary and void.

(4) Plaintiff states further that even if the defendant has the authority to establish a new institution for the care of epileptic persons separate and distinct from the Feeble Minded Institute at Frankfort, the place which it proposes to purchase at Shakertown is not suitable for that purpose; that the same is located on one of the main highways of the State and that said highway divides the property proposed to be purchased; that said highway connects Harrodsburg, with Lexington, Nicholasville and Versailles, and that it would be dangerous for the inmates of the institution proposed to be established for the same to be located upon said highway on both sides or on either side of said highway, contiguous thereto.

Plaintiff states that the buildings located on said property are more than a century old and not fitted for the purposes proposed; that to renovate and rehabilitate them would be costly; that there is no police protection, no fire protection, no adequate water supply, and that the land is not fertile for farming purposes.

Plaintiff states that a school for orphan girls has been established in close proximity to the land proposed to be used for said epileptic colony and that said orphan school for girls would be damaged by the establishment of said epileptic colony, and it is not suitable for such a colony to be located contiguous to said school.

Plaintiff states that for the aforesaid reasons the defendant, State Board of Charities and Corrections, is not authorized to enter into the contract referred to and that the aforesaid members of said Board have no authority to authorize the execution of said contract.

Plaintiff states that unless enjoined by this Honorable Court, the said defendants, John P. Haswell, Vernon Richardson, John Skain, John T. Stamper, C. Roy Steinfort,

Charles Davidson, Mrs. Shirley Burns Wellman and Miss Nancy A. Day, will convene on Wednesday, July 29, 1931, for the purpose of deciding whether said State Board of Charities and Corrections will execute said contract for the purchase of said land, which it decided to purchase at its last meeting, and that should said contract be signed this plaintiff will suffer as a taxpayer and other taxpayers of the State of Kentucky will suffer great and irreparable injury; that it has not adequate remedy at law.

Plaintiff states that the defendants live in various counties in the State, as set out in the petition, and that plaintiff has not time to give them notice of a motion for an injunction in time to make said motion and have this Court pass upon the same before said Board convenes on Wednesday, July 29, 1931, and that irreparable injury will result to this plaintiff from delay in giving notice and making a motion for a temporary injunction, and that it is essential to the preservation of the plaintiff's rights that a temporary order be entered by this Court restraining said defendants, John P. Haswell, Vernon Richardson, John Skain, John T. Stamper, C. Roy Steinfort, Charles Davidson, Mrs. Shirley Burns Wellman and Miss Nancy A. Day, and each of them, from authorizing the execution of the contract herein referred to and restraining the defendant, State Board of Charities and Corrections, from executing such a contract until the further order of this Court.

Plaintiff states that no injunction or restraining order has been applied for by it against said defendants, or either of them, or refused by the Court or any judge.

Plaintiff states that the defendants, Hanly Bohon, and Katherine Bohon, his wife, Minnie B. Raine, D. T. Bohon, Jr. and Mary Ward Bohon, his wife, and Lillian K. Bohon, are made parties to this action because of their interest in said proposed contract and, called upon to set up any defense they may have to this action or be forever barred.

WHEREFORE, plaintiff, Louisville Courier-Journal Company, prays a temporary order restraining the defendants, John P. Haswell, Vernon Richardson, John Skain, John T. Stamper, C. Roy Steinfort, Charles Davidson, Mrs. Shirley Burns Wellman and Miss Nancy A. Day, and each

of them, from authorizing the State Board of Charities and Corrections to execute, and restraining said State Board of Charities and Corrections from executing, any contract with the defendants, Hanly Bohon and Katherine Bohon, his wife, Minnie B. Raine, D. T. Bohon, Jr. and Mary Ward Bohon, his wife, and Lillian K. Bohon, or either of them, for the purchase of the property referred to in the petition at or near Shakertown for the purpose of establishing an epileptic colony, or any purpose, and from executing any contract with any one for the purchase of land for the use of an epileptic colony until the further order of this Court, and on the hearing prays that the defendants, and each of them, be perpetually enjoined and restrained as above prayed for, and finally for all relief in equity and good conscience to which it may be entitled.

PETER, LEE, TABB, KRIEGAR & HEYBURN.
CARY TABB,
Attorneys for Plaintiff.

Emanuel Levi says he is Vice-President of the Louisville Courier-Journal Company, plaintiff in the above styled action, and the Chief Officer thereof in the State of Kentucky and that the statements of the foregoing petition are true.

EMANUEL LEVI.

Subscribed and sworn to before me by Emanuel Levi this 29 day of July, 1931. My commission expires on the 7th day of January, 1932.

DOROTHY PEIL,
Notary Public, Jefferson County, Ky.

The answer filed on August 3, 1931, is in words and figures as follows:

No. 34807

FRANKLIN CIRCUIT COURT

LOUISVILLE COURIER-JOURNAL COMPANY,

Plaintiff,

v.

STATE BOARD OF CHARITIES AND CORRECTIONS, *et al,*

Defendants.

PARAGRAPH No. 1

The defendants, for answer, deny that State Board of Charities and Corrections has no authority to purchase said site, or any part thereof, or for said purpose, denies that the individual members of the Board have no authority to authorize the purchase of said property; deny that any action of the Board in voting to purchase said property or for said purpose, is illegal or void, or for the following reasons; deny that if said Board were to purchase said land for the aforesaid purpose, it would, or for all practical purposes, or at all, have to establish a new institution for the care of epileptics or separate from the Feeble Minded Institute at Frankfort, Kentucky, or that the law under which said Board is governed, or any other law, does not contemplate the establishment of a new institution for the care of epileptics; deny that, if said law does not contemplate the establishment of a new institution as separate from or in addition to the Feeble Minded Institute at Frankfort, then so much of said law as attempts to authorize said Board to do so is unconstitutional or void, or that it violates Section 51 of the Constitution of Kentucky; denies that were it to contract to make said purchase it would have to use its general funds for that purpose, or that it has no authority to do so; deny that it has no authority to use its general funds for the purpose of said purchase even though it intends to reimburse itself later out of the pro-

ceeds of the Gross Sales Tax; deny that they do not know the amount to be available from the Gross Sales Tax in the event it is upheld by the Courts; deny that they have no right or authority to use any part of their general funds for the purchase aforesaid, or to bind themselves to do so by the proposed contract.

The defendants deny that it is not convenient for said Board to make said expenditure because of insufficient funds to pay therefor or because other institutions under control of the said board are so greatly in need of funds; deny that its action in proposing to make said purchase is arbitrary or void.

The defendants deny that the property proposed to be purchased is not suitable for the purpose; deny that it would be dangerous for the inmates of the institutions proposed to be established for same to be located on both sides of said highway; deny that the buildings are not fitted for the purposes proposed; deny that renovation or rehabilitation of them would be unreasonably costly; deny that there is no adequate water supply; deny that said orphan school for girls would be damaged by the establishment of the epileptic colony, or that it is not suitable for such a colony to be located contiguous to said school; deny that for the aforesaid or any reasons, the Board is not authorized to enter into the contract referred to, or that its members have no authority to authorize the execution of the contract; deny that unless enjoined the plaintiff will suffer great or irreparable injury, or that it has no adequate remedy at law; deny that irreparable or any injury will result from delay in giving notice of the application for a restraining order.

PARAGRAPH No. 2

The defendants, still relying on the allegations of the first paragraph, for further answer say:—

That the defendant, State Board of Charities and Corrections is a body politic and corporate under the laws of Kentucky:

That in order to provide for the custody, maintenance and welfare of its citizens who by reason of mental or physical infirmities, neglect or misfortune must necessarily

be held in its custody or under its supervision, the Commonwealth has provided, and has for several years past has maintained, nine penal and charitable institutions as follows:—State Reformatory at Frankfort, Ky.; State Penitentiary at Eddyville, Ky.; Houses of Reform, Greendale, Ky.; Eastern State Hospital, Lexington, Ky.; State Hospital for the criminally insane, Lakeland, Ky.; Western State Hospital, Hopkinsville, Ky.; Feeble-Minded Institute, Frankfort, Ky.; and House of Reform for Girls in Shelby County, Kentucky;

That under the law of the Commonwealth the Board is vested with the control, management and administration of all of said institutions;

That it is the policy of the Commonwealth, as declared by Statute, including that Statute under which the Board acts, to exercise a broad humane and practical policy in the care and treatment of all of the inmates of said institutions, and all those who may become inmates thereof, with the end in view of encouraging the employment of all inmates able to do any character of labor, at some profitable labor, so as to assist in paying their maintenance, and by reason of being employed to make them more contended and happy;

That each of the said nine institutions is now congested and filled to largely more than its capacity so that it is unable at any of them to give to the inmates the proper care and attention;

That included in those citizens of the Commonwealth who are so unfortunate as to be inmates of said institutions, is a class of persons afflicted or epilepsy, which is a disease affecting them periodically; seizures are fits usually only lasting for a short period. Many of such persons so afflicted can, and should do manual labor and should do so because of the benefit derived from the exercise, and the further benefit of employment which makes them contented. Many of such persons so afflicted are able to perform, under proper supervision, manual labor sufficient to more than maintain themselves.

That it is the declared policy and purpose of the Commonwealth, that these epileptics should be segregated from the other inmates who are of unsound mind, lunatics or

feeble minded, and given simple employment or work in a colony, home or large family to themselves, all for the reason that it is best for the welfare of the epileptics and other afflicted persons that they be so segregated and employed;

That because of lack of facilities for so locating the epileptics and segregating them from the other inmates, the Board has never been able to do so, but that it is now and has for years been compelled to confine and restrain all these unfortunates, both epileptics, feeble-minded persons and lunatics together and in the same institution or institutions, all of which is detrimental to the best interests of all concerned.

That the Board now has in its custody about 650 epileptics, (at least more than 625 and less than 675) who are confined along with its other wards at the Eastern and Western and Central State Hospitals and at the Feeble Minded Institute to the great detriment and injury of all;

That along with the declared policy of the Commonwealth, the Board deems it highly important and for the best interests of these epileptics that they be removed from these institutions and formed into a colony or large family on a farm where they can have the advantages and freedom of country life, and be employed at the ordinary labor incident to farming, thereby causing many of them to be entirely self supporting and greatly contributing to their welfare and happiness;

That, having in view these advantages to its wards and to the Commonwealth, the Board sought an available place for the establishment of such a farm and colony, believing that the laws of the Commonwealth furnished ample authority for it to purchase such a farm and to establish thereon such colony, and to improve and equip it for their maintenance and to remove the epileptics thereto.

That the defendants, Hanly Bohon, et al., offered to the Board the property in Mercer County, Kentucky, commonly called Shakertown, consisting of more than 800 acres, most of which is suitable for farming and stock raising, with eight large brick and stone buildings thereon, besides stock barns, tobacco barns, and tenant houses, **for the sum of $110,000.00** payable in interest bearing State Warrants of the Commonwealth of Kentucky;

That the Board has had the proposition under advisement for more than nine months, during which time it has caused a survey to be made thereof by competent engineers, architects, psychologist and others skilled and experienced in the treatment of persons afflicted with mental disease, with the result that it is advised and alleges that the buildings thereon are of a permanent nature, such as to lend themselves easily to such remodeling and rehabilitation as would be needed to turn them into suitable buildings for the housing of such an epileptic colony, and that the value of the buildings alone in connection with such project is more than double the amount required to purchase the entire property; that it is further advised that the land is well suited for its purposes, from standpoints of sanitation, water supply, fertility and location;

That the resolution attacked by the petition was a resolution proposing to purchase said property on the terms referred to;

That at the time of the restraining order herein it was proceeding with its business in regular order and with the intention of further considering the question of completing the purchase of said property for the purpose of establishing thereon said epileptic colony and transferring thereto the epileptics as above set out, all of which is necessary for it to do in order to properly provide for their welfare and maintenance and to relieve the over crowded and congested condition of the other institutions referred to;

WHEREFORE, for further answer defendants pray the plaintiff's petition be dismissed and held for naught, they taking thereto the cost herein expended for all proper relief both fair and equitable.

J. W. CAMMACK,
Attorney General.

S. H. BROWN,
Assistant Attorney General.

ATTORNEYS FOR THE STATE BOARD OF CHARITIES AND CORRECTIONS.

C. R. RANKIN,
Attorney for Hanly Bohon, et al.

At a court held on November 21, 1931, the following order was entered:

FRANKLIN CIRCUIT COURT

LOUISVILLE COURIER-JOURNAL COMPANY,

Plaintiff,

vs. No. 34807 INJUNCTION

STATE BOARD OF CHARITIES AND CORRECTIONS, ET AL.,

Defendants.

This action coming on to be heard upon the motion of the plaintiff for a permanent injunction upon the pleadings and proof and the court being sufficiently advised is of the opinion that the establishment of epileptic colony on the proposed site to be purchased (Shakertown property) would constitute the establishment of a separate institution, and the court being further of the opinion that the funds appropriated for the State Board of Charities and Corrections under the Act of 1930, known as the Gross Sales Tax Act, cannot be used for the establishment of a separate institution, it is therefore ordered that the said motion be and the same is hereby sustained, and that the defendants, John P. Haswell, Vernon Richardson, John Skain, John T. Stamper, C. Roy Steinfort, Charles Davidson, Mrs. Shirley Burns Wellman, and Miss Orvetta Brummett, and each of them, be and they are hereby permanently enjoined and restrained from authorizing the State Board of Charities and Corrections to execute, and said State Board of Charities and Corrections is hereby permanently enjoined and restrained from executing any contract for the purchase of the land in Mercer County, Kentucky, referred to in the petition, known as the Shakertown Tract, or any part thereof, for the purpose of establishing an epileptic colony, unless and until authorized by law.

THOS. B. MCGREGOR, *Judge.*

COMMONWEALTH OF KENTUCKY,
COUNTY OF FRANKLIN. } ss:

I, Kelly C. Smither, Clerk of the Franklin Circuit Court in and for the County and State aforesaid, do hereby certify that the foregoing Forty-two (42) pages contain a full, true and complete transcript of the record and proceedings in the case wherein Louisville Courier-Journal Company is plaintiff and State Board of Charities and Corrections, et al., are defendants. No. 34807, an action lately pending in the aforesaid court; also contains a copy of the Opinion of Judge Gus Thomas, Chief Justice of the Court of Appeals of Kentucky, as the same appears of record and now on file in my office.

Witness my hand as Clerk aforesaid, this September 2, 1933.

KELLY C. SMITHER,
Clerk Franklin Circuit Court.

By....., D. C.

COMMONWEALTH OF KENTUCKY,
COUNTY OF FRANKLIN. } ss:

I, H. Church Ford, Judge of the 14th Judicial District of Kentucky, and ex-officio Sole Judge of the Franklin Circuit Court, do hereby certify that Kelly C. Smither, who signed the foregoing certificate, is now, and was at the time of signing the same Clerk of said court, duly elected, qualified, and sworn: that his said signature is his own genuine and proper handwriting, and that said certificate and anthentication are in due form of law.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and caused the seal of said court to be hereunto affixed at Frankfort, Kentucky, this 2nd day of September, 1933.

H. CHURCH FORD,
Judge of the 14th Judicial
District of Kentucky.

COMMONWEALTH OF KENTUCKY,
COUNTY OF FRANKLIN. } ss:

I, Kelly C. Smither, Clerk of the Franklin Circuit Court, within and for the County and State aforesaid, do hereby certify that Honorable H. Church Ford, who signed the foregoing certificate, is now and was at the time of signing the same, Judge of said court, duly elected, commissioned and sworn, and that his said signature is his own genuine handwriting.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of said court, in my office in Frankfort, Kentucky, this 2nd day of September, 1933.

KELLY C. SMITHER,

Clerk Franklin Circuit Court,
Frankfort, Kentucky.

APPENDIX C

AN ACT relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words "retail merchants" are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this act. Be it Enacted by the General Assembly of the Commonwealth of Kentucky:

"Section One. The words 'retail merchant,' as used in this act, shall mean and include every person, firm, association, co-partnership or corporation opening, establishing, operating or maintaining any 'store' as defined herein, for the purpose of and selling goods, wares or merchandise at retail in this State, except those actually engaged in gardening or farming and selling garden or farm products raised by them in this State. The term 'store' as used in this act, shall be construed to mean and include any store or stores or any mercantile establishment or establishments in this State which are owned, operated, maintained or con-

trolled by the same 'retail merchant,' as defined herein, either domestic or foreign, in which goods, wares or merchandise of any kind are sold at retail. The provisions of this act shall be construed to apply to every 'retail merchant' and 'store,' as defined herein, which is controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management.

Section Two. Every retail merchant, as defined herein, shall pay an annual license tax for the opening, establishing, operating or maintaining of any store or stores, as defined herein, determined by computing the tax on the amount of gross sales as follows: One-twentieth of one per cent of the gross sales of Four Hundred Thousand ($400,000) Dollars or less; two-twentieths of one per cent on the excess of the gross sales over Four hundred thousand ($400,000) Dollars and not exceeding Five hundred thousand ($500,000) Dollars; five-twentieths of one per cent on the excess of the gross sales over Five hundred thousand ($500,000) Dollars, and not exceeding Six hundred thousand ($600,000) Dollars; eight-twentieths of one per cent on the excess of the gross sales over Six hundred thousand ($600,000) Dollars, and not exceeding Seven hundred thousand ($700,000) Dollars; eleven-twentieths of one per cent on the excess of the gross sales over Seven hundred thousand ($700,000) Dollars and not exceeding Eight hundred thousand ($800,000) Dollars; fourteen-twentieths of one per cent on the excess of the gross sales over Eight hundred thousand ($800,000) Dollars and not exceeding Nine hundred thousand ($900,000) Dollars; seventeen-twentieths of one per cent on the excess of the gross sales over Nine hundred thousand ($900,000) Dollars, and not exceeding One million ($1,000,000) Dollars; one per cent on the excess of the gross sales over One million ($1,000,000) Dollars.

Section Three. Every retail merchant, as defined herein, in order to ascertain the amount of taxes due and payable under the next preceding section, shall file with the State Tax Commission on or before the first day of February each year a written report verified by the affidavit of the owner or chief officer on such forms as it may prescribe,

giving the number and location of its store or stores, as defined herein, the name and post office address of its owner or principal officer, the name and address of its officer or agent in charge of its business at each separate store, the nature and kind of business, the total gross sales during the preceding year ending the thirty-first day of December, and such other facts bearing on the proper taxation as the Tax Commission may require. The State Tax Commission may, in any case, require such additional information as it may deem necessary to enable it to perform its duties herein. It shall be the duty of the State Tax Commission from such reports, and from such additional information as it may obtain, to ascertain the amount of taxes due, and to certify to every such retail merchant the amount of taxes due for the preceding year, based upon such reports and information as it may ascertain. Upon final action by the State Tax Commission, it shall certify to the Auditor of Public Accounts and to the retail merchant, the amount of such tax due by each retail merchant, as defined herein, and it shall be the duty of each retail merchant to pay the amount of such tax to the Auditor of Public Accounts not later than thirty days thereafter. In reporting the gross sales for the year, one thousand nine hundred and thirty, retail merchants shall include only those sales made between the date that this act becomes effective and December Thirty-one, One thousand nine hundred and thirty, and the license tax due for the year One thousand nine hundred and thirty shall be based on the amount of those sales only.

Section Four. The license or excise tax levied herein, shall not be in lieu of any special state license, excise, occupational or corporation license tax due under the provisions of any law now in force, or that may hereafter be enacted. Should any retail merchant, as defined herein, be liable for and pay any special state license, excise, occupational or corporation license tax under the laws now in force, or that may, hereafter be enacted, credit may be taken on the tax levied in this act for the amount of such special license, excise, occupational or corporation license tax so paid not to exceed the amount of the license or excise tax levied herein.

Section Five. If any retail merchant, as defined herein, neglects or refuses to file the verified report or pay the tax due at the time herein provided, the amount thereof with an addition of a penalty of twenty per centum thereof, with interest at the rate of six per centum per annum from the date when due until paid, shall be collected on an account settled by the State Tax Commission as other taxes are settled and collected; and if collected by proceedings in any court, an additional penalty of twenty per centum shall be collected, as is authorized to be collected in revenue agent's proceedings under Section 4263-4 of the Kentucky Statutes. The said twenty per centum penalty thereon and interest due shall be paid into the State Treasury as part of the tax, and the twenty per centum penalty collected in revenue agent's proceedings shall be distributed as provided in Section 4263-4 of the Kentucky Statutes.

Section Six. The State Tax Commission, or any assistant or representative thereof, appointed in writing by it, is hereby authorized to examine the books, records, papers, files and equipment of any retail merchant, as defined herein, made taxable by this act, and to that end, shall have the power to examine witnesses under oath to verify the accuracy of any return made under the provisions of this act, or to ascertain whether or not any tax is due under the provisions of this act by any retail merchant; and in the collection of said tax, the State Tax Commission shall have the power to institute legal proceedings for the purpose of ascertaining the amount of tax due and the collection thereof with the penalties thereon, and the State Tax Commission shall be vested with all the powers under the law of the State for the collection of taxes. The State Tax Commission may, at or after the commencement of any action for the purpose of collecting the amount of tax due and penalties and interest due thereon, as set out herein, have an attachment against the property of the defendant, including garnishees, without the execution of a bond upon the filing of an affidavit showing the nature of the claim, that it is just, the sum which the State Tax Commission believes the plaintiff ought to recover and that the collection of the demand will be endangered by delay in obtain-

ing judgment or a return of no property found. Any information gained by the State Tax Commission, or any assistant, agent or representative thereof, as a result of the reports, investigations or verifications herein required to be made, shall be confidential, and any persons divulging such information shall be guilty of a misdemeanor, and, upon conviction, shall be fined not exceeding Five Hundred ($500) Dollars; provided, that this prohibition shall not extend to information required in prosecutions for making false reports or returns or in the preparation and prosecution of legal proceedings for the collection of any tax due under the provisions of this act, or any prosecutions for any other infraction of the tax laws of this State.

Section Seven. Any retail merchant, as defined herein, or any officer, director, trustee or agent, who shall fail, neglect, or refuse to make the reports and pay the tax herein prescribed, or shall refuse to permit the State Tax Commission, its assistants, agents or representatives appointed by it in writing to examine the books, records, papers, files and equipment of such retail merchant, as defined herein, or who does, or attempts to do, anything whatever to avoid a full disclosure of the amount of business done, or to avoid the payment of the whole or any part of the tax or penalties due, shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding One thousand ($1,000) Dollars, and in case the offender is an individual he may be imprisoned in the county jail not exceeding six months, or both so fined and imprisoned. Such penalty shall be in addition to the penalty imposed in Section Five of this act.

Section Eight. It shall be the duty of the State Tax Commission to administer and enforce the provisions of this act, and it is hereby authorized and empowered to prescribe all blanks, forms and reports necessary to carry out the provisions of this act, and all costs and expenses incurred by the State Tax Commission in the administration of this act shall be paid out of the funds collected hereunder.

Section Nine. All taxes collected under the provisions of this act shall be paid to the Auditor of Public Accounts,

and of such amounts so received by the Auditor in any fiscal year, one-half part shall be set aside and credited to the Board of Charities and Corrections for the specific purpose of repairing, maintaining and constructing permanent improvements for the use of the institutions under the control of said board. The remainder of the amounts so collected and received by the Auditor in any fiscal year shall be credited to a fund to be used for the specific purpose of liquidating any indebtedness of the Commonwealth.

Section Ten. No suit shall be maintained in any court to restrain or delay the collection or payment of the tax herein imposed upon any ground whatever, but the aggrieved taxpayer shall pay the tax as and when due, and if paid under protest may at any time within two years from the date of such payment sue the Auditor of Public Accounts in an action at law to recover the tax so paid, with legal interest thereon, from the date of payment. If it is finally determined that said tax, or any part thereof, was wrongfully collected for any reason, it shall be the duty of the Auditor of Public Accounts then in office to issue his warrant on the Treasurer of the Commonwealth of Kentucky for the amount of such tax so adjudged to have been wrongfully collected, together with interest thereon, and the Treasurer shall pay same out of the General Fund of the State. A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made, and which are not barred by the limitation of two years herein imposed.

Section Eleven. The provisions of this act are severable and if any of its provisions or any penalty provided by this act shall be held unconstitutional, such provisions or the particular penalty held to be invalid may be rejected without affecting the remainder of the act or such part of the penalties as are not held to be invalid and the decisions of the courts shall not affect or impair the remaining provisions of this act or any of the other penalties anywhere in this act provided. It is hereby declared as a legislative intent that this act would have been adopted had such unconstitutional provisions or such invalid penalties not been included therein.

Section Twelve. All laws and parts of laws in conflict herewith are hereby repealed to the extent of such conflict.

Section Thirteen. Whereas, The present state revenue does not meet the immediate needs for the maintenance and development of the State Government and its agencies, an emergency is declared to exist, and this act shall become a law and be effective upon its passage and approval by the Governor.

4

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CHARLES ELMORE CR

Supreme Court of the United States

OCTOBER TERM 1934

The Stewart Dry Goods Company, . . . Appellant,
vs. No. 454
John B. Lewis, et al., ... Appellees.
Fred Levy, et al., ... Appellants,
vs. No. 455
John B. Lewis, et al., ... Appellees.
J. C. Penney Company, ... Appellant,
vs. No. 456
John B. Lewis, et al., ... Appellees.
The Kroger Grocery & Baking Company, . Appellant,
vs. No. 457
John B. Lewis, et al., ... Appellees.

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Of Counsel.

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Supreme Court of the United States

OCTOBER TERM 1934

THE STEWART DRY GOODS COMPANY,
Appellant,

No. 454 vs.

JOHN B. LEWIS, ET AL.,
Appellees.

FRED LEVY, ET AL.,
Appellant,

No. 455 vs.

JOHN B. LEWIS, ET AL.,
Appellees.

J. C. PENNEY COMPANY,
Appellant,

No. 456 vs.

JOHN B. LEWIS, ET AL.,
Appellees.

THE KROGER GROCERY & BAKING COMPANY,
Appellant,

No. 457 vs.

JOHN B. LEWIS, ET AL.,
Appellees.

STATEMENT

The above styled cases are before this Court for the second time. Upon the first hearing the District Court entered a decree dismissing the bills of complaint on the sole ground that complainants had an adequate remedy at

law under section 10 of the challenged act. The decree was reversed by this Court and the causes were remanded for further proceedings consistent with the opinion. Stewart Dry Goods Company vs. Lewis, et al., 287 U. S. 9.

Upon a return of the cases the District Court found that the remedy at law was inadequate, but sustained the validity of the act and entered a decree dismissing the bills of complaint on the merits. 7 Fed. Sup. 438. (Opinion, Dawson, J., Kroger R. p. 106.)

Appellants prosecute these appeals from judgments dismissing their bills of complaint which challenged the validity, on Federal and State constitutional grounds, of the Kentucky Gross Sales Tax Law of 1930. (Chapter 149, Sessions Acts, General Assembly of 1930, p. 475.)

Appellants represent four different types of merchants affected by the provisions of the act and prosecute these actions as such. In addition to the four appellants, fifteen merchants have come under the protection of the interlocutory injunction as intervenors. The following is a list of appellants and intervenors and their classification:

Name	Type of Merchant
APPELLANTS	
The Stewart Dry Goods Co.	1 department store
J. C. Penney Co.	21 department stores
Levy Brothers	1 department store
The Kroger Grocery & Baking Co.	289 grocery stores
INTERVENORS	
Kaufman-Straus Co.	1 department store
H. P. Selman	1 department store
J. Bacon Company Sons	1 department store
Montgomery Ward & Co.	7 department stores
Sears-Roebuck & Co.	3 department stores
Ben Snyder, Inc.	1 department store
Lerman Brothers	Group of department stores
Byck Bros. & Co., Inc.	1 specialty store and 1 leased dept.
S. S. Kresge Co.	10 five and ten cent stores
F. W. Wolworth Co.	19 five and ten cent stores

S. H. Kress Co.	4 five and ten cent stores
The Great Atlantic & Pacific Tea Co.	Grocery stores
Melville Shoe Corporation	8 shoe stores
Hook Drug Co., Inc.	5 drug stores
Walgreen Drug Stores	4 drug stores

Thirteen of the nineteen merchants protected by the interlocutory injunction operate more than one store.

The Court made findings of fact and conclusions of law pursuant to Equity Rule 70½. (Kroger R. p. 143–152.)

QUESTIONS INVOLVED

Appellants have designated eight points to be relied upon in the Kroger case, and four points in the Stewart case. (Kroger R. pp. 475–476; Stewart R. pp. 413–414.) The assignment of errors presents but four questions. However, appellants have abandoned their claim that the challenged act is violative of the due process clause of the Fourteenth Amendment, leaving three questions to be considered, as follows:

I. The challenged act is violative of the equal protection clause of the Fourteenth Amendment for the reason that the classification is unreasonable, arbitrary and has no rational basis.

II. The farm exemption provision of the challenged act violates the interstate commerce clause of the Federal Constitution.

III. The challenged act violates the Bill of Rights and Section 181 of the Kentucky Constitution.

SUMMARY OF ARGUMENT

I. **THE CHALLENGED ACT DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE FEDERAL CONSTITUTION.**

(a) The Rate Structure.

(b) Rate Structure as Modified by Section 4.

(c) Appellants have Failed to Sustain the Burden of Showing There is No Factual Basis for the Classification.

(d) Relation of Sales to Profits.

(e) The Challenged Act Equalizes the Tax Burden.

(f) Advantages of Large-Scale Merchandising Firms Over Their Small Competitors.

(g) Classification Under the Equal Protection Clause.

II. **THE FARM EXEMPTION PROVISION OF THE CHALLENGED ACT DOES NOT VIOLATE THE INTERSTATE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION.**

III. **THE CHALLENGED ACT DOES NOT VIOLATE THE BILL OF RIGHTS AND SECTION 181 OF THE KENTUCKY CONSTITUTION.**

(a) Confiscation.

(b) Classification.

IV. **APPELLANT'S BRIEF ANALYZED.**

ARGUMENT

I

The Challenged Act Does Not Violate The Equal Protection Clause of The Fourteenth Amendment to The Federal Constitution

(a) The Rate Structure

The challenged act imposes a license tax on retail merchants doing business in the Commonwealth of Kentucky, graduated in amount from 1/20 of 1% to 1% according to the volume of business transacted in each year.

It is charged repeatedly by appellants in their brief that the rate structure fixed by the act is discriminatory and that appellants and intervenors are required to pay a tax of 1% on their gross sales while their independent competitors are completely exempt from the payment of any tax. Section 2 imposing the tax and fixing the rates follows:

> "Every retail merchant, as defined herein, shall pay an annual license tax for the opening, establishing, operating or maintaining of any store or stores, as defined herein, determined by computing the tax on the amount of gross sales as follows:
>
> "One-twentieth of one per cent of the gross sales of Four hundred thousand ($400,000.00) Dollars or less; two-twentieths of one per cent on the excess of the gross sales over Four hundred thousand ($400,000.00) Dollars and not exceeding Five hundred thousand ($500,000.00) Dollars; five-twentieths of one per cent on the excess of the gross sales over Five hundred thousand ($500,000.00) Dollars and not exceeding Six hundred thousand Dollars; eight-twentieths of one per cent on the excess of the gross sales over Six hundred thousand ($600,000.00) Dollars and not

exceeding Seven hundred thousand ($700,000.00) Dollars; eleven-twentieths of one per cent on the excess of the gross sales over Seven hundred thousand ($700,000.00) Dollars and not exceeding Eight hundred thousand ($800,000.00) Dollars; fourteen-twentieths of one per cent on the excess of the gross sales over Eight hundred thousand ($800,000.00) Dollars and not exceeding Nine hundred thousand ($900,000.00) Dollars; seventeen-twentieths of one per cent on the excess of the gross sales over Nine hundred thousand ($900,000.00) Dollars and not exceeding One million ($1,000,000.00) Dollars; one per cent on the excess of the gross sales over One million ($1,000,000.00) Dollars."

(Kroger R. p. 109.)

Notwithstanding appellants' charge of discrimination, the language of the act is clear that all members of the same class within the same graduated levels are treated impartially and subjected to the same rate of taxes. It is the increased volume in each of the classes that is taxed at the increased rate and not the total amount of sales. Every merchant affected by the act, regardless of the amount of his sales, has the same privileges under the act with respect to the graduated scale. The appellant Kroger Grocery & Baking Company is taxed on the first $400,000.00 of its sales at exactly the same rate as every other merchant. In ascertaining the effective rate of the tax, consideration must be given to sales under a million dollars at the lower rates.

From a casual reading of the levying section, supra, it would appear that the graduations in the act are somewhat steep. Actually, this is not true, as is clearly demonstrated by Walradt exhibits C and D. (Kroger R. pp. 465–470A.) The effective rate is graphically shown by Walradt exhibits B and D. (Kroger R. pp. 464B–470A.) These exhibits show clearly that the effective rate imposed by the challenged act increases less rapidly than the graduated rate imposed by the 1918 Federal Income Tax. The effec-

tive rate imposed by the challenged act as compared to the effective rate imposed by similar laws of the States of Minnesota, New Mexico and Vermont is shown graphically by Martin exhibit 18. (Kroger R. p. 528A.) It is clearly shown that the graduation imposed by the Kentucky act is far less drastic than that imposed by other States.

To find the effective rate of the tax on a given amount of gross sales it is necessary to divide the total tax due by the amount of the sales. This gives the rate of tax, which is known as the effective rate. Appellants have consistently ignored this fact and, as shown both by arguments of counsel and in much of the evidence introduced by them, have thought only in terms of the highest rate applicable without regard to the fact that the effective rate was in reality much lower. For example, appellant Levy Brothers in its bill of complaint (Levy R. p. 19), alleges it will be taxed 1%, when as a matter of fact the record discloses it has annual sales of approximately one million dollars per year and would be required to pay a tax of .305%. (Walradt exhibit G, Kroger R. p. 474.) Walradt exhibit C, (Kroger R. pp. 465–469), shows the tax does not reach ½ of 1% until gross sales exceed $1,390,000.00 and does not reach ¾ of 1% until gross sales amount to $2,800,000.00. The lower Court found the claim of appellants and intervenors that they were being subjected to a 1% tax was not supported by the record. We quote the following from the opinion of the Court, which recognizes the effective rate:

> "Under the Act here involved the effective tax rate, without allowing for deductions of the special taxes referred to in Section 4 of the Act, applicable to taxpayers with gross sales of $1,300,000.00 is in excess of one-half of one per cent; to taxpayers with sales of $5,000,000.00, in excess of 86/100 of one per cent; to taxpayers with $7,000,000.00 of gross sales 9/10 of one per cent; and to taxpayers with $11,000,000.00 of sales, in excess of 93/100 of one per cent; and as the volume of sales increases beyond this figure, the effec-

> tive rate gradually approaches, although it can never quite reach, one per cent, due to the fact that the taxpayer in the higher bracket gets the benefit of the application of the lower rates to that part of his gross sales which falls within the lower classifications."
>
> (Kroger R. p. 117.)

The effective rate is also shown under findings of fact No. 5 relative to the Fourteenth Amendment. (Kroger R. p. 145; Stewart R. p. 396.)

Our position that no merchant affected by the act will be required to pay a tax in excess of 85/100 of 1% is sustained by the testimony of Albert H. Morrill, President of the Kroger Grocery & Baking Company. (Kroger R. p. 379.) As the opinion of the lower Court shows, the tax can never reach a full 1%.

The changes in the effective rate of the tax as gross sales increase by $100,000.00 are small, the largest increase being only 632/10,000 of 1%. This occurs in the increase of gross sales from $1,000,000.00 to $1,100,000.00. After sales reach $2,500,000.00 there is a flattening out of the rate of increase as shown graphically in Walradt exhibits D, E, F and G. (Kroger R. pp. 470A–475.) Walradt exhibit A, (Kroger R. p. 464A), plots the effective rate as computed in exhibit C, (Kroger R. pp. 465–469), so as to show the degree of progression. We have compared the effective rate of the act with the Federal Income Tax of 1918, and with progressive taxes levied by three other states, and have found the comparison favorable to the challenged act in that the rates levied are not so sharply progressive as those levied by the Federal Government nor those levied on gross receipts in other states. The State of Maine has imposed a graduated tax on the gross receipts of railroads since 1881. (Kroger R. pp. 459–460.)

(b) Rate Structure As Modified By Section 4

Appellants complain that practically all merchants in the class having sales of less than $400,000.00 are exempt from the payment of any tax by reason of the credits allowed by section 4 and that this section favors those merchants who pay special license or excise tax as against those taxpayers who pay no special license or excise taxes. This complaint was completely and convincingly answered by Judge Dawson of the District Court:

> "It is vigorously urged upon us that the provision of section 4 of the act which allows a credit to the extent of special license, excise, occupational or corporation license taxes paid by the retail merchant operates to deny equal protection to those taxpayers who are required to pay no such taxes, and as an illegal discrimination in favor of those taxpayers in the lower brackets whose special taxes paid under other laws of the State are sufficient in amount to almost or entirely liquidate the tax here involved. This view is an entirely superficial one. No individual taxpayer under this law has any vested right in the continuation of a corporation license tax imposed by State law on his corporate competitor, nor in the continuation of any other special license tax any of his competitors has heretofore been required to pay. Certainly the Legislature, in the imposition of the tax here involved, could have repealed all special license taxes which were imposed by law upon those coming within the ambit of the act under consideration. If there are any retail merchants affected by this act who, prior to its enactment, were not required to pay any special license taxes, they had the advantage over their competitors from whom such taxes were exacted. Section 4, to the extent that it allows the payment of such taxes as a credit, simply eliminates a discrimination, though not an illegal one, which theretofore existed. The fact that these credits will substantially liquidate the tax of many of the taxpayers whose sales amount to less than $400,000.00 is simply an incident in the operation of the law. Taxpayers in the higher brackets, where

> they pay such special taxes, get exactly the same credits. Those who complain of these credits because they are not entitled to like credits put themselves in the anomalous position of complaining because they have not heretofore been subject to special license or other special taxes."
>
> (Kroger R. p. 114.)

There is no showing that appellants and intervenors do not pay special license taxes for which they are entitled to take credit under section 4. The Kroger Company alleged in its amended bill of complaint that for the year 1930 it paid special State license, excise, occupational and corporation license taxes amounting to $15,369.00, being an average of $53.18 for each of its stores; for the year 1931 it paid $15,643.84, being an average of $61.59 for each store; and for the year 1932 it paid $12,271.75, being an average of $49.28 for each store. (Kroger R. p. 83.) This credit lessens the tax burden about which the appellant Kroger complains so bitterly, yet it complains that the act is invalid because of the credits. The Kroger Company and the other appellants and intervenors get the same credits their independent competitors get, all taxpayers being treated impartially and given the same treatment under the act.

(c) Appellants Have Failed to Sustain The Burden of Showing There Is No Factual Basis for the Classification

If a state of facts can reasonably be conceived to sustain the classification made by the Legislature then there exists a presumption of the existence of such facts and one who assails the classification must carry the burden of showing that the challenged classification is arbitrary.

> Broden's Farm Products Co. v. Baldwin, 79 L. ed. 130.

Mr. Chief Justice Hughes, speaking for the Court, on page 135 says:

> *"When the classification made by the legislature is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary.* Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. ed. 369, 31 S. Ct. 337, Ann. Cas. 1912C, 160, supra; Ohio ex rel Clarke v. Deckebach, 274 U. S. 392, 397, 71 L. ed. 1115, 1120, 47 S. Ct. 630; Lawrence v. State Tax Commission, 286 U. S. 276, 283, 76 L. ed. 1102, 1107, 52 S. Ct. 556, 87 A. L. R. 374."
>
> (Italics ours.)

Continuing the opinion, the Court recognized in the following language the principle that the State has a broad discretion in fixing classification:

> "The principle that the State has a broad discretion in classification, in the exercise of its power of regulation, is constantly recognized by this Court."

Continuing, the Court says:

> "Or, after a full showing of facts, or opportunity to show them, it may be found that the burden of establishing that the classification is without rational basis has not been sustained. Lindsey v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. ed. 369, 31 S. Ct. 337 Ann. Cas. 1912C, 160 ,supra; Rast v. Van Deman & L. Co., 240 U. S. 342, 60 L. ed. 679, 36 S. Ct. 370, L. R. A. 1917A, 421, Ann. Cas. 1917B, 455; Radice v. New York, 264 U. S. 292, 68 L. ed. 690, 44 S. Ct. 325; Ohio ex rel. Clarke v. Deckenbach, 274 U. S. 392, 71 L. ed. 1115, 47 S. Ct. 630, supra; Ohio Oil Co. v. Conway, 281 U. S. 146, 74 L. ed. 775, 50 S. Ct. 310; State Tax Comrs. v. Jackson, 283 U. S. 527, 75 L. ed. 1248, S. Ct.

540, 73 A. L. R. 1464, 75 A. L. R. 1536. But where the legislative action is suitably challenged, and a rational basis for it is predicated upon the particular economic facts of a given trade or industry, which are outside the sphere of judicial notice, these facts are properly the subject of evidence and of findings. With the notable expansion of the scope of governmental regulation, and the consequent assertion of violation of constitutional rights, it is increasingly important that when it becomes necessary for the Court to deal with the facts relating to particular commercial or industrial conditions, they should be presented concretely with appropriate determinations upon evidence, so that conclusions shall not be reached without adequate factual support."

It was incumbent upon appellants to show that the classification embodied in the challenged act was arbitrary and without a rational basis. This they failed to do, as disclosed by an examination of their evidence, much of which was presented in the form of affidavits. The Court will observe at once that the chief endeavor of appellants was to establish that the chain stores and other large scale merchandising firms, such as appellants and intervenors, have no advantages over independent or single unit stores. The affidavit of R. W. Lyons, Executive Vice-President of the National Chain Store Association, is typical of the affidavits presented by appellants. We quote from the Lyons affidavit:

> "The chain store system of retail merchandising does not present any inherent or fundamental advantages over the single store unit of merchandising. * * * * The fundamental requirements of successful merchandising which apply equally and are available equally to 'chain store' and single stores of 'individual merchants' are as follows:" etc.
>
> (Kroger R. p. 171.)

To illustrate the theory upon which appellants base their claim that the classification is arbitrary, we quote further from the affidavit of this winess:

> "There is a common notion, which is quite unfounded, that certain types of retailing establishments enjoy special advantages not available to other types of retailers and that certain taxes should be based upon distorted graduations designed to correct existing inequalities. An examination of competition in the retail grocery field will indicate the fallacy of such reasoning. The 'chain stores' were the first to reduce food retailing to a basis of operating efficiency. It appeared temporarily that by the introduction of scientific management into the field of retailing, 'chain stores' had secured a distinct advantage over competitive retailers. Almost immediately, however, there began to develop a nation-wide movement among independent retailers to group themselves into co-operative organizations known as 'voluntary chains.' Such organizations perform for their members much the same function performed by the regular 'chain stores' in all matters of group buying, sales and display service, equipment, layout, advertising, accounting and stock control systems, etc. There are at the present time, more than 500 of these so-called 'voluntary chains' of independent retailers, comprising more than 60,000 retail stores. A number of such 'voluntary chain' store organizations operate in the State of Kentucky, among which are the following:
>
> Independent Grocers' Alliance.
> Associated Community Stores.
> James Grocery Co.
> Ohio Valley Grocery Company.
> Merchants Wholesale Grocery Company.
> National Grocery Company.
>
> "The advantages derived by membership in the 'voluntery chain' are practically identical with the advantages enjoyed by the regular 'chain store.' Each represents a fundamental attempt to bring organized intelligence and scientific methods to the operating problems of retail distribution. By pooling their buying resources, the members of the so-called 'voluntary

> chains' are able to purchase their supplies on an equal footing with any existing competition. The development of the 'voluntary chain' has made it possible for the jobber to materially reduce his handling, warehousing, shipping, unloading, clerical and selling expenses, and the savings thus effected are passed on to the retailers in the form of reduced prices, dividends or bonuses."
>
> (Kroger R. pp. 174-175.)

Appellants present the affidavits of some thirty witnesses who held some position with the appellants or the intervenors. Their affidavits may be found in the Kroger Record, pages 169 to 355. Practically all of these witnesses state that the chain store organizations have no advantages over their independent competitors and the voluntary chains have the same advantages as the "integrated chains." They all state that the tax imposed upon appellants and intervenors is 1% of their gross sales. The appellants have attempted to make the same defense in this action as has been made in the chain store cases which have reached this Court. A complete answer to their defense is found in the opinions of this Court in the cases of:

> Fox v. Standard Oil Co. of New Jersey,
> Decided January 14, 1935
>
> Louis K. Liggett Co. v. Lee,
> 288 U. S. 517, 77 L. ed. 579
>
> Board of Tax Commissioners v. Jackson,
> 283 U. S. 527, 75 L. ed. 1248.

It is being generous with the witnesses who made these affidavits to say this record clearly shows they had no regard for the truth when they stated there was no difference between the chain store organizations and their independent competitors and that the tax imposed by the challenged act upon appellants and intervenors amounted to

1%. To illustrate the fallacy of the position of appellants we call the Court's attention to the affidavit of Dann Byck, general manager of Byck Brothers & Company, who have annual sales of approximately one million dollars. We quote from his affidavit:

> "This 1% tax which is imposed upon us and not upon competitors who sell the same goods but who confine themselves to the sale of only one type of goods enables those competitors to undersell us in their particular line and take away our business without subjecting themselves to the tax."
>
> (Kroger R. p. 326.)

As a matter of fact, Byck Brothers will only be called on to pay a tax of .14%. This is shown by the Court's findings of fact No. 21, relative to the Fourteenth Amendment, which we quote:

> "21. Byck Brothers operate a department store in Louisville, Kentucky, with annual gross sales of approximately $700,000. They also operate a department by lease in the Wolf-Wile Department Store at Lexington, Kentucky. This department in Lexington is in no way affected by the sale of goods in Louisville, but does compete directly with stores handling similar merchandise in Lexington, and its annual volume of sales is approximately $50,000. Under the Act, including the sales of this department, the tax of Byck Brothers is approximately 14/100 of one per cent of its gross sales. In a general way, this concern has the same problem of competition with single specialized stores as have Stewart Dry Goods Company and Levy Brothers, with relatively the same advantages."
>
> (Kroger R. p. 150.)

Turning to the evidence of appellants by deposition, we find but two witnesses were presented. They are Albert H. Morrill and Harry W. Schacter. (Kroger R. pp. 375–448H.) Mr. Morrill, who is President of the

Kroger Grocery & Baking Company, proceeds very much on the same theory as appellants' witnesses who testified by affidavit, that there is no difference between the chain store organization and the independent merchant. (Kroger R. pp. 385–386.) In addition to this he takes issue with the contention of appellees that increased sales result in increased profits by saying "profits tend to decrease with increased sales." (Kroger R. p. 383). His statements represent his conclusions and we submit that he does not testify to any statement of fact and does not present any concrete evidence from operating statistics of merchandising firms, or any other evidence, to support his statement that "profits tend to decrease with increased sales," and his statement that "increased sales has no necessary relation to net profits". Much of his evidence has to do with the history of the Kroger Company and the efficiency methods practiced by his organization and other large merchandising firms. While he states there is no difference between the methods employed by his organization and the methods employed by his independent competitors, we find he contradicts himself when he describes the efficiency methods employed by large retailing firms. Although he categorically denies that large retailing firms enjoy any competitive advantages over their small competitors he destroys the effect of his denial when he goes into detail in describing the methods employed by his firm and others similarly situated. For example, he testifies at length about the value of efficient management. It is true that management plays an important part in the success of any business and it is also a matter of common knowledge that large retailing firms can and as a matter of fact do hire the most efficient merchandising experts, the best buyers, and the best advertising managers. His statement that profits tend to decrease with increased sales is in direct contradiction with the established facts appearing in this record and as recognized by all students of economy. It is also a fact within the knowledge of all men that if profits

decreased with increased sales, then large scale merchandising would cease to exist. There is no more factual basis for this statement than there is for the statement that the integrated chain store has no advantage over the voluntary chain. (Kroger R. pp. 385–386.)

What we have said as to the testimony of Mr. Morrill is applicable to the evidence of Mr. Schacter.

We submit that appellants have failed to offer any legitimate proof to rebut the legislative presumption supporting the classification in the challenged act. Appellees' contention that the classification is reasonable may be sustained upon the following grounds:

(d) Increased volume of sales results in increased profits.

(e) Large scale merchandising firms, such as appellants, pay relatively less tax for state and local purposes than do their small competitors.

(f) Large scale merchandising firms have an advantage over their small competitors in standardization of equipment and display, superiority and uniformity in store management, rapid turnover and unified sales policy.

(d) Relation of Sales to Profits

The appellees take the position that the classification made by the challenged act may be sustained alone upon the ground that increased volume of sales results in increased profits. We sustained this proposition by the evidence of economists and by actual operating statistics of merchandising firms. Appellants, of course, disagree with this proposition and contend there was no relation between increased sales and profits. They present nothing to sustain their contention and, as we will later point out, in fact sustain appellees.

Judge Dawson, writing the opinion for the Court, in discussing this controversy and as to whether or not it presented a reasonable foundation for the classification, used this language:

> "There is a widely accepted theory of economics that, as a general proposition, ability to pay increases with volume of business, because, generally speaking, increased volume of business means increased profits. We recognize, of course, that this theory of economics is not universally accepted, but, on the contrary, is vigorously opposed by another school of economic thought. These opposing theories were vigorously advanced in these cases by business men and economists in their testimony. If economists and business men disagree on these propositions, how can it be said that legislative classification in harmony with one of these schools of thought to the exclusion of the other is not reasonably founded in the 'purposes and policies of taxation,' or that such classifications precludes the assumption that it was in good faith exercise of legislative judgment and discretion?"

(Kroger R. pp. 113-114.)

Professor Martin presented exhibits I to VII to sustain his evidence. (Kroger R. pp. 491–494.) These exhibits deal with different classes of retailing establishments. Exhibit I shows that stores having sales of less than five hundred thousand dollars earn profits of 2.8%; stores with sales ranging from five hundred thousand to two million dollars earn 3%, and stores having sales in excess of two million dollars earn an average profit of 5.2%. Professor Martin in analyzing Exhibits II, III, IV and V, said:

> "Exhibit II sets forth similar data for a large number of department stores scattered over the United States, including several in Kentucky. In each year the experience of department stores confirms that of the specialty already discussed in that earnings on sales were very much higher for large-scale enterprises than for the smaller-scale operators. In

1929, for instance, the retailers having sales of between $150,000 and $299,000 made an average of 2 per cent on sales, whereas those selling $10,000,000 or more during the year made an average of 5.3 per cent. The showing for the years 1928 and 1927 is even more conclusive (for department stores) than for the abnormal year 1929.

"Another and more significant analysis of the reliability of the theory that large-scale operation makes possible certain economies unattainable for those who operate on a small scale is offered in a series of exhibits now being presented, showing the ratios of profits or net gain (by which we mean return on invested, borrowed as well as owned capital) to invested capital as shown by net worth, in certain types of retailing by size groups.

"Exhibit III shows the ratio of net profits to net worth of retail jewelry stores for the year 1927, the only year for which information is available. The exhibit indicates that the least efficient jewelers, speaking in terms of size-groups, are those having sales of between $20,000 and $49,000 each. On the average these incurred a loss of 0.7 per cent. The return ranges from this negative quantity on small stores to a positive 3.2 per cent on stores having $500,000 or over of sales. This exhibit may be accepted as a typical example of one of the less efficient retailing groups. It indicates that in no instance is the net return based on the investment of owners particularly generous. It approaches adequacy only in the case of those having net sales of $500,000 or over.

"Exhibit IV shows the relation between net gain and the capital investment, as measured by net worth, of retail specialty stores scattered over the United States. (This is the same group of stores used in Exhibit I.) Analysis of this exhibit shows that large retailers in the specialty field appear to derive very much greater gains if they are large-scale operators than if they do business on a small scale or relatively small scale.

"Exhibit V shows the ratio of net gain to net worth of department stores, both chain and independ-

ent, for the three years ending 1929. In 1927 and 1928 it will be observed that, as the size of the business increases, there is an almost perfectly continuous tendency toward an increase of the rate of net gain to net worth. Even in the abnormal year 1929 this tendency, while not absolutely continuous, is certainly unmistakable.

"Summarizing these evidences, it may be said that the effectiveness of the merchant, as measured either in terms of ratio of net income or net gain to sales or of the ratio of net income or net gain to capital invested by owners, is greater in large than in small enterprises. The evidence all points to the conclusion that large-scale are more profitable than small scale enterprises. This conclusion would imply, on the basis of generally accepted principles of justice in taxation, that it is justifiable to tax the large-scale operator at a higher rate than the dealer engaged in retailing on a small scale."

(Kroger R. pp. 482-483.)

Appellants sought to belittle and destroy the effect of Dr. Martin's evidence, together with the operating satistics submitted by him, by introducing Harry W. Schacter, President of the Kaufman-Straus Company, one of the intervenors. His attention was called to the affidavits of Professors Walradt, Martin and Phelps, showing the relation of profits to sales and the return on invested capital, to which he replied:

"That might be correct theoretically but all the supporting facts and figures from actual experience of department stores indicated that there was no relationship."

(Kroger R. p. 437.)

This witness in discussing his theory of economics, apparently evolved by himself and wholly unsupported by any other evidence, undertakes to sustain his statement that

there is no relationship between profits and increased sales by a discussion of what he calls the "interquartile range." The witness, however, contradicts his statement just quoted that there was no relationship between increased sales and profits in discussing Dr. Martin's Exhibit No. I, when he makes this statement:

> "Professor Martin again quotes average figures and leaves out the interquartile ranges quoted in this table. For example, the increase in percentage of net worth of stores doing less than a million is 8.9%, whereas in stores doing over a million dollars in sales, the increase in net worth is 15.5%"
>
> (Kroger R. p. 441.)

Here the witness admits that table 34, page 45, of Bulletin 78 of the Bureau of Research of Harvard University shows the average increase in percentage of net worth of merchants having sales of less than one million dollars is 8.9%, whereas in stores having over a million dollars in sales the increase of net worth is 15.5%. The witness then proceeds to discuss the interquartile range by showing that stores having sales of less than one million dollars had a range of profit of from 3.20% to 20.75% and stores having more than one million dollars in sales have an interquartile range of from 10.64% to 20.35%. We submit that this admission on the part of the witness sustains our theory. He overlooks the fact that while some stores in the less than million dollar class had an increased percentage of net worth of 20.75%, the average of this class is 8.90%; and likewise overlooks the fact that the lowest percentage of stores with sales in excess of one million dollars is 10.64%, while the lowest in the first class earn only 3.20%.

The majority opinion of the lower court points out very clearly and correctly that the Legislature in levying a tax is not required to make inquiry as to whether the

taxing statute will impose a tax upon some business that is making little or no profit. We quote from the opinion:

> "The test is, what is its effect generally upon the class taxed or what is the effect generally upon any branch or subdivision of that class."
>
> (Kroger R. p. 117.)

To further illustrate the fallacy of the appellant's contention that there is no relation between increased sales and profits, we quote from the evidence of the witness Schacter with reference to Martin Exhibits IV and V:

> "Attention of the witness was then called to Martin Exhibits 4 and 5 and to page 8 of Bulletin 83 of the Bureau of Business Research of Harvard University on the operating results of department stores in 1929. His attention was also called to pages 20 and 28 of the same bulletin. The witness thereupon testified that the percentage of gain to net worth, according to Professor Martin's figures indicated that he again used the average figures all the way down the line and omitted the interquartile ranges. For stores doing less than $500,000 Martin showed a percentage of gain to net worth of 5.7%. For stores doing $500,000 to $2,000,000 of business he showed a percentage of gain to net worth of 7.5% and for stores having sales in excess of $2,000,000 he showed a percentage of gain to net worth of 8.5%."
>
> (Kroger R. p. 442.)

The witness here admits that the figures used by Professor Martin show he used average figures. The witness does not challenge the correctness of the precentages of gain to net worth shown by Exhibits IV and V, but again reverts to his interquartile range argument, showing that some merchants having sales of less than $500,000 had a larger percentage of net gain than merchants having sales in excess of $2,000,000.

The figures in the exhibits which we have discussed related to the years 1927, 1928 and 1929. Professor Martin in giving his deposition on the final hearing supplemented the information shown in Exhibits I to V, which we have discussed, by Exhibits I-A, II-A, II-B, IV-A and V-A. (Kroger R. pp. 531-533.) Professor Martin, to show the correctness of the statement contained in his original affidavit, which we have discussed and which was criticized by Mr. Schacter by injecting his interquartile range theory, presented Exhibit XIX, (Kroger R. p. 528B), putting the testimony of Mr. Schacter in graphic form. In discussing this exhibit the witness said:

> "The witness was thereupon asked the significance of Exhibit 19 and replied that in his affidavit filed in 1931 the data given in the line marked 'Average' were incorporated as part of the affidavit. The evidence presented by Mr. Schacter made a good deal of comment on the fact that there was omitted from the witness's original testimony the data respecting the interquartile range. Witness thought it would be convenient for the court to put the testimony of Mr. Schacter in graphic form. The exhibit means, the witness stated, that the average percentage, that is, the average net gain as a percentage of net worth is indicated in the middle line. The solid line in the chart and the middle fifty per cent of the cases arrayed according to the rate of earnings on net worth are shown between the dotted lines, the middle fifty per cent being the interquartile range that Mr. Schacter referred to. This graph showed, the witness stated, that the middle fifty per cent of the cases arrayed with respect to earnings of the department stores moved very much as the average moved. In other words, the earnings on the invested capital in the case of the smaller enterprises is relatively lower and that on enterprises of intermediate size considerably higher, and that on enterprises of very large size in the department store business it is even larger than the earnings on the intermediate class. The witness stated that it did not seem worthwhile to prepare an exhibit to show the earnings

> on net sales but from his general investigation it would be about the same in general character. The witness also stated that in preparing his chart he did not use the data used by Mr. Schacter but he drew it from the original source."
>
> (Kroger R. pp. 508–509.)

The witness filed with his depositions exhibits XVII to XXXI, (Kroger R. pp. 525–542A), in which he demonstrates by charts, graphs and tables the correctness of his evidence that increased sales result in increased profits. His evidence explaining these various exhibits is found on pages 508 to 521, Kroger Record. The evidence presented here shows conclusively there is no basis for the oft-repeated assertion in appellants' brief that the classification in the challenged act was discriminatorily and arbitrarily made; it establishes conclusively that the classification was a "good faith exercise of legislative judgment and discretion."

The lower Court under findings of fact relative to the Fourteenth Amendment, No. 10, recognized that appellees had sustained their claim that increased volume of sales results in increased profits and increased ability to pay taxes. Finding No. 10 follows:

> "10. The evidence fails to show that there is no relation between sales volume and net earnings, nor does it satisfactorily rebut a widely accepted theory of economists that, as a general proposition, increased volume of sales results in increased profits and increased ability to pay. On the contrary, there is substantial evidence supporting the affirmative of each of these propositions."
>
> (Kroger R. p. 147.)

(e) The Challenged Act Equalizes The Tax Burden

The State of Kentucky and its various political subdivisions have relied largely on the ad valorem system of taxation, as a consequence of which appellants and others similarly situated have not borne their fair portion of the tax burden. The challenged act equalizes that burden. Prior to the passage of the act each dollar of gross income received by large merchants was taxed less than each dollar received by a small merchant. This is shown in Martin's exhibit IX, (Kroger R. p. 497; Stewart R. p. 197). Professor Martin in discussing the facts shown by the exhibit said:

> "As plaintiffs have urged in their petitions, rate of turnover is a significant fact in retailing efficiency. That merchant who secures the highest rate of turnover, other things remaining the same, will enjoy the most profitable business. Consequently, it may be concluded on the basis of data already published from the Census of Distribution that, generally speaking, large-scale merchants enjoy a more profitable business than do small-scale operators.
>
> "That the data shown above are actual comparisons of large with small-scale retailers is borne out by examinations of column five in the tables presented in Exhibits VI and VII. Examination of this column makes it entirely clear that in general two-store multiples have larger sales per store than single store independents; three-store multiples still larger sales, et cetera. From an examination of this column also, it may be concluded that the large-scale retailer must pay less in the way of managerial expense per unit of sales than must the small-scale dealer, since the former has so much greater average sales per store."
>
> (Kroger R. pp. 484–485.)

In discussing the facts shown by exhibit IX relating to different classes of retail stores, the witness said:

> "Exhibit IX shows that the taxes on different classes of retail stores operating in Louisville, Kentucky, in 1928 tend to decline as the sales of the store get larger. In the case of drug stores, for example, it will be observed that the very small merchant pays three times as much tax per dollar of sales as the merchant having sales of $100,000 or more. The merchant doing a general grocery business pays about six times as much tax in proportion to sales if he is one of the very small dealers, as he pays if his sales amount to $100,000 or more. The table indicates clearly that, if information available (that is, concerning merchants doing some kind of food business) is typical, the large merchant generally must pay less taxes, relatively speaking, than the small one."
>
> (Kroger R. p. 486.)

In concluding his evidence showing that large scale merchandising businesses, such as appellants and intervenors enjoy greater tax-paying ability in proportion to amount of business than their small competitors, the witness said:

> "On the basis, then, of the information available, it is fair to say that, not only does the the large retailer enjoy greater tax-paying ability than the small one, but in actual practice at the present time he appears to pay less tax in proportion to amount of business than does his already handicapped competitor. Therefore, it may be suggested that the graduation of rates in the gross sales tax is justified, not only by greater taxable capacity on the part of the large retailer, but also by the fact that the payment of larger taxes will tend to equalize the tax burdens already imposed on large and small merchandising enterprises.
>
> "One other point in this connection should be made. Exhibit XI indicates that, taking the country

as a whole, the tax burden resting on the department store tends to decline with increase in the scale of operations at about the same rate whether the merchant is an independent, a cooperative or a chain dealer. The tax on the enterprise having $2,000,000 or more of sales is in either instance approximately one-half that imposed on those merchants having less than $500,000 of sales."

(Kroger R. p. 487.)

The evidence of Professor Martin is supported by the evidence of Professor Walradt, from which we quote:

"There is still another strong argument in favor of progressive rates in connection with a gross sales tax. In those states which depend largely for their local revenues upon the general property tax, it is a well known fact that those concerns which have a large volume of sales with a rapid turnover escape bearing their fair share of the tax burden as compared with those concerns having a much smaller volume of sales and a slow turnover. The average amount of merchandise on hand at any time as compared with the total business done is relatively much smaller for the former than the latter. It is only fair, therefore, that in addition to the general property tax some other form of tax be devised which will tend to equalize the tax burden between these two groups. In so far as a gross sales tax tends to be larger for concerns having a relatively rapid turnover, such a tax served that purpose."

(Kroger R. p. 461.)

Professor Phelps agrees with Professors Martin and Walradt. We quote from his evidence:

"Now, ability to pay taxes increases progressively as the size of an establishment (as measured by the volume of sales) increases. It is a well-known principle in the field of economics that there are important economies in large scale production and large

scale operation which bring it about that, in general, the larger the business the more efficient it is (and consequently the greater tax-paying power it has).

(Kroger R. p. 544.)

These three witnesses who have testified that large scale merchandising firms pay less taxes on each dollar of their gross income than do their small competitors are economists and qualified to testify on the subject discussed. The evidence of these witnesses which we have quoted stands in this record uncontradicted. The appellants do not take issue with the facts disclosed by them.

We submit that the classification in the challenged act may be sustained alone upon the ground that appellees have established as a fact that appellants and intervenors pay less tax on each dollar of gross income than their small competitors.

(f) Advantages of Large-Scale Merchandising Firms Over Their Small Competitors

Appellants and intervenors in their anxiety to escape the force of appellees' contention that increased sales result in increased profits and as a result large scale enterprises have greater tax-paying ability than their small competitors have fallen into their own trap. They presented as witnesses such merchandising experts as Robert W. Lyon, Executive Vice-President of the National Chain Store Association, Albert H. Morrill, President of the Kroger Grocery & Baking Company, Harry W. Schacter, President of the Kaufman-Straus Company, and Robert J. McKim, President of the Stewart Dry Goods Company, who attributed the success and profits of large merchants to efficient management instead of increased sales. Mr. Morrill states:

> "The difference insofar as profits were concerned was not due to territory but to management. That is the entire thing in a grocery business."
>
> (Kroger R. p. 381.)

After discussing the relation of sales to profits, he said:

> "It comes back again to the question of management and this is peculiarly so in the retail distribution of food stuffs through stores."
>
> (Kroger R. p. 383.)

In discussing business conditions after the "crash" which occurred in October 1929, he said:

> "Many of the larger companies got into the red and went into the hands of Receivers. A large number of the smaller grocery chains also went into Receivership and their assets melted away."
>
> (Kroger R. p. 382.)

Following this statement the witness named several of the small chains that failed and went out of business. He only gives one example of a large grocery chain that went into receivership. On cross examination he was asked to name a number of the large chain stores, which he did. He then stated:

> "None of the larger firms mentioned have failed or gone into the hands of receivers, for the most part the failures having been among the smaller chains in the grocery line."
>
> (Kroger R. p. 390.)

In discussing the mortality rate among individual merchants, the witness admitted that:

> "According to figures shown by the Louisville Grocery Survey, the mortality rate among individual groceries was 100% every three and one-half years."
>
> (Kroger R. p. 391.)

The witness states his training and experience, showing he has given all of his time to the Kroger Company since he became president; that he had visited foreign countries, studying their bookkeeping, delivery, warehousing

methods and everything connected with the business. (Kroger R. p. 376.) He said:

> "Kroger trains its men, having regular training schools and diplomas."
>
> (Kroger R. pp. 384–385.)

What small competitor of the Kroger Grocery & Baking Company, Stewart Dry Goods Company, and the other appellants and intervenors is able to secure the expert management such as appellants and intervenors have shown they have? The appellants have made out a case for appellees by showing that large retail merchants are able to and do secure those who are most efficient by training and experience to manage their enterprises. Expert management, as shown by Mr. Morrill, does not apply alone to the head of the enterprise,—the entire organization is made up of trained experts such as salesmen and advertising managers. The lower Court recognized these facts as a basis for the classification in the challenged act under findings of fact Nos. 13 and 14, relative to the Fourteenth Amendment, which we quote:

> "13. The management of a store or stores is one of the fundamental factors in determining whether or not a profit is realized, and the amount of profit.
>
> "14. As a general proposition, those merchants doing the largest volume of trade are enabled to secure the highest type of management."
>
> (Kroger R. p. 148.)

It is established by the record in these cases that large business organizations return larger dividends to their stockholders than do their small competitors. The best evidence of this fact is that such organizations continue to grow and flourish. There have been instances where large business enterprises have failed, sometimes due to dishonest management, sometimes due to sudden economic

changes, sometimes as a result of both. Such failures are few and far between. The rule remains that in any given economic situation large business organizations can and do return larger dividends per dollar of capital invested than do their small competitors. What was said by Mr. Justice Cardozo on this subject in the case of *Fox* v. *Standard Oil Company of New Jersey, supra,* is applicable to the appellants and intervenors here. We quote from the Fox opinion:

> "We have here abundant capital; standardization in equipment and display; superior management; more rapid turnover; uniformity in store management; special accounting methods; and a unified sales policy coordinating the diverse units."

The challenged act does not violate the equal protection clause of the Fourteenth Amendment and the classification contained therein is not arbitrary, but may be sustained on the following facts shown by the record:

(1) All merchants in the same class within the same graduated levels pay the same rate of tax.

(2) Increased volume of sales results in increased profits.

(3) The challenged act equalizes the tax burden between large merchants and their small competitors.

(4) Large merchants have an advantage over their small competitors in the standardization of equipment and display, superiority and uniformity in management, more rapid turnover, and a unified sales policy.

Any one of the above reasons is sufficient to sustain the classification in the challenged act and the appellants have failed to rebut the presumption of the existence of such facts.

(g) Classification Under The Equal Protection Clause

Few if any provisions of our Constitution have been invoked more times as a barrier to Federal and State legislation than the equal protection clause of the Fourteenth Amendment. This Court has repeatedly held that the equal protection clause does not require abstract equality and uniformity in State excise, privilege or occupational taxes. All that is required is that the tax apply equally and uniformly to all persons similarly situated. The most recent case on this subject before this Court is that of Fred L. Fox v. Standard Oil Company of New Jersey, decided January 14, 1935. This case involved the validity of an act of the West Virginia Legislature imposing a license tax graduated according to the number of stores, ranging from $2.00 on one store to $250.00 on all stores in excess of 75. Stores were divided into nine classes. The entire tax for the year 1933 amounted to $569,693.00. Of this amount the Standard Oil Company paid $240,173.00, or 42.16% of the total tax under the act. Five oil companies paid $476,-171.00, or 83.5%. These five companies had less than 5% of the gross sales of all merchants taxed by the act. The Standard Oil Company challenged the act, claiming the statute in its application to it and others similarly situated denied to them the equal protection of the law. Mr. Justice Cardozo, speaking for the Court in sustaining the act, said:

> "When the power to tax exists, the extent of the burden is a matter for the discretion of the lawmakers. The subject was fully considered in Magnano Co. v. Hamilton, 292 U. S. 40, decided at the last term. 'Even if the tax should destroy a business, it would not be made invalid or require compensation upon that ground alone. Those who enter upon a business take that risk.' Alaska Fish Co. v. Smith, 255 U. S. 44, 48, quoted in Magnano Co. v. Hamilton, supra, p. 46. True the reservation was made (292 U. S. at p. 44) that an act might be so arbitrary as not to be an exercise of

the taxing power at all, the form of a tax being a cloak for something else. Cf. Child Labor Tax Case, 259 U. S. 20. In respect of the challenged act, there is neither evidence nor even claim of any such abuse. On the contrary, the complainant has stated in its bill that the 'act is, in effect, a tax measure,' its validity or invalidity to be adjudged upon that basis. A chain, as we have seen is a distinctive business species, with its own capacities and functions. Broadly speaking its opportunities and powers become greater with the number of the component links; and the greater they become the more far-reaching are the consequences, both social and economic. For that reason the state may tax the large chains more heavily than the small ones, and upon a graduated basis, as indeed we have already held, State Board of Tax Commissioners v. Jackson, supra; Liggett Co. v. Lee, supra. Not only may it do this, but it may make the tax so heavy as to discourage multiplication of the units to an extent believed to be inordinate, and by the incidence of the burden develop other forms of industry. Quong Wing v. Kirkendall, 223 U. S. 59; American Sugar Refining Co. v. Louisiana, 179 U. S. 89, 95; Southwestern Oil Co. v. Texas, 217 U. S. 114, 126; Sproles v. Binford, 286 U. S. 374, 394; Stephenson v. Binford, 287 U. S. 251. In principle there is no distinction between such an exercise of power and the statute upheld in Magnano Co. v. Hamilton, supra, whereby sales of butter were fostered and sales of oleomargarine repressed. A motive to build up through legislation the quality of men may be as creditable in the thought of some as a motive to magnify the quantity of trade. Courts do not choose between such values in adjudging legislative powers. They put the choice aside as beyond their lawful competence. 'Collateral purposes or motives of a legislature in levying a tax of a kind within the reach of its lawful powers are matters beyond the scope of judicial inquiry.' Magnano Co. v. Hamilton, supra, at p. 44; McCray v. United States, 195 U. S. 27, 56. The tax now assailed may have its roots in an erroneous conception of the ills of the body politic or of the efficacy of such a measure to bring about a cure. We have no thought in anyhting we have written to

> declare it expedient or even just, or for that matter to declare the contrary. We deal with power only."

Appellants complain bitterly that the Kentucky tax is oppressive; that although appellants and intervenors have approximately 20% of the gross sales taxed by the act yet they will be called upon to pay 80% of the tax. It is apparent that the challenged statute in the case at bar is not anything like as oppressive as the West Virginia act sustained in the Fox case supra. They also charge that merchants in the highest bracket will be required to pay twenty times the tax their independent competitors in the lower bracket will be required to pay. This does not constitute a reason for declaring the challenged statute invalid, since merchants in the ninth class under the West Virginia statute are required to pay a tax of 125 times that paid by the merchants in the first class.

Recognizing the necessity of conceding to the legislative power of the State a wide discretion in the classification of trades, callings, businesses and occupations, the Court in the case of Brown-Forman Co. v. Kentucky, 217 U. S. 573, 54 L. ed. 887, 30 S. Ct. 578, said:

> "A very wide discretion must be conceded to the legislative power of the state in the classification of trades, callings, businesses or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law."

This statement was quoted with approval in the case of Board of Tax Commissioners v. Jackson, 283 U. S. 527, 75 L. ed. 1248, in which case the Court added at page 1256:

> "It is not the function of this court in cases like the present to consider the propriety or justness of

the tax, to seek for the motives or to criticize the public policy which prompted the adoption of the legislation."

Reaffirming the principle that the equal protection of the law does not compel equal taxation, the Court in the same case said (at page 1255):

> "The principles which govern the decision of this cause are well settled. The power of taxation is fundamental to the very existence of the government of the states. The restriction that it shall not be so exercised as to deny to any the equal protection of the law does not compel the adoption of an iron rule of equal taxation, nor prevent variety or differences in taxation, or discretion in the selection of subjects, or the classification for taxation of properties, businesses, trades, callings, or occupations. Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 S. Ct. 533; Southwestern Oil Co. v. Texas, 217 U. S. 114, 54 L. ed. 688, 30 S. Ct. 496; Brown-Forman Co. v. Kentucky, 217 U. S. 563, 54 L. ed. 883, 30 S. Ct. 578. *The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction,* American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. ed. 102, 21 S. Ct. 43, or if any state of facts reasonably can be conceived to sustain it. Rast v. Van Denman & L. Co., 240 U. S. 342, 60 L. ed. 679, L. R. A. 1917A, 421, 36 S. Ct. 370, Ann. Cas. 1917B, 455; Quong Wing v. Kirkendall, 223 U. S. 59, 56 L. ed. 350, 32 S. Ct. 192."
>
> (Italics ours.)

The appellants presented considerable evidence as to the similarity of opportunities and advantages between appellants and intervenors and their small competitors and showing they were in direct competition with each other. Much of their brief is given to a discussion of this evidence, and contending these facts show the classification in the challenged act is arbitrary and denies to them the equal protection of the law. A complete answer to the conten-

tion of appellants on this point is the case of Louis K. Liggett Co. v. Lee, 288 U. S. 517, 77 L. Ed. 529. Mr. Justice Roberts, speaking for the Court said: (288 U. S. p. 533.)

> "Neither similarity of opportunities and advantages in some aspects, nor the fact that the one kind of store competes with the other, is enough to condemn the discrimination in the taxes imposed. It is needless to repeat what was said in the Jackson Case to the effect that the difference between the subjects taxed need not be great, and that if any reasonable distinction can be found the duty of the court is to sustain the classification embodied in the law."

It is true the Court in the cases quoted was dealing with chain store legislation, but as observed by the Court in the Jackson case, the principles which govern the decision of the case at bar are well settled. The principle upon which the chain store cases were decided is applicable to the case here. We quote from Syllabus 3, in the case of Best Foods, Inc. v. Welch, 34 Fed. 2d 682:

> "Any classification in state legislation reasonably founded in purposes and policy of taxation, and which has reasonable relation to some permitted end of governmental action, is permissible within equal protection clause of Const. U. S. Amend. 14."

As held in the case of Penny Stores, Inc. v. Mitchell, 59 Fed. 2nd 789. (Syllabus 3.)

> "Classification is primarily and conclusively for Legislature unless facts cannot reasonably be conceived to sustain it."

This Court has had occasion to deal with the propriety of the progressive features in license taxes based on volume in other than chain store cases. Clark v. City of Titusville, 184 U. S. 329, is directly in point. The City of Titusville, Pennsylvania, passed an ordinance imposing a license tax on retail merchants progressively increasing in

amount upon the volume of gross sales. The scale was as follows: (p. 330)

Class	Business	Tax
1	Over $60,000.00	$100.00
2	$50,000 to 60,000	80.00
3	40,000 to 50,000	70.00
4	30,000 to 40,000	60.00
5	20,000 to 30,000	50.00
6	10,000 to 20,000	35.00
7	5,000 to 10,000	25.00
8	2,500 to 5,000	15.00
9	1,000 to 2,500	10.00
10	1,000	5.00

The ordinance was attacked upon the ground that the progressive scale was prohibitory and arbitrary, but this Court upheld it in the following language: (p. 331)

> "The objection that plaintiff makes to the ordinance is, that it classifies by amount or value with the result (1) that the lowest amount or value of property of a class 'is required to pay the same amount of taxes with the highest amount or value of property therein'; (2) that the differences are not in kind but only in amount, or value, and that the taxes decrease in rate or ratio as the value of the class increases; (3) that the so-called classes are subdivisions of a class, and taxes are imposed upon such subdivisions without regard to a common ratio, either as between the several subdivisions, or as between the members of each of the subdivisions. These objections are but the expression of the effect of classification by amount, and have been made before and considered before by this court, and the judgment has been adverse to the contention of plaintiff in error. We do not think that it is necessary to review the cases or enter again into the reasoning upon which they were based.
>
> "Classification by amount came up for consideration and decision in *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, and was sustained. That case, plaintiff in error recognizes, may be urged against his contention and attempts to limit its decision to the power of a State over inheritances, and to explain by that power not only the taxes imposed, but the discriminations which were claimed to have re-

sulted from grading the taxes by the amount of the legacy. This, we think, is a misunderstanding of the opinion. The contentions of the parties in the case were extremely opposite. The appellee claimed that the power of the State could be exerted to the extent of making the State the heir of everybody; the appellant asserted a natural right of children to inherit. We expressed no opinion on either contention, but chiefly directed our consideration and decision to the alleged discriminating features of the law in Illinois. We said: Our inquiry must be not what will satisfy the provisions of the state constitutions, but what will satisfy the rule of the Federal Constitution. The power of the States over successions may be as plenary in the abstract as appellee contends for, nevertheless it must be exerted within the limitations of that Constitution. If the power of devise or of inheritance be a privilege, it must be conferred or regulated by equal laws.'

"The law of Illinois was charged with inequality of operation because of the classes which it created. It was asserted, as it is in the case at bar, that the classes were formed upon arbitrary differences, and the provisions of the statute which fixed the tax upon legacies to strangers to the blood of the intestate were vigorously assailed. Those provisions were as follows:

"'On each and every hundred dollars of the clear market value of all property and at the same rate for any less amount on all estates of ten thousand dollars and less, three dollars; on all estates over ten thousand dollars and not exceeding twenty thousand dollars, four dollars; on all estates over twenty thousand dollars and not exceeding fifty thousand dollars, five dollars; and on all estates over fifty thousand dollars, six dollars. Provided, that an estate in the above case, which may be valued at a less sum than five hundred dollars, shall not be subject to any duty or tax.'

"Manifestly, there was inequality between the members of different classes, and that was conceded in the opinion, but as manifestly there was equality between the members of each class, and that equality was held to satisfy the Fourteenth Amendment of the

Constitution of the United States; and the reasoning by which that conclusion was supported is applicable to the case at bar. We met the contention accurately and squarely that there was no reasonable distinction between the classes. We said:

"'If there is inequality it must be because the members of a class are arbitrarily made such and burdened as such, upon no distinctions justifying it. This is claimed. It is said that the tax is not in proportion to the amount but varies with the amounts arbitrarily fixed, and hence that an inheritance of $10,000 or less pays 3 per cent, and that one over $10,000 pays not three per cent, on $10,000, and an increased percentage on the excess over $10,000, but an increased percentage on the $10,00 as well as on the excess, and it is said, as we have seen, that in consequence one who is given a legacy of $10,000 and one dollar by the deduction of the tax receives $99.04 less than one who is given a legacy of $10,000. But neither case can be said to be contrary to the rule of equality of the Fourteenth Amendment. That rule does not require, as we have seen, exact equality of taxation. It only requires that the law imposing it shall operate on all alike under the same circumstances. The tax is not on money, it is on the right to inherit, and hence a condition of inheritance, and it may be graded according to the value of that inheritance. The condition is not arbitrary because it is determined by that value; it is not unequal in operation because it does not levy the same percentage on every dollar; does not fail to treat "all alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed." The jurisdiction of courts is fixed by amounts. The right of appeal is. As was said at bar, the Congress of the United States has classified the right of suitors to come into the United States courts by amounts. Regarding these alone, there is the same inequality that is urged against classification of the Illinois law. All license laws and all specific taxes have in them an element of inequality; nevertheless they are universally imposed, and their legality has never been questioned.'

"Plaintiff in error, however, contends that the

tax in the case at bar is a tax on property, not on the privilege to do business, because the final incidence of the tax is on the merchant, and is paid by him. But every tax has its final incidence on some individual. That effect, therefore, cannot be urged to destroy well recognized distinctions. The tax in the case at bar is a tax on the privilege of doing business regulated by the amount of sales, and is not repugnant to the Constitution of the United States."

This Court has gone even further. In Metropolis Theatre v. City of Chicago, etc., 228 U. S. 61, it sustained the right of a municipality to impose a theatre license tax increasing with the amount of admission charged, on the theory that it was, after all, a tax on volume. The wording used is interesting: (p. 69)

"In other words, there is a natural relation between the price of admission and revenue, some advantage, certainly, that determines the choice. The distinction obtains in every large city of the country. The reason for it must, therefore, be substantial, and if it be so universal in the practice of the business, it would seem not unreasonable if it be adopted as the basis of governmental action. If the action of government have such a basis it cannot be declared to be so palpably arbitrary as to be repugnant to the Fourteenth Amendment. This is the test of its validity, as we have so many times said. We need not cite the cases. It is enough to say that we have tried, so far as the Amendment is concerned, to declare in words, and the cases illustrate by examples, the wide range which legislation has in classifying its objects. To be able to find fault with a law is not to demonstrate its invalidity. It may seem unjust and oppressive, yet be free from judicial interference. The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific. But even such criticism should not be hastily expressed. What is best is not always discernible; the wisdom of any choice may be disputed or condemned. Mere errors of government are not subject to our judicial review. It is only its

palpably arbitrary exercises which can be declared void under the Fourteenth Amendment; and such judgment cannot be pronounced of the ordinance in controversy."

There is no difference between the principles which govern the decision of the case at bar and the principles upon which this Court decided the cases of Metropolis Theatre and City of Titusville, supra. If the tax here involved had been 1/40 of 1% on the first $400,000 of sales and graduated on the same scale so that the maximum tax would be ½ of 1% it is doubtful if the validity of the act would have been challenged. The amount of the tax however does not make the act invalid. This is clear from Mr. Justice Sutherland's language in the case of A. Magnano Company v. Hamilton, 292 U. S. 39, 78 L. ed. 1109, from which we quote: (p. 1115)

"If the tax imposed had been five cents instead of fifteen cents per pound, no one, probably, would have thought of challenging its constitutionality or of suggesting that under the guise of imposing a tax another and different power had in fact been exercised. If a contrary conclusion were reached in the present case, it could rest upon nothing more than the single premise that the amount of the tax is so excessive that it will bring about the destruction of appellant's business, a premise which, standing alone, this court heretofore has uniformly rejected as furnishing no juridical ground for striking down a taxing act. * * *"

Judge Dawson in applying the facts in the case at bar to the well-settled principles discussed in all these cases found, the challenged act did not deny to appellants and intervenors the equal protection of the law. His language is so clear and convincing that we quote from his opinion:

(Kroger R. pp. 111-114.)

"It should always be remembered that the power of the State to tax for public purposes within its constitutional sphere is as unlimited as is the power of

the National Government within its sphere, except for the equality clause of the Fourteenth Amendment.

"It has often been written that the equal protection provision of the Fourteenth Amendment is not a guarantee of equality of the operation or application of State legislation upon all the citizens of a State. All that it intends to secure to citizens is that the laws of a State shall have equality of operation and application on persons according to their relations. That is to say, it is a guarantee to every citizen that he shall be accorded the same treatment by the laws of his State as is accorded to other citizens in his class and similarly circumstanced. As applied to taxation, it has been repeatedly declared by the Supreme Court that this provision of the Constitution does not prohibit classification further than that the classification must be rested upon some ground of difference having a fair and substantial relation to the object of the legislation. The exemption of certain classes of property from taxation, or the imposition of different rates of taxation upon different classes of property or persons, is not prohibited by the equal protection provision of the Fourteenth Amendment provided the classification is not unreasonable or arbitrary; and this is true as to excise, license and occupational taxation, as well as property taxation. *It is not necessary that the classification shall be one that appeals to the judgment or sense of fairness of courts. It is enough if the classification is reasonably founded on the purposes and policies of taxation. Generally speaking, the judgment of the legislative body is conclusive as to classification unless it is based upon so unsubstantial a difference in the classes affected, or is so arbitrary and unreasonable as to preclude the assumption that the classification was made in the good faith exercise of legislative judgment and discretion. These principles are so well settled that citation of authority is hardly necessary, but among the cases sustaining the principles above enunciated are*: Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S. 232; Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283; Campbell v. California, 200 U. S. 87; Royster-Guano Co. v. Virginia, 253 U. S. 412; Watson v. Comptroller, 254 U. S.

122; Stebbins v. Riley, 268 U. S. 137; Quong Wing v. Kirkendall, 223 U. S. 59; McLean v. Arkansas, 211 U. S. 539; Armour Packing Co. v. Lacy, 200 U. S. 226; Connolly v. Union Sewer Pipe Co., 184 U. S. 540; Alaska Fish Co. v. Smith, 255 U. S. 44.

(Italics ours.)

"The decisions are equally clear that in order to sustain classified taxation of things or persons the difference between the classes need not be great. *We think it safe to say that slight differences, such as inability to pay, in character of property or circumstances of persons taxed, will sustain State tax classification against attack under the equal protection clause of the Fourteenth Amendment. Further we think it may be laid down as a sound rule that even though the Court may doubt or question the existence of the distinction or difference forming the basis of classification for State Taxation, yet if the matter is one about which reasonable men may disagree, the judgment and discretion of the legislative body should not be interfered with.*

(Italics ours.)

"Measured by these rules, we are unable to say that the Act in question violates the equal protection clause of the Fourteenth Amendment. It is well settled, and the plaintiffs concede, that classification for taxation based upon mere volume is not open to attack under the Fourteenth Amendment. Plaintiffs contend, however, that it is a long cry from classification upon volume, by the application of the same rate to all classes, to a classification which steps up the rate on the respective classes determined according to volume. Conceivably there might be some merit in this contention, if the law under attack here imposed increasing rates upon the entire volume of business done by those in the higher classes. But such is not the case here. *All those who fall exclusively within the* $400,000.00 *class have applied to them exactly the same rate, and each taxpayer in each higher classification gets the benefit of exactly the same rate, not only of other taxpayers in his particular classification, but he and all others in his class likewise get the same rate applied to that portion of their sales which falls within the lower classi-*

fications as is exacted of those taxpayers who fall exclusively within such lower classifications.
(Italics ours.)

"Therefore, it seems quite clear to us that the rates applied in this Act apply equally to all in the same class. Hence, the claim of the plaintiffs that classification of taxpayers according to volume and the application of different rates to different classes amounts to a denial of equal protection of the law, comes at last to the proposition that such classification is so unreasonable and arbitrary as to preclude the assumption that the classification was made in the good faith exercise of the taxing power of the State.

"Having in mind the principles heretofore adverted to, we can not agree to this proposition. The Court judicially knows that there is in the public mind a quite widely accepted theory that taxation may properly be based upon ability to pay, and this theory has often been translated into legislative action. There is a widely accepted theory of economics that, as a general proposition, ability to pay increases with volume of business, because generally speaking, increased volume of business means increased profits. We recognize, of course, that this theory of economics is not universally accepted, but, on the contrary, is vigorously opposed by another school of economic thought. These opposing theories were vigorously advanced in these cases by business men and economists in their testimony. If economists and business men disagree on these propositions, how can it be said that legislative classification in harmony with one of these schools of thought to the exclusion of the other is not reasonably founded in the "purposes and policies of taxation", or that such classification precludes the assumption that it was in the good faith exercise of legislative judgment and discretion?"

It is of no significance that the number of merchants who must pay the maximum rate on some part of their sales is small, since "a classification is not invalid because it affects one person or corporation alone where it is broad enough to apply to others if they exist." (Cooley on Taxation, 4th ed., Vol. 1, p. 717.)

II

The Challenged Act Does Not Violate The Interstate Commerce Clause of The Federal Constitution

Appellants' rather extended but absurd argument in support of their contention that the challenged act violates the interstate commerce clause of the Federal Constitution is fully answered by the opinion of the lower court. We quote from Judge Dawson's oipnion:

> "We think this question is conclusively decided against the contention of the plaintiffs by the opinion of the Court of Appeals of Kentucky in the case of Moore v. State Board of Charities & Corrections, 239 Ky. 729. The plaintiffs vigorously assail the authority of this case, upon the ground that a legal fraud was practiced upon the State Courts, in that there was no real controversy between the parties to that litigation. We can not escape the fact, however, that the validity of the Act was squarely presented to the Court of Appeals in that case. That court had jurisdiction of the subject matter and of the parties, and while the action which led to the opinion in that case originated after these actions had been filed in this court, that fact can have no effect upon the binding force of the opinion of the State Court, in so far as it deals with the meaning and interpretation of the Act. The opinion of that court as to the meaning and scope of the Act is binding upon all State officials, and is binding upon us. Traux v. Corrigan, 257 U. S. 312. But of course the opinion of that court as to the practical results of the application of the Act so construed involves a finding of fact and is not binding upon us. That court in the opinion referred to specifically held that the Act does not apply to sales made in interstate commerce, and further held that, properly interpreted, Section 1 does not and was not intended to discriminate against farm and garden products raised in other states and sold in this State."

(Kroger R. pp. 118-119.)

The above is a complete answer not only to every fair and logical argument that could possibly be made that the act violates the interstate commerce clause, but it is also a complete answer to the unfair and ill-founded criticism of the Kentucky Court of Appeals.

The case of Forrest Moore, et al., v. State Board of Charities and Corrections, et al., was orginally filed on the 22d day of December, 1930, prior to the filing of the bills of complaint by the appellants. The Moore case was filed and practiced in good faith for the purpose of obtaining from the Court of last resort of the State a construction of a new and untried law. Every argument that has been advanced in the cases at bar was advanced in the Moore case. In fact there was filed with the Court of Appeals a transcript of the record in the Kroger case containing all the pleadings, affidavits and exhibits filed and introduced in that case prior to its reversal by this Honorable Court. The Court also had the advantage of the large and voluminous briefs prepared by the able attorneys for appellants, and we submit that one has but to read the opinion in the Moore case to know that the Court of Appeals considered fully every angle of the case which has been presented in the cases at bar. We quote from that part of the opinion in the Moore case dealing with the question of interstate commerce, 239 Ky. 729, 40 S. W. (2d) 349:

> "Does the act violate the commerce clause of the federal Constitution?

"It is argued that it does, because in defining a retail merchant it exempts those 'actually engaged in gardening or farming and selling garden or farm products raised by them in this State.' Appellants say that under this definition the tax must be collected from those who raise their farm products elsewhere but bring them into this state to sell, which, being true, we have a tax laid on interstate commerce, a thing which the state cannot do. However, we are of the opinion that the phrase 'in this State' was

meant to modify the word 'selling' and not the word 'raised'. The whole import of the act is the levy of a tax measured by sales made in this state. It is the sales which count, not the place where the goods sold are produced. It was plainly the purpose of the act to exempt from its operation those engaged in gardening and farming and selling their own products. Such sales the Legislature intended to be without the operation of the act, and it was of no moment to that body where the produce sold was raised. We must always presume that the Legislature intended to write a constitutional act and must construe its law with that end in view. With this principle controlling us, and being convinced that it was the sale the Legislature had in mind and not the place of production, we conclude that the act must be construed as to exempt those engaged in gardening and farming and selling in this state their own products no matter where grown. With this construction placed upon the act, the criticism of its constitutionality based upon the ground now urged falls.'"

The Kentucky Court of Appeals having held that the challenged act does not violate the commerce clause of the Federal Constitution, all parties affected by said act are bound by that construction. The General Assembly in exempting farm products when sold by the producer from the operation of the act did not intend to do a vain and foolish thing. It is a well recognized rule that when a legislative act is susceptible of two interpretations,—one which makes it valid, the other invalid—the court will accept the interpretation which will sustain the act. Appellants have taken an absurd position when they say:

> "The construction of this clause adopted by the lower court exempts from the tax all of the sales of retail merchants selling farm products raised by them anywhere."

Neither the lower court nor the Kentucky Court of Appeals gave the challenged act any such construction. The Kentucky Court said:

> "It was plainly the purpose of the act to exempt from its operation those engaged in gardening and farming and selling their own products. Such sales the legislature intended to be without the operation of the act, and it was of no moment to the body where the produce sold was raised."

It is clear that the General Assembly had in mind farmers and gardeners who operate roadside markets for the sole purpose of selling farm and garden products raised by them. Certainly the Legislature did not intend to exempt the Kroger Grocery & Baking Company and the claim that such was the intention of the Legislature is ridiculous. To so construe the act would make it possible for every merchant within the State to escape the provisions of the act simply by engaging to some extent in the business of raising and selling farm products. Kroger's farming business is nothing but an advertising scheme. It owns and operates a farm of approximately three hundred acres in Ohio, known as the County Club Farm. This Court judicially knows that a farm of that size, no matter how efficiently operated, could produce but an infinitesimal part of the farm produce sold by Kroger. The Court also judicially knows that many of the farm products sold by Kroger could not be produced in Ohio because of the climate.

The appellants contend that if the act is construed to exempt farmers and gardeners the act is invalid because the classification is arbitrary. The Court of Appeals of Kentucky did hold that the Legislature by the challenged act intended to exempt farmers and gardeners. The Court said, however, that such a classification was valid. We quote from the Kentucky opinion:

> "We did not, in that part of this opinion dealing with the equal protection of the laws, discuss the exemption of farmers and gardeners from the operation of the act because it is settled that a classification such as this is valid. Thus in Potter v. Dark Tobacco Growers' Co-Operative Association, 201 Ky. 441, 257 S. W. 33, 35, we said:

"'The basis of this change in public opinion toward combination and classification is not in any sense political, but economic rather, and, in our judgment, it is because of basic economic conditions, affecting vitally not only the farmers, but also the public weal, that the classification based upon agricultural pursuits is reasonable, just, and imperative for the good of the entire nation and every citizen thereof.' "

The lower court's finding of fact No. 2, with reference to Interstate Commerce follows:

"2. The Kroger Grocery and Baking Company ships packaged articles from outside the State of Kentucky to its stores in that State, where such articles are sold in the original containers in which they are packed for shipment. The retail sales of such articles, however, are separate and distinct transactions had after the goods have come to rest and become a part of the stock of merchandise of the particular store making the sale, such retail sales being entirely consummated in Kentucky."

(Kroger R. p. 150.)

The court concluded as a matter of law that the decision of the Court of Appeals of Kentucky "as to the meaning and scope of the act in question is binding upon this court" and that "as the act had been interpreted and construed by the Court of Appeals of Kentucky in the Moore case it does not violate the commerce clause of the Federal Constitution in any of the particulars urged by the plaintiff."

It has been repeatedly held that the Interstate Commerce clause has no application to the sale of goods in a state when it appears that the goods were manufactured or grown in another state and shipped in quantity into the taxing state and there sold at retail by the manufacturer or producer. Emert v. Missouri, 146 U. S. 296.

III

The Challenged Act Does Not Violate The Bill of Rights Nor Section 181 of The Kentucky Constitution

(a) Confiscation

The appellants and intervenors have cried "confiscation" from the institution of these cases four years ago until this good day. The evidence of their witnesses is a sufficient answer to the claim of confiscation. Turning to the record, the Court will find that Robert W. Lyons, Vice-President of the National Chain Store Association, testified that during the year 1930, the average earnings of all department stores handling great varieties of merchandise were only 1½% of their net sales. (Kroger R. p. 173.) He added that smaller percentages of earnings resulted because of the established practice of department stores in accepting the return of unsatisfactory merchandise, and that well-managed companies in the retail grocery field "are able to earn on their large volume of sales only from 1½% to 2% net." (Kroger R. p. 173.)

John B. Bonham, Vice President of the Kroger Grocery & Baking Company, testifying by affidavit as to Kroger earnings, states:

> "Kroger has always built its business upon the policy of selling good food and merchandise to the consumer at the lowest possible prices. In order to accomplish this it has been necessary to sell a large volume of merchandise at a small margin of profit on individual items. The profit which plaintiff is endeavoring to make in order to sell its merchandise at the lowest possible price has averaged from 2% to 2½% of its gross sales."
>
> (Kroger R. p. 187.)

W. A. Steiden was for many years connected with the Piggly-Wiggly Valley Company and for the two years

prior to the time he testified by deposition was acting branch manager for the Louisville branch of the Kroger Company, having the general management, supervision, and control of 222 of its stores. He makes the following statement as to Kroger earnings:

> "The profits which we endeavor to make from store operation in the branch over which I supervise does not average over 1½% to 2% on gross sales, but we are not able to make this profit at all times and a number of stores in my district have been operated at a loss for the past two years."
>
> (Kroger R. p. 197.)

Gilbert J. Schneider, who had been an employee of the Kroger Company for sixteen years at the time he testified by affidavit, and who was supervisor over District No. 12, which covered twenty-seven counties in Kentucky, in discussing Kroger earnings in his district, said:

> "Each store operates on a basis of a small margin of profit which is not over 1½% to 2% on gross sales."
>
> (Kroger R. p. 216.)

D. T. Petty, Superintendent of Kroger stores in the counties of Daviess, Hopkins, Henderson and Christian in Kentucky, stated in his affidavit:

> "The profits which we endeavor to make are about 1½ to 2% on gross sales, but we are not able to make this profit at all times and some of our stores for the last two years have operated at a loss."
>
> (Kroger R. p. 232.)

Albert B. Berger, who had been engaged in the grocery business for eighteen years and was at the time he testified by affidavit superintendent having charge of 125 Kroger stores, 82 of which were in Kentucky, made the following statement as to Kroger earnings in the stores under his supervision:

"The profits from store operation in the district under my supervision which we endeavor to make is about 2% on gross sales. We are able to make a profit of 2% on gross sales, a 1% tax would take about half of this profit * * * *."

(Kroger R. p. 237.)

John E. Donohue, superintendent in charge of 49 Kroger stores in Kentucky, made the following statement in his affidavit as to the earnings in stores under his supervision:

"The profits from store operations in the district under my supervision are not over 1½% to 2% on the gross sales."

(Kroger R. p. 248.)

Chris Schumann, superintendent in charge of 62 A. & P. stores in Jefferson County, made this statement as to the earnings of A. & P. stores under his supervision:

"Profits in my territory range from 1½% to 2½% on gross sales and the 1% tax would take almost all of this profit."

(Kroger R. p. 264.)

Louie J. Jones, superintendent of 65 A. & P. stores located in Louisville, in giving earnings of stores under his supervision, said:

"Profits from the store operations in my district average between 1½% to 2% on gross sales."

(Kroger R. p. 274.)

Brack M. Ferrill, in charge of 62 stores for the A. & P. Company states:

"Profits from my store operations in the district over which I have supervision average about 1½% to 2½%."

(Kroger R. p. 283.)

Walter Wenderoth, superintendent of Kroger stores in Campbell and Kenton counties, Kentucky, gave the earnings of those stores as follows:

> "We endeavor as a general rule to make about 2% profit per $1.00 of sale and the assessment of a 1% tax would deprive us of about 50% of this profit."
>
> (Kroger R. p. 289.)

This closes the affidavit evidence presented as to the earnings of the appellant Kroger and the intervenor Great Atlantic & Pacific Tea Company. It is certain that these witnesses state the earnings of their respective companies at the lowest possible figure consistent with the truth. These witnesses appeared to have been in actual charge of the stores under them, most of which were located in Kentucky, and the lowest earnings reported by any of their stores was 1½%. They directly contradict the evidence of Mr. Morrill, President of the Kroger Company, as to the earnings of the Company. Mr. Morrill testified that corporation and other license taxes to which the Kroger Company would be entitled to take credit under Section 4 would amount to about $50.00 per store. Thus it will be seen that when Kroger takes credit for the corporation and special license taxes its tax rate under the act will amount to little in excess of 75/100 of 1%.

It takes no argument to show that as applied to Kroger and the Great Atlantic & Pacific Tea Company under this evidence the tax is not confiscatory. Moreover, Mr. Morrill, after discussing the economic period covered by the years 1927, 1928 and 1929, said:

> "The crash in these values occurred in September 1929. This was the first one. Another one occurred in October 1929, and a third during the next summer. Values varied thereafter causing disorganization and chaos in business generally. With comparatively few exceptions business profits disappeared in retail business after the crash in the fall of 1929,

> many of the larger companies got into the red and went into the hands of receivers. A large number of the smaller grocery chains went into receivership and their assets melted away."
>
> (Kroger R. p. 382.)

This is a striking statement as to the condition of retailing business during the years 1930 to 1932, when the witness claims that Kroger made little profit. It is well to look to the earnings of the Kroger Company during the first six months period of 1933. Mr. Morrill says:

> "The percent of profit to the sales was 2.49. The Kroger Company business was much more profitable for the first six months of 1933 than it was for the same period of 1932, the increase in profits being $929,749.17."
>
> (Kroger R. pp. 391-392.)

The Court's finding of fact No. 2 on appellants' claim of confiscation finds that the experience of the Kroger Grocery & Baking Company for the years involved is not typical of the experience of the class taxed, nor of any subdivision of such class. (Kroger R. p. 151.) Appellants complain of this finding and make the statement there is no basis in the record for the finding of the Court. We quote from Mr. Morrill's evidence upon which the finding was made:

> "The rate of profit at which the company earned in 1930 and 1931 was somewhat lower than the rate of profit earned by the average grocery store chain."
>
> (Kroger R. p. 381.)

The majority opinion of the lower Court makes a correct statement of the rule that the Legislature in levying a tax is not required to make inquiry as to whether the taxing statute will impose the tax upon some business that will make little or no profit. We quote from the opinion:

> "The test is: What is its effect generally upon the

class taxed, or what is the effect generally upon any branch or subdivision of that class?"

(Kroger R. p. 117.)

If the rule were otherwise and the State was required to follow a taxing policy which at no time would tax any business that is making little or no profit, then the power of the State to tax would be destroyed.

In speaking of the margin of profit upon which large scale merchandising firms such as Kroger was built, Mr. Morrill testified:

> "The Kroger Company and all similar businesses are built on an extremely small margin of profit, the percentage varying from a red figure to 2.50% or 3.8%, the latter figure being the exception."
>
> (Kroger R. p. 377.)

When we apply the rule that a taxing statute is to be considered as to its effect generally upon the class taxed, or what is the effect generally upon any branch or subdivision of a class to the evidence which we have quoted, it is apparent that the repeated charge of confiscation made by counsel for appellants has no foundation in this record.

It is proper at this point to examine the evidence as to the claim of confiscation as it relates to the other appellants and intervenors. The affidavit of Robert J. McKim, President of the appellant Stewart Dry Goods Company, in narrative form, is found in Kroger Record pages 297 to 319, Stewart Record pages 70 to 81. An examination of this voluminous affidavit made by the President of appellant company nowhere suggests or intimates that the tax levied by the challenged act is confiscatory as to the Stewart Company. He nowhere mentions the earnings of this company and does not state that the payment of the tax would result in a loss to his company or even be oppressive.

The appellant J. C. Penney Company operates a large

number of stores in Kentucky, but it has not presented a single statement of evidence as to its earnings or that the tax as applied to it is confiscatory or even burdensome.

What we have said of the Stewart Company and J. C. Penney Company is equalley true as to the appellant Levy Brothers. The affidavit of Fred Levy, Senior member of appellant Levy Brothers, may be found on pages 319 to 324 Kroger Record.

It is charged in the bills of complaint that the Kroger Company, Stewart Dry Goods Company, Levy Brothers and J. C. Penney Company each sue as a representative of their particular class. There is no effort on the part of the three classes represented by Stewart, Penney and Levy Brothers to show that the tax applicable to the classes which they represent is confiscatory. They do not even suggest that the tax as applied to them or their class is oppressive. The only effort to support the charge of confiscation is made by Kroger and the class which it represents. As we have pointed out from the evidence of the officials and representatives of the appellant Kroger Grocery & Baking Company and the intervenor Great Atlantic & Pacific Tea Company, the earnings of the class which Kroger represents far exceed the amount of the tax and there is no showing that the tax is confiscatory as to the class which Kroger represents.

Much of the evidence presented here on the question of confiscation was before the Kentucky Court of Appeals in the case of Moore vs. State Board of Charities and Corrections, 239 Ky. 729, 40 S. W. (2d) 349. The Kentucky Court in denying that the tax levied by the challenged act was confiscatory, said:

> "Nor does the evidence show that taken as a whole there is any confiscation arising out of the imposition of this tax. Excluding special license, excise, and corporation license tax cases, the effective rate on total gross sales expressed in fractions of 1 per cent. rises from .05 in cases of gross sales not exceeding $400,000 to .305 where such sales amount to $1,000,000. The per-

centage is .6525 where the gross sales amount to $2,000,000, but, from this point on, the curve of increase begins to flatten out. For $3,000,000 of gross sales, the percentage is .7683; for $4,000,000 it is .8263; for $6,000,000 it is .8842; for $9,000,000 it is .92278, and for $12,000,000 it is .94208. The evidence discloses that the average amount of profit in the case of these large retailers as a class (and we must gauge the law by how it operates on the class, not on some special individual, whether good or ill for him) is not less than 2 to 2½ per cent. of gross sales. It is highly doubtful under the evidence in this case whether the large retailer, because of his lower sales prices which he charges the public, cannot pass the tax laid upon him by this act on to the consumer and still be able to meet the competition of the small retailer and speciality store. The burden is upon him who attacks the constitutionality of a law, and it devolved upon appellant to show that the tax could not be shifted. But even if it be conceded that the tax must fall upon the large retailer, yet it cannot be said that, in the light of the percentage of profit per gross sales, this tax which, for practically all of these large retailers, will vary between the limits of .6525 and .94208, is confiscatory. It is not as large in the higher brackets as is the income tax levied by the United States government, and in the lower brackets it closely approximates such federal taxes. Indeed, the evidence shows that whether considered from the point of view of the ratio of profit before gross sales tax to net worth as compared with the ratio of profit after gross sales tax to net worth, or the per cent. earned on property investment in Kentucky before the gross sales tax as compared with such per cent. after the gross sales tax or the per cent. earned on invested capital before the gross sales tax as compared with such percentage after the gross sales tax, the ratio of decrease caused by the operation of the gross sales tax is just about the same. Except in the case of one large chain store, the decrease in the cases of representative large retailers does not exceed the difference between the ratio of 32.67 per cent. and that of 21.58 per cent. The application of the gross sales

tax to these representative retailers leaves the largest scale enterprises still earning on the average 12.49 per cent., the second largest scale 11.61 per cent. and the third, 9.74 per cent. This is far from confiscation."

It was asserted in the Moore case that the challenged act was confiscatory and for that reason violated Section 181 of the Kentucky Constitution and the Bill of Rights. The Court laid down the rule that the act could not be declared invalid because its operation resulted in the confiscation of the property of some particular individual, but must be tested by its operation on the class affected. It is not required that the Legislature in levying a graduated tax must inquire as to the ability of every group within the class to pay the tax without sacrificing profits. The last word on this subject is the language of this Court in the case of Fox vs. Standard Oil Company of New Jersey, decided on January 14, 1935. Mr. Justice Cardozo, writing for the Court, said:

> *"We have never yet held that government in levying a graduated tax upon all the members of a class must satisfy itself by inquiry that every group within the class will be able to pay the tax without the sacrifice of profits.* The operation of a general rule will seldom be the same for every one. If the accidents of trade lead to inequality or hardship, the consequences must be accepted as inherent in government by law instead of government by edict."
> (Italics ours.)

(b) Classification

It is also urged by appellants that the challenged act violates Section 181 of the Kentucky Constitution and the Bill of Rights for the reason that the classification is arbitrary.

The evidence presented by appellees to sustain the classification has been discussed at length in answering the contention of appellants that the classification in the chal-

lenged act is arbitrary and denies to them equal protection of the law under the Fourteenth Amendment to the Federal Constitution. It is unnecessary to again review this evidence.

The rule adopted and followed by the Court of Appeals of Kentucky with reference to equality and uniformity is the same as that approved and followed by this Court. All that is required is that the tax apply equally and uniformly to all persons similarly situated. The Kentucky Court of Appeals in the Moore case, supra, sustained the classification in the challenged act both on the authority of Kentucky and Federal cases. Mr. Justice Dietzman, speaking for the Court said:

> "*The power of classifying taxes upon business according to the volume of business done has always been upheld by this court.* Thus in Gordon v. City of Louisville, 138 Ky. 442, 128 S. W. 327, 328, we said: 'In this state we recognize as valid the imposition of license taxes based upon three theories; one being a uniform tax upon all persons engaged in the same business without any reference to the amount of business done, another that levies a uniform tax upon the volume of business done without changing it in the proportion that the business increases, the per cent. being the same whether there is realized from the business $1,000 or $100,000 per annum. And yet another is the division of a general class, as in this case and the Strater Case (117 Ky. 604, 78 S. W. 871, 25 Ky. Law Rep. 1717) into separate classes according to the volume of business done, and the imposition of a different tax upon each division into which the class is divided. This last-mentioned scheme is, of course, open, as are all the others, to the objection of inequality; but the inequality is not any greater under this system than it is under the others. *Of course, in selecting the line that divides the general class into subdivisions and taxing persons coming within the provisions of each subdivision a different rate, the divisional lines are necessarily arbitrarily selected by the authorities having power to enact the tax laws as*

is the tax that those in each division shall pay. But this fact alone is not sufficient to condemn the act as an unwarranted exercise of legislative authority, if the tax levied upon each class is reasonable, and the lines dividing the class appear to have been made with reasonable regard for the rights of the persons engaged in the business that is thus divided.' To the same effect are Young v. City of Lexington, supra; Strater Brothers Tobacco Co. v. Commonwealth, 117 Ky. 604, 78 S. W. 871, 25 Ky. Law Rep. 1717; Clark v. City of Titusville, 184 U. S. 329, 22 S. Ct. 382, 46 L. Ed. 569; and Metropolis Theater v. City of Chicago, 228 U. S. 61, 33 S. Ct. 441, 57 L. Ed. 730.

"The state having, under the authorities, the right to classify in its taxation program and even to discriminate in favor of certain classes if the discrimination be founded upon a reasonable distinction, and classification according to the volume of business done being valid because based upon a reasonable distinction, if the tax levied be not confiscatory and the lines dividing the classes appear to have been made with reasonable regard for the rights of the persons engaged in the businesses that are thus divided, let us now turn to the evidence herein adduced to see if the conditions upon which such a classification may be validly based are fulfilled in this case. It is true the witnesses for the appellants say that the large retailer, whether operating chain stores, a department store, or just a specialty store, is in intense competition with the smaller dealer, but they do not successfully combat the evidence of the appellees to the effect that advantages in unified and superior management, manifesting itself in lower operating costs, greater efficiency in purchasing, buying for cash and thus obtaining cash discounts, warehousing goods, and distributing from a single warehouse to numerous stores, thus involving less liability for ad valorem taxes (since, as in the case of chain stores, there is no need for such a stock in any one store to be on hand on the assessment date as is required in an independent store) pricing and sales policy; greater rapidity of turnover, less advertising costs per store or department—all are those which the large retailer enjoys to his profit and which the small

retailer does not enjoy. These advantages manifest themselves in both gross and net profits. Thus the proof establishes that the ratio of net gain either to sales or to capital invested is very much higher in the case of large-scale merchants than in that of the small-scale ones whether the large-scale ones be of the chain store type or of the department store type, or even of the specialty store type.

"It is true that, in the case of department stores, appellant's witnesses state that each department is in competition with small independent dealers who will not have to pay the gross sales tax, whereas the department's sales, because of being added to the sales of other departments, will have to bear its proportion of the gross sales tax, thus putting such department at a disadvantage in its competition with the independent dealer. *But these witnesses overlook the advantages which the proof discloses that a department has in location of the store of which it is a department, its sharing with the other departments of overhead, of purchasing power, of obtaining discounts for cash, of advertising, of window display, of unified and superior management, all or most of which the average specialty store does not enjoy. The evidence further establishes that the small retailer pays a very much higher ad valorem tax per dollar of sales than does the larger merchant, and that the imposition of the gross sales tax graduated as it is tends to equalize as between the small and large retailer the tax burden per dollar of sales. The moderate amount of the graduated increase per class in the tax from one-twentieth of 1 per cent. in cases of sales of $400,000 or less to 1 per cent. of sales in excess of $1,000,000, being an increase of but two-twentieths of 1 per cent. for each additional $100,000 of sales after $500,000 can not in the light of the evidence herein produced as to the increased ability to pay in proportion to greater volume of gross sales made be said to be arbitrary, or made without reasonable regard for the rights of the persons engaged in the classes thus divided. Indeed, the percentage of graduated increase in the tax is not as great as that sustained in Clark* v. *City of Titusville, supra. In the case of City of Newport* v. *Frankel, 192 Ky. 408, 233 S. W. 884, relied upon by appellants, with but an increase of 5 cents in the admission to theatres*

of a stated seating capacity, the license tax jumped from $450 to $5,000. Obviously such a jump could not be justified by the small increase in the price of admission. But here the jump amounts to but two-twentieths of 1 per cent. for each $100,000 of increase of gross sales. There is no such manifest injustice in this advance as there was in the Newport Case. The evidence supports the advance.''

(Italics ours.)

What was said here is a complete answer to the claim that the classification in the act is arbitrary.

The Moore case was not the first occasion the Kentucky Court had to deal with the power of the Legislature under the Kentucky Constitution to tax according to the volume of business done. In the case of Gordon v. City of Louisville, 138 Ky. 442, 128 S. W. 327, the court said:

"In this State we recognize as valid the imposition of license taxes based upon three theories: one being a uniform tax upon all persons engaged in the same business, without any reference to the amount of business done; another that levies a uniform tax upon the volume of business done without changing it in the proportion that the business increases, the percent being the same whether there is realized from the business $1,000.00 or $100,000.00, per annum. And yet another is the division of the general class, as in this case and the Strater case, into separate classes according to the volume of business done, and the imposition of a different tax upon each division into which the class is divided. This last-mentioned scheme is, of course, open, as are all the others, to the objection of inequality; but the inequality is not any greater under this system than it is under the others. *Of course in selecting the line that divides the general class into subdivisions and taxing persons coming within the provisions of each subdivision a different rating, the divisional lines are necessarily arbitrarily selected by the authorities having power to enact the tax laws as is the tax that those in each division shall pay. But this fact alone is not sufficient to condemn the Act as an unwarranted exercise of legislative authority, if the tax levied upon each class is reasonable, and the*

lines dividing the class appear to have been made with reasonable regard for the rights of the persons engaged in the business that is thus divided. . . . . The first object in the minds of the legislative body was to tax all merchandise brokers. As a secondary consideration there came up the propriety of dividing them into classes based upon the volume of business done and this classification was manifestly suggested by the fact that the broker who did a small business should not be taxed as much as the one who did a large business. And so the class was divided into divisions, and a different but not unreasonable tax imposed upon each division. The requirement that the broker who does a large business should be required to pay a heavier tax than the broker who does a small business is neither unreasonable nor unjust. And to divide them into classes based on the volume of business done did not, in our opinion, violate the rule of uniformity or reasonableness that has often been applied in cases like this."

(Italics ours.)

The Court of Appeals of Kentucky, speaking through Judge Carroll, in the case of Hager, Auditor, v. Walker, 128 Ky. 1, 107 S. W. 254, approved the principle of classification based on volume in this language:

> "The power to tax according to the volume of business done has been upheld by this Court in *Strater Brothers Tobacco Co.* v. *Commonwealth*, 117 Ky. 604, 25 Ky. Law Rep. 1717, 78 S. W. 871, and here again the principle of uniformity was applied, the Court saying: 'We do not think the tax is lacking in the quality of uniformity. It is the same on each person or corporation which manufacture the same quantity of tobacco. The Legislature had the right to impose a graduated license tax. The larger manufacturer is required to pay more than the small one, based upon value of the product manufactured.' "

The language of the Kentucky Court in these cases is a complete answer to all the reckless statements of counsel for appellants that the classification of the challenged act violates Section 181 of the Kentucky Constitution and the Bill of Rights.

IV

APPELLANTS' BRIEF ANALYZED

No effort will be made to answer every argument found in brief for appellants. Many of the assertions in the brief are so ridiculous as to merit no consideration. Their brief will be discussed in the following order: (a) nature of tax; (b) the Moore case; and (c) theory upon which the act is challenged.

(a) Nature of the Tax

These cases have been pending for more than four years. They have been considered twice by the District Court, once by this Court. The bills of complaint treated the challenged tax as one levied upon retail merchants for the privilege of engaging in business. (Kroger R. pp. 21-23.)

During the trial of the cases in the lower court the appellants and their counsel treated the tax as one levied upon merchants for the privilege of engaging in business. On page four of the brief filed in this Court on the former appeal they said "the tax levied by the challenged act is an excise or license tax on retail merchants." We quote their language:

> "The Act by its terms relates to 'revenue and taxation' and is an excise or license tax on retail merchants. The tax is laid upon 'the opening, establishing, operating or maintaining any store or stores.' The amount of tax is determined by computing the tax upon the amount of gross sales."

They take the position here for the first time that the tax levied by the challenged act is not levied upon the "merchant for the right to exercise the privilege or occupation" but is levied "upon the transaction or sale measured according to the price at which the article is sold." (Appellants' brief, p. 6.)

Pages 24 to 31 of appellants' brief are devoted to their contention that the tax imposed by the challenged act is a sales tax levied upon the articles sold by appellants and intervenors. The Court of Appeals of Kentucky in the Moore case, supra, discussing the nature of the challenged tax, said:

> "The tax levied by the act is by the terms of the act itself an excise or license tax imposed upon retail merchants for 'the opening, establishing, operating or maintaining' any store or stores as defined in the act, the tax being measured by the amount of gross sales and being graduated as the amount of such sales increases."

The challenged act levies a license tax for the privilege of doing business. Such a tax is often referred to as an excise tax, as are all forms of taxation which are not burdens laid directly upon persons or property. Shanks v. Kentucky Independent Oil Co., 225 Ky. 303; 8 S. W. (2d) 383.

Appellants' contention that the act levies a sales tax upon the articles sold by them is worthy of no consideration, except to show how their counsel have shifted from one position to another throughout this litigation.

(b) Moore vs. State Board of Charities and Corrections, 239 Ky. 729, 40 S. W. (2) 249.

Many pages of appellants' brief are devoted to an attack upon the opinion of the Court of Appeals of Kentucky in this case. The Kentucky Court sustained the validity of the act upon every question presented to this Court in the case at bar adversely to the contention of appellants. They charge that a fraud was practiced upon the Kentucky Court by appellants and appellees and their counsel in the Moore case.

Appellants and their counsel knew of the pendency of the Moore case, and could have intervened in that action had they so desired. It did not suit their purpose, however,

to have an early adjudication of the questions raised as to the validity of the challenged act. We invite the Court's careful consideration of the opinion in the Moore case, which was written by Judge Dietzman, one of the ablest judges who has ever occupied the appellate bench in Kentucky. The opinion is sound and shows that the court gave careful consideration to every question presented here.

It is interesting to observe that several of the attorneys who represent appellants in the case at bar filed a brief, amicus curiae, with the Kentucky court, and the reported opinion so shows.

The charge of fraud and the reckless statements with reference to the opinion is worthy of no consideration except the reflection it may cast upon the attorneys representing appellants who filed a brief, amicus curiae, with the court. It was their duty as officers of the court to advise it of the alleged fraud which they now say was practiced upon that tribune. Their cry of fraud is but a smoke-screen to escape the opinion in the Moore case in which the court held that the challenged act did not violate the commerce clause of the Federal Constitution; the classification was not arbitrary but was a valid exercise of the taxing power of the state; and that the act in its operation was not confiscatory in violation of Section 181 and the Bill of Rights of the State Constitution.

The lower court held that the opinion in the Moore case "as to the meaning and scope of the act," and the holding that it did not violate the commerce clause of the Federal Constitution nor any provision of the State Constitution, was binding upon it.

The ruling by the lower court is supported by the opinions of this Court in the case of Michigan Central Railroad v. Powers, 201 U. S. 245. On pages 290 and 291 Mr. Justice Brewer, speaking for the court, said:

> "The unconstitutionality of a statute may depend upon its conflict with the Constitution of the state or with that of the United States. If conflict in the State

> Constitution is the sole ground of attack, the supreme court of the state is the final authority, Merchants and Manufacturers Bank v. Pennsylvania, 167 U. S. 461, and cases cited in the opinion, while in the other case the ultimate decision rests with this court."

In the case of Merchants & Manufacturers Bank v. Pennsylvania, 167 U. S. 461, referred to in the Michigan Central Railroad case, the court said:

> "It is sufficient to say in reference to this contention that the decision of the supreme court of the state of Pennslyvania, sustaining the statute, is conclusive in this court as to any question of conflict between it and the State Constitution."

This court has gone even further in the consideration of taxing statutes in holding that it will give "respectful consideration" to the contemporaneous construction of an administrative agent charged with the enforcement of the statute. Fox v. Standard Oil Co. of New Jersey, decided January 14, 1935; United States v. Moore, 95 U. S. 760; Fawcus Machine Company v. United States, 282 U. S. 375.

(c) Theory upon Which the Act is Challenged

When the act was passed the appellants and intervenors considered it a chain store tax. The bills of complaint charged that the act was passed "to restrain the unfair competition of chain stores." (Kroger R. p. 3, Stewart R. pp. 4-5.) The bills alleged that cooperative associations offer to retail merchants operating specialized stores all the facilities and advantages enjoyed by chain and department stores in the matter of "buying on a large scale, pooling of purchasing power, the ability to contract for newspaper display, store and other advertising, * * * scientific and efficient arrangement of stores, window displays, and the development of merchandising methods." (Kroger R. p. 18, Stewart R. p. 22.) A majority of the evidence presented by appellants was to sustain these allega-

tions of the bills of complaint. (Lyons affidavit, Kroger R. pp. 171-180; Bonham affidavit, pp. 185-187; Steiden affidavit, pp. 196-198; Schneider affidavit, pp. 215-217; Petty affidavit, pp. 230-232; Berger affidavit, pp. 237-238; Donahue affidavit, pp. 247-256; Ferrill affidavit, pp. 281-283; McKim affidavit, pp. 299-319; Levy affidavit, pp. 321-323; Morrill deposition, pp. 385-386). Other witnesses were presented in an effort to establish the contention of appellants and intervenors that the independent unit store has no advtantage over the department and chain store, but the witnesses named go into the question more at length than the others. This is the theory upon which appellants sought to sustain their claim that the classification was arbitrary and that the act discriminated against them.

The contention made in the case at bar by the appellants is similar to that presented in the Jackson case involving the Indiana act, the Fox case involving the West Virginia act, and the numerous other chain store cases. Such evidence having been rejected in those cases, it will undoubtedly be rejected in the case at bar.

CONCLUSION

All members of the same class, within the same graduated levels are treated impartially and subjected to the same tax rate. The graduated feature of the act has been repeatedly sustained by this Court and by the Court of Appeals of Kentucky as not being in violation of the equal protection clause of the Fourteenth Amendment, nor of Section 181 and the Bill of Rights of the Kentucky Constitution.

Appellees have submitted the evidence of qualified economists, supported by actual operating statistics, to show that increased sales result in increased profits; that large scale merchandising firms have advantages over their small independent competitors in the standardization of equipment and display, superior management, rapid turnover, uniformity in store management, accounting methods,

unified sales policy, coordinating the diverse units and abundant capital; and, that the act equalizes the tax burden between large scale merchandising firms and their small independent competitors. This Court has repeatedly rejected the contention presented by appellants that there is no difference between large and small merchandising firms.

For the reasons herein stated, we submit that the decree of the lower court should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1934

The Stewart Dry Goods Company, . . . Appellant,
vs. No. 454
John B. Lewis, et al., ... Appellees.
Fred Levy, et al., ... Appellants,
vs. No. 455
John B. Lewis, et al., ... Appellees.
J. C. Penney Company, ... Appellant,
vs. No. 456
John B. Lewis, et al., ... Appellees.
Kroger Grocery & Baking Company, . . . Appellant,
vs. No. 457
John B. Lewis, et al., ... Appellees.

PETITION FOR REHEARING

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S. H. BROWN,
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Postal Telegraph Cable Co. vs. Adams, 155 U. S. 688, 698.

CERTIFICATE 18

Supreme Court of the United States

OCTOBER TERM, 1934

THE STEWART DRY GOODS COMPANY	*Appellant*
vs.	
JOHN B. LEWIS, ET AL.	*Appellees*
FRED LEVY, ET AL.	*Appellants*
vs.	
JOHN B. LEWIS, ET AL.	*Appellees*
J. C. PENNEY COMPANY	*Appellant*
vs.	
JOHN B. LEWIS, ET AL.	*Appellees*
KROGER GROCERY & BAKING COMPANY	*Appellant*
vs.	
JOHN B. LEWIS, ET AL.	*Appellees*

PETITION FOR REHEARING

May It Please the Court:

The above styled appeals are now pending on petitions for a rehearing.

In the opinion of the court, delivered by Mr. Justice Roberts, it is said:

> "In several recent cases we sustained a classification of chain stores for taxation at rates higher than

those applicable to single stores graduated upward on each store as the total number of units in one ownership increased. We found this classification reasonable because of advantages incident to the conduct of multiple stores and obvious differences in chain methods of merchandising as contrasted with those practiced in the operation of one store."

There are appended in the footnotes the cases from this court supporting this proposition. We submit that the same considerations which support the classification of chain stores for taxation at rates higher than those applicable to single stores support with equal force a classification of department stores different from stores that deal in a single line of goods or a few lines of goods of coordinate character.

As pointed out in the case of Moore vs. the State Board of Charities and Corrections, 239 Ky. 729, 40 S. W. (2d) 349, that, while it is true in the case of department stores that each department is in competition with small independent dealers, dealing in one line of goods or a few coordinate lines and who will not have to pay this sales tax whereas the department sales because of being added to sales of other departments will have to bear its proportion of the gross sales tax, thus putting such department at a disadvantage in its competition with the independent dealer, yet the proof in that and in the above styled appeals discloses that the advantages which a department has in the location of the store of which it is a department, its sharing with the other departments of overhead, of purchasing power, of obtaining discounts for cash, of advertising, of window display, of unified and superior management, all or most of which the average specialty store does not enjoy, supports the department store classification.

Indeed, we take it that the opinion of Mr. Justice Roberts for the court, at least by inference, sustains this contention for he therein differentiates between those who

sell but one sort of goods and those who, through departments, deal in many lines of merchandise.

In this opinion the proposition, supported by abundant authority in the footnotes, is laid down that, in resolving this issue of taxation, the courts are not concluded "by the name or description of the tax as found in the act." "The duty of the court is to ascertain its nature and effect." To use the quotation in the opinion from the case of Postal Telegraph Cable Company vs. Adams, 155 U. S. 688, 698—

> "The substance and not the shadow determines the validity of the exercise of the power."

In other words, the court in determining the validity of a taxing statute will look at the realities of the situation and to this end we invite the attention of the court.

Your Honors will take judicial notice of the geography, the population, the character of its economic life, and the concentration of population of the state of Kentucky and its people. It contains approximately 40,000 square miles. Its population is slightly in the rise of 2,500,000. Its economic support is mainly agrarian in character, with the coal mining industry being of some moment in Eastern and Southeastern Kentucky, coupled with a lesser development of oil and gas. Save in the larger cities of Ashland, Louisville, Paducah, Covington, Newport and Lexington, the manufacturing industry is not large. There is but one city of the first class in the State. Under the Constitution, Section 156, cities with a population of 100,000 are cities of the first class. The one city of the first class is Louisville, with a population, including that of the surrounding county in which it is located, of perhaps 350,000. There are no large cities or centers of population across the Ohio River from Louisville. Ashland, Paducah, Lexington, Covington and Newport are cities of the second class which include cities from 20,000 to 100,000 in population. None of them, except

Covington and Newport, have near them any large center of population or hinter-land of which there is a density of population. Covington and Newport are opposite the city of Cincinnati but, as we shall point out, this very fact, instead of affording a clientele for its stores and merchants, works quite to the contrary and is a drain upon the Kentucky clientele which the merchants of Covington and Newport might look to for their customers, the latter preferring the larger stores and perhaps greater variety of merchandise to be found in the larger metropolis than in the smaller cities of Covington and Newport. The other cities of Kentucky range from 20,000 and less in population down to a negligible number. The census statistics of the counties (there being 120 of them in Kentucky) disclose no great density of population anywhere, with the possible exception of the city of Louisville, and even there the population is as above stated. The census figures of which this court takes judicial notice disclose a per capita worth of $.

The court knows that any community that depends so much in the main for its income on agrarian activities will not be one where the purchasing power of the community can rise to very great heights.

With these observations in mind, we submit that although, as the court says in its opinion, on its face the tax does not seem to be confined to those who do business by the chain store method or by the department store method, yet looking through the shadow to the substance, as this court says we must in this very opinion, the tax cannot in reality operate and will not operate except on merchants who do business by the methods which this court says supports the classification.

With the markets available to them, with the clientele upon which they can draw, we confidently assert that this record, together with the facts which the court judicially knows, discloses that no merchant dealing in but one line of

goods or in a few coordinate lines of goods by retail in the state of Kentucky will ever rise to the dignity of a gross sales of $400,000.00 per year.

There is no party complaining of this tax before the court except those doing business either on the chain store method or the department store method. The reason for this lies in the very fact we are trying to emphasize, and that is whatever name the tax bore, it was in truth and in fact a tax on chain stores and department stores, and not one on the individual merchant dealing in a specialty line or in a few coordinate lines of business. The legislature knew that such merchants doing business in such individual lines would never have sales amounting to as much as $400,000 per year by retail. The political economy in the State forbade any such result.

For the same reasons that have actuated the chain store legislation throughout the Union, the legislature was passing this gross sale stax because of the unfavorable decision of the Indiana tax then rendered by the lower courts. The legislature, prior to the reversal of the decision in the Indiana case, sought to achieve the same results by the act here in question. They knew the act which they were passing would never apply to anybody but chain stores and department stores, but framed it as they did in order to avoid the criticism aimed at chain store legislation in the decision in the lower court on the Indiana tax.

We submit, therefore, that this act, though not called such, is in truth and in fact a tax on doing business by the chain store method or by the department store method. As a matter of fact, the act has been repealed, but assuming its continued vitality and assuming that in the course of time the economic life of Kentucky would so change as that the act would become broader in its scope than it would ever reasonably be anticipated to have, would it not then be the time and the place to raise its constitutionality by one who did not labor under the classification of a chain store or department store operator?

For we take it that it is axiomatic that one who is not hurt or has no grounds to complain of the constitutionality of the act will not be heard to question such constitutionality. Surely the parties to this suit, department stores and chain stores, whose activities, as this court points out, affords a basis for classification, ought not to be heard to say that in some remote time, had the act remained on the statute books, the political economy of the State might have become so large as to embrace those merchants who, this court says, would have a just cause of complaint if they were doing business in one line of goods or a few coordinate lines. If realities are to control and this is a chain store or department store classification, it is valid as this court in the opinion concedes.

We also wish the court to reconsider the proposition advanced in the opinion of the majority that no difference is suggested, so far as concerns the transaction, which is the occasion of the tax, between the taxpayer's first sale of the year and his thousandth; and that the statute is unjustifiably unequal, whimsical and arbitrary as much so as would be a tax on tangible personal property—say cattle stepped up in rate on each additional animal owned by the taxpayer, or a tax on land similarly graduated according to the number of parcels owned.

We regret that our argument and brief did not make more manifest to the court our position which we think is abundantly supported by the record that there is a decided difference between the first and even the hundredth or even the second sale in any store. Until the second sale is made, the first sale bears all of the burden of the overhead, the rent, the light, the heat, the advertising, the clerk's hire, the general office expense. As soon as the second sale is made the burden begins to be pro-rated and diminishes per sale until the point is reached where some additional expense must be incurred because of the increased volume of business. But even here the added expense, when pro-rated out over all of the transactions, is less per unit of sale

than was the burden on the first sale where the overhead was not so large. Indeed we would not need a record to support so obvious a principle of political economy and merchandising.

May we invite the attention of the court to what we said in our brief on the original hearing in this case relative to this point?

"We submit that appellants have failed to offer any legitimate proof to rebut the legislative presumption supporting the classification in the challenged act. Appellees' contention that the classification is reasonable may be sustained upon the following grounds:

(d) Increased volume of sales results in increased profits.

(e) Large scale merchandising firms, such as appellants, pay relatively less tax for state and local purposes than do their small competitors.

(f) Large scale merchandising firms have an advantage over their small competitors in standardization of equipment and display, superiority and uniformity in store management, rapid turnover and unified sales policy.

(d) Relation of Sales to Profits

The appellees take the position that the classification made by the challenged act may be sustained alone upon the ground that increased volume of sales results in increased profits. We sustained this proposition by the evidence of economists and by actual operating statistics of merchandising firms. Appellants, of course, disagree with this proposition and contend there was no relation between increased sales and profits. They present nothing to sustain their contention and, as we will later point out, in fact sustain appellees.

Judge Dawson, writing the opinion for the Court, in discussing this controversy and as to whether or not it presented a reasonable foundation for the classification, used this language:

> "There is a widely accepted theory of economics that, as a general proposition, ability to pay increases with volume of business, because, generally speaking, increased volume of business means increased profits. We recognize, of course, that this theory of economics is not universally accepted, but, on the contrary, is vigorously opposed by another school of economic thought. These opposing theories were vigorously advanced in these cases by businses men and economists in their testimony. If economists and business men disagree on these propositions, how can it be said that legislative classification in harmony with one of these schools of thought to the exclusion of the other is not reasonably founded in the 'purposes and policies of taxation,' or that such classifications precludes the assumption that it was in good faith exercise of legislative judgment and discretions?"
>
> (Kroker R. pp. 113-114.)

Professor Martin presented exhibits I to VII to sustain his evidence. (Kroger R. pp. 491-494.) These exhibits deal with different classes of retailing establishments. Exhibit I shows that stores having sales of less than five hundred thousand dollars earn profits of 2.8%; stores with sales ranging from five hundred thousand to two million dollars earn 3%, and stores having sales in excess of two million dollars earn an average profit of 5.2%. Professor Martin in analyzing Exhibits II, III, IV and V, said:

> "Exhibit II sets forth similar data for a large number of department stores scattered over the United States, including several in Kentucky. In each year the experience of department stores confirms that of the specialty already discussed in that earnings on sales were very much higher for large-scale en-

terprises than for the smaller-scale operators. In 1929, for instance, the retailers having sales of between $150,000 and $299,000 made an average of 2 per cent on sales, whereas those selling $10,000,000 or more during the year made an average of 5.3 per cent. The showing for the years 1928 and 1927 is even more conclusive (for department stores) than for the abnormal year 1929.

"Another and more significant analysis of the reliability of the theory that large-scale operation makes possible certain economies unattainable for those who operate on a small scale is offered in a series of exhibits now being presented, showing the ratios of profits or net gain (by which we mean return on invested, borrowed as well as owned capital) to invested capital as shown by net worth, in certain types of retailing by size groups.

"Exhibit III shows the ratio of net profits to net worth of retail jewelry stores for the year 1927, the only year for which information is available. The exhibit indicates that the least efficient jewelers, speaking in terms of size-groups, are those having sales of between $20,000 and $49,000 each. On the average these incurred a loss of 0.7 per cent. The return ranges from this negative quantity on small stores to a positive 3.2 per cent on stores having $500,000 or over of sales. This exhibit may be accepted as a typical example of one of the less efficient retailing groups. It indicates that in no instance is the net return based on the investment of owners particularly generous. It approaches adequacy only in the case of those having net sales of $500,000 or over.

"Exhibit IV shows the relation between net gain and the capital investment, as measured by net worth, of retail specialty stores scattered over the United States. (This is the same group of stores used in exhibit I.) Analysis of this exhibit shows that large retailers in the specialty field appear to derive very much greater gains if they are large-scale operators than if they do business on a small scale or relatively small scale.

"Exhibit V shows the ratio of net gain to net worth of department stores, both chain and independent, for the three years ending 1929. In 1927 and 1928 it will be observed that, as the size of the business increases, there is an almost perfectly continuous tendency toward an increase of the rate of net gain to net worth. Even in the abnormal year 1929 this tendency, while not absolutely continuous, is certainly unmistakable.

"Summarizing these evidences, it may be said that the effectiveness of the merchant, as measured either in terms of ratio of net income or net gain to sales or of the ratio of net income or net gain to capital invested by owners, is greater in large than in small enterprises. The evidence all points to the conclusion that large-scale are more profitable than small-scale enterprises. This conclusion would imply, on the basis of generally accepted principles of justice in taxation, that it is justifiable to tax the large-scale operator at a higher rate than the dealer engaged in retailing on a small scale."

(Kroger R. pp. 482-483.)

Appellants sought to belittle and destroy the effect of Dr. Martin's evidence, together with the operating statistics submitted by him, by introducing Harry W. Schacter, President of the Kaufman-Straus Company, one of the intervenors. His attention was called to the affidavits of Professors Walradt, Martin and Phelps, showing the relation of profits to sales and the return on invested capital, to which he replied:

"That might be correct theoretically but all the supporting facts and figures from actual experience of department stores indicated that there was no relationship."

(Kroger R. p. 437.)

This witness in discussing his theory of economics, apparently evolved by himself and wholly unsupported by any

other evidence, undertakes to sustain his statement that there is no relationship between profits and increased sales by a discussion of what he calls the "interquartile range." The witness, however, contradicts his statement just quoted that there was no relationship between increased sales and profits in discussing Dr. Martin's Exhibit No. I, when he makes this statement:

> "Professor Martin again quotes average figures and leaves out the interquartile ranges quoted in this table. For example, the increase in percentage of net worth of stores doing less than a million is 8.9%, whereas in stores doing over a million dollars in sales the increase in net worth is 15.5%"
>
> (Kroger R. p. 441.)

Here the witness admits that table 34, page 45, of Bulletin 78 of the Bureau of Research of Harvard University shows the average increase in percentage of net worth of merchants having sales of less than one million dollars is 8.9%, whereas in stores having over a million dollars in sales the increase of net worth is 15.5%. The witness then proceeds to discuss the interquartile range by showing that stores having sales of less than one million dollars had a range of profit of from 3.20% to 20.75% and stores having more than one million dollars in sales have an interquartile range of from 10.64% to 20.35%. We submit that this admission on the part of the witness sustains our theory. He overlooks the fact that while some stores in the less than million dollar class had an increased percentage of net worth of 20.75%, the average of this class is 8.90%; and likewise overlooks the fact that the lowest percentage of stores with sales in excess of one million dollars is 10.64%, while the lowest in the first class earns only 3.20%.

The majority opinion of the lower court points out very clearly and correctly that the Legislature in levying a tax is not required to make inquiry as to whether the

taxing statute will impose a tax upon some business that is making little or no profit. We quote from the opinion:

> "The test is, what is its effect generally upon the class taxed or what is the effect generally upon any branch or subdivision of that class."
>
> (Kroger R. p. 117.)

To further illustrate the fallacy of the appellant's contention that there is no relation between increased sales and profits, we quote from the evidence of the witness Schacter with reference to Martin Exhibits IV and V:

> "Attention of the witness was then called to Martin Exhibits 4 and 5 and to page 8 of Bulletin 83 of the Bureau of Business Research of Harvard University on the operating results of department stores in 1929. His attention was also called to pages 20 and 28 of the same bulletin. The witness thereupon testified that the percentage of gain to net worth, according to Professor Martin's figures indicated that he again used the average figures all the way down the line and omitted the interquartile ranges. For stores doing less than $500,000 Martin showed a percentage of gain to net worth of 5.7%. For stores doing $500,000 to $2,000,000 of business he showed a percentage of gain to net worth of 7.5% and for stores having sales in excess of $2,000,000 he showed a percentage of gain to net worth of 8.5%.'
>
> (Kroger R. p. 442.)

The witness here admits that the figures used by Professor Martin show he used average figures. The witness does not challenge the correctness of the percentages of gain to net worth shown by Exhibits IV and V, but again reverts to his interquartile range argument, showing that some merchants having sales of less than $500,000 had a larger percentage of net gain than merchants having sales in excess of $2,000,000.

The figures in the exhibits which we have discussed related to the years 1927, 1928 and 1929. Professor Martin in giving his deposition on the final hearing supplemented the information shown in Exhibits I to V, which we have discussed, by Exhibits I-A, II-A, II-B, IV-A and V-A. (Kroger R. pp. 531-533.) Professor Martin, to show the correctness of the statement contained in his original affidavit, which we have discussed and which was criticized by Mr. Schacter by injecting his interquartile range theory, presented Exhibit XIX (Kroger R. p. 528B) putting the testimony of Mr. Schacter in graphic form. In discussing this exhibit the witness said:

> "The witness was thereupon asked the significance of Exhibit 19 and replied that in his affidavit filed in 1931 the data given in the line marked 'Average' were incorporated as part of the affidavit. The evidence presented by Mr. Schacter made a good deal of comment on the fact that there was omitted from the witness's original testimony the data respecting the interquartile range. Witness thought it would be convenient for the court to put the tesimony of Mr. Schacter in graphic form. The exhibit means, the witness stated, that the average percentage, that is, the average net gain as a percentage of net worth is indicated in the middle line. The solid line in the chart and the middle fifty per cent of the cases arrayed according to the rate of earnings on net worth are shown between the dotted lines, the middle fifty per cent being the interquartile range that Mr. Schacter referred to. This graph showed, the witness stated, that the middle fifty per cent of the cases arrayed with respect to earnings of the department stores moved very much as the average moved. In other words, the earnings on the invested capital in the case of the smaller enterprises is relatively lower and that on enterprises of intermediate size considerably higher, and that on enterprises of very large size in the department store business it is even larger than the earnings on the intermediate class. The witness stated that it did not seem worthwhile to prepare an exhibit to show the earnings

> on net sales but from his general investigation it would be about the same in general character. The witness also stated that in preparing his chart he did not use the data used by Mr. Schacter but he drew it from the original source."
>
> (Kroger R. pp. 508-509.)

The witness filed with his deposition exhibits XVII to XXXI (Kroger R. pp. 525-542A), in which he demonstrates by charts, graphs and tables the correctness of his evidence that increased sales result in increased profits. His evidence explaining these various exhibits is found on pages 508 to 521, Kroger Record. The evidence presented here shows conclusively there is no basis for the oft-repeated assertion in appellants' brief that the classification in the challenged act was discriminatorily and arbitrarily made; it establishes conclusively that the classification was a "good faith exercise of legislative judgment and discretion."

The lower Court under findings of fact relative to the Fourteenth Amendment, No. 10, recognized that appellees had sustained their claim that increased volume of sales results in increased profits and increased ability to pay taxes. Finding No. 10 follows:

> "10. The evidence fails to show that there is no relation between sales volume and net earnings, nor does it satisfactorily rebut a widely accepted theory of economists that, as a general proposition, increased volume of sales results in increased profits and increased ability to pay. On the contrary, there is substantial evidence supporting the affirmative of each of these propositions."
>
> (Kroger R. p. 147.)"

After all, this tax, graduated as it is, is a burden upon the entire business done by the merchant. The income

from the business must pay the tax in the last analysis and, although the tax is measured and graduated according to the volume and sales yet, when the tax is finally computed, it rests upon the business generally. To use the illustration advanced by the court in its majority opinion, individual acres of coal land may in and of themselves be of little worth and yet when brought together in one big operation, and because of their connection one with another, the total acreage may become quite valuable. If we look at realities instead of shadows, the tax here involved is a tax on the total business done, measured and stepped up because of the increased business done because of the volume. The reasonableness of the tax, we take it, is measured by incidents of its general operation and not by what may happen in some sporadic case or incident. As pointed out above, the general operation of this tax is on those whose profits increase because of the increase in business done and whose contributions to support of government by way of taxation decline because of the method of doing business along the chain store or departmental line.

Just as it is fair to lay a tax on a thousand acres of coal land higher because of these thousand acres being brought together and thus the operation being rendered more valuable than could be levied on an isolated acre of coal land which would be valueless, so it is right to levy a higher gross sales tax where the business is larger than where there is a small amount of business done.

We therefore respectfully submit in the inverse order of this argument that the record does disclose a decided difference between the first and the thousandth sale that justifies and supports this graduated tax. If we look through the shadow to the substance, we find that this tax is in truth, no matter what it may be called, actually a chain store and department store classification and, being such, is a reasonable one under the authorities and as this court

concedes. If this be true, we respectfully submit that the petition for rehearing should be granted and the judgment herein affirmed.

Respectfully submitted,

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I, S. H. Brown, assistant attorney general of Kentucky, counsel for appellees, do certify that the above petition for rehearing is filed in good faith and not for delay. I further certify that counsel for appellants have been furnished copies of said petition.

S. H. BROWN
Assistant Attorney General.

SUPREME COURT OF THE UNITED STATES.

Nos. 454, 455, 456 and 457.—October Term, 1934.

454	The Stewart Dry Goods Company, Appellant, *vs.* John B. Lewis, et al.	On Appeals from the District Court of the United States for the Western District of Kentucky.
455	Fred Levy, et al., Appellants, vs. John B. Lewis, et al.	
456	J. C. Penney Company, Appellant, *vs.* John B. Lewis, et al.	
457	The Kroger Grocery & Baking Company, Appellant, *vs.* John B. Lewis, et al.	On Appeal from the District Court of the United States for the Eastern District of Kentucky.

[March 11, 1935.]

Mr. Justice Roberts delivered the opinion of the Court.

These are four suits heard by a specially constituted District Court in Kentucky, to enjoin state officers from enforcing an act of that Commonwealth imposing a gross sales tax. The plaintiffs are, respectively, a domestic corporation conducting a department store in Louisville, a partnership operating a similar store in the same city, a Delaware corporation having 21 department stores in Kentucky, and an Ohio corporation maintaining 289 grocery stores within the Commonwealth. Nineteen individuals, partnerships and corporations, proprietors of one or more stores selling various lines of merchandise, intervened as plaintiffs. Interlocutory injunctions issued, but the district court of three judges dismissed the bills for want of equity, being of opinion there was an adequate remedy at law. Upon appeal this court reversed the decrees and remanded the causes.[1] At final hearing the district court found the remedy at law inadequate, but sustained the act and dismissed the bills.[2] The present appeals are upon the merits.

[1] 287 U. S. 9.

[2] 7 F. Supp. 438; 8 F. Supp. 396.

The statute became a law March 17, 1930. The title and certain sections are copied in the margin; other sections are there summarized.[3] The tax imposed upon the first $400,000 of annual gross sales is 1/20th of one per cent. The rate increases on each additional $100,000 of sales between $400,000 and $1,000,000, inclusive, being 17/20ths of one per cent. in the last bracket. On sales over $1,000,000 the rate is one per cent. The increased rates are applicable, however, only in respect of sales in each successive bracket, and therefore the tax burden attributable to $1,100,000 of sales is not one per cent., but a composite ascer-

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[3]Chap. 149, Acts of 1930, p. 475.

"AN ACT relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this act.

Be it Enacted by the General Assembly of the Commonwealth of Kentucky:

"§ 1. The words 'retail merchant', as used in this act, shall mean and include every person, firm, association, co-partnership or corporation opening, establishing, operating or maintaining any 'store', as defined herein, for the purpose of and selling goods, wares or merchandise at retail in this State, except those actually engaged in gardening or farming and selling garden or farm products raised by them in this State. The term 'store', as used in this act, shall be construed to mean and include any store or stores or any mercantile establishment or establishments in this State which are owned, operated, maintained or controlled by the same 'retail merchant,' as defined herein, either domestic or foreign, in which goods, wares or merchandise of any kind, are sold at retail. The provisions of this act shall be construed to apply to every 'retail merchant' and 'store,' as defined herein, which is controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management.

"§ 2. Every retail merchant, as defined herein, shall pay an annual license tax for the opening, establishing, operating or maintaining of any store or stores, as defined herein, determined by computing the tax on the amount of gross sales as follows:

"One-twentieth of one per cent of the gross sales of Four hundred thousand ($400,000.00) Dollars or less; two-twentieths of one per cent on the excess of the gross sales over Four hundred thousand ($400,000.00) Dollars and not exceeding Five hundred thousand ($500,000.00) Dollars; five-twentieths of one per cent on the excess of the gross sales over Five hundred thousand ($500,000.00) Dollars and not exceeding Six hundred thousand ($600,000.00) Dollars; eight-twentieths of one per cent on the excess of the gross sales over Six hundred thousand ($600,000.00) Dollars and not exceeding Seven hundred thousand ($700,000.00) Dollars; eleven-twentieths of one per cent on the excess of the gross sales over Seven hundred thousand ($700,000.00)

tained by adding the total tax for the sales falling within the various brackets, and dividing by the dollar-value of all sales. Thus the act requires the merchant to pay in the total .05 per cent. on $400,000 of sales, .305 per cent. on $1,000,000 of sales and .96 per cent. on $15,000,000 of sales.

The appellants charge that the statute violates several sections of the Constitution of Kentucky and several provisions of the Federal Constitution. We shall not stop to enumerate these, since we must sustain the claim that the classification made by § 2 denies the appellants the equal protection of the laws assured by the Fourteenth Amendment.

The trial court's relevant findings are: The act is essentially a revenue measure. The tax is on gross sales, not on gross collections from vendees. Sales made by merchants taxed under any of the brackets of the act are made in competition with like sales of the same character of merchandise by those who are taxed under other brackets. As a general proposition increased volume of sales results in increased profits and increased ability to pay the tax. The rate of profit from retail sales generally varies with the character of the goods sold. The management of a store or stores is one of the fundamental factors in determining whether or not a profit is realized and the amount of profit. As a general proposition those merchants doing the largest amount of trade are enabled to secure the highest type of management.

In the light of these findings, does the act tax sales in an unequal and arbitrary way, classifying them for the imposition of different rates without reference to any real or substantial distinction, as appellants insist; or does it impose an excise upon the conduct of retail business, reasonably adjusted in amount with regard to substantial differences in the nature of the privilege exercised, as appellees contend?

Dollars and not exceeding Eight hundred thousand ($800,000.00) Dollars; fourteen-twentieths of one per cent on the excess of the gross sales over Eight hundred thousand ($800,000.00) Dollars and not exceeding Nine hundred thousand ($900,000.00) Dollars; seventeen-twentieths of one per cent on the excess of the gross sales over Nine hundred thousand ($900,000.00) Dollars and not exceeding One million ($1,000,000) Dollars; one per cent on the excess of the gross sales over One million ($1,000,000.00) Dollars."

§ 3 provides for annual returns to the state tax commission, assessment and payment of the tax. § 4 allows certain credits for other taxes. § 7 makes it a misdemeanor, punishable by fine or imprisonment, to fail to file returns and pay the tax.

In resolving the issue we are not concluded by the name or description of the tax as found in the act; our duty is to ascertain its nature and effect.[4] "The substance and not the shadow determines the validity of the exercise of the power."[5] The act does not impose an income or profits tax, or a license tax, is not an inspection measure, or a police regulation. The tax is not confined to a particular method of merchandising. All retailers, individual and corporate, selling every description of commodities, in whatever form their enterprises are conducted, make up the taxable class. And the excise is laid in respect of the same activity of each of them—the making of a sale. Although no difference is suggested, so far as concerns the transaction which is the occasion of the tax, between the taxpayer's first sale of the year and his thousandth, different rates may apply to them. The statute operates to take as the tax a percentage of each dollar due or paid upon every sale, but increases the percentage if the sale which is the occasion of the tax succeeds the consummation of other sales of a specified aggregate amount. As found by the court below, the act of making a sale, which with all others made in the taxable year represents a total sales price of $400,000 or less, results in the imposition of a tax of 1/20th of one per cent. upon the price, whereas the making of the same sale by one who has theretofore sold $400,000 but less than $500,000 worth of goods entails a tax of 2/20ths of one per cent., or by one whose prior sales aggregate $900,000, a tax of 17/20ths of one per cent.

In connection with other provisions of the fundamental law this court has had occasion to analyse similar acts. In *Brown* v. *Maryland*, 12 Wheat. 419, a tax on the occupation of an importer was held a tax on imports obnoxious to the commerce clause. Said the court (p. 444): "It is impossible to conceal from ourselves, that this is varying the form, without varying the substance . . . All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself." In *Cook* v. *Pennsylvania*, 97 U. S. 566, a tax on the amount of an auctioneer's sales was declared a tax on the goods sold. In *Crew Levick Co.* v. *Pennsyl-*

[4] *Galveston, Harrisburg &c. Ry. Co.* v. *Texas*, 210 U. S. 217, 227; *Choctaw & Gulf R. R.* v. *Harrison*, 235 U. S. 292, 298; *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292, 294; *Shaffer* v. *Carter*, 252 U. S. 37, 55; *Dawson* v. *Kentucky Distilleries Co.*, 255 U. S. 288, 292; *St. Louis Cotton Compress Co.* v. *Arkansas*, 260 U. S. 346, 348.

[5] *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688, 698.

vania, 245 U. S. 292, a state tax on the business of selling goods in foreign commerce, measured by gross receipts from goods so sold and shipped, was pronounced an impost upon exports. The court said (p. 297): "... nor is it an occupation tax except as it is imposed upon the very carrying on of the business of exporting merchandise. It operates to lay a direct burden upon every transaction in commerce by withholding, for the use of the State, a part of every dollar received in such transactions." *Panhandle Oil Co.* v. *Knox,* 277 U. S. 218, decides a privilege tax imposed on sellers of gasoline, fixed at so many cents per gallon sold, is a tax on sales. At page 222 the court said: "Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests. ... To use the number of gallons sold ... as a measure of the privilege tax is in substance and legal effect to tax the sale." And in *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, a federal tax upon motorcycles "sold ... by the manufacturer" was held to be an excise on the sale, and the doctrine of the *Panhandle* case was reaffirmed.

Thus understood, the operation of the statute is unjustifiably unequal, whimsical and arbitrary, as much so as would be a tax on tangible personal property, say cattle, stepped up in rate on each additional animal owned by the taxpayer, or a tax on land similarly graduated according to the number of parcels owned.

The appellees seek to avoid the arbitrary character of the classification of sales for the purpose of imposing the levy by the claim that the act, properly construed, lays an excise upon the privilege of merchandising at retail and the exaction is made only for this privilege. They insist the amount of tax is merely measured by the volume of sales,[6] and in this view the classification is not arbitrary if any reasonable relation can be found between the amount demanded and the privilege enjoyed. They endeavor to deduce such a relation from the alleged fact that a merchant's net income and his consequent ability to pay increase as the volume of his sales grows. The argument does not advance the case for the validity of the statute. Even in this aspect the classification is arbitrary, for the claimed relation of gross sales—the measure of the tax—to net profits fails to justify the discrimination between taxpayers.

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[6]Franchise taxes measured by net income have been sustained, as not constituting a tax on income: *Educational Films Corp.* v. *Ward,* 282 U. S. 379; compare *Macallen Co.* v. *Massachusetts,* 279 U. S. 620; *Pacific Co., Ltd.* v. *Johnson,* 285 U. S. 480.

The district court found that "generally speaking" he who sells more is in receipt of a greater profit and hence has larger ability to pay, and upon this basis justified the classification. But it is to be remembered that the act in question taxes gross sales and not net income. As stated in *United States Glue Co.* v. *Town of Oak Creek*, 247 U. S. 321, 328:

"The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large."

Argument is not needed, and indeed practical admission was made at the bar, that the gross sales of a merchant do not bear a constant relation to his net profits; that net profits vary from year to year in the same enterprise; that diverse kinds of merchandise yield differing ratios of profit; and that gross and net profits vary with the character of the business as well as its volume. The trial court made no finding that the relation between gross sales and net profits, or increase of net worth, was constant, or even that there was a rough uniformity of progression within wide limits of tolerance. Expert witnesses, using data assembled from various reporting agencies, endeavored to establish that net profits or net worth grow with increased sales. But their testimony not only indicated great variations within each class selected for comparison, but also showed that in some of the classes representing the greater amount of sales the net profit or addition to net worth is smaller than in a class having less aggregate sales. The best that can be said for this evidence is that averaging the results of the concerns making the reports it is true "generally speaking", as the court below put it, that profits increase with sales. The ratio of increase, however, differs in different lines of activity and even as between concerns carrying on the same business, and so many exceptions and reservations must be made that averages are misleading. The proofs submitted are insufficient to support the appellees' contention that the graduation of the tax was ad-

justed with reasonable approximation to the net earnings of the taxpayers, and that such minor and incidental inequalities as may be found are those always incident in the application of any valid general rule of classification. We think the graduated rates imposed were not intended to bear any relation to net profits. The argument based upon the asserted analogy to a tax upon net income graduated in accordance with the size of the income is unconvincing, for the exaction here demanded is not of that kind.

We are told that the gross sales tax in question is in truth a rough and ready method of taxing gains under the guise of taxing sales; that it is less complicated and more convenient of administration than an income tax; and Kentucky for these reasons is at liberty to choose this form, and to ignore the consequent inequalities of burden in the interest of ease of administration. The argument is in essence that it is difficult to be just and easy to be arbitrary. If the Commonwealth desires to tax incomes it must take the trouble equitably to distribute the burden of the impost. Gross inequalities may not be ignored for the sake of ease of collection.

The assertion that a graduated income tax, like the graduated sales tax under consideration, ignores the varying rates of return upon investment of those carrying on similar enterprises is obviously inaccurate. An income levy by its very nature, assures equality of treatment, because the burden of the exaction varies with increase or decrease of return on capital invested and with the comparative success or failure of the enterprise. If, as argued, larger merchants are more efficient, their efficiency will be correspondingly reflected in their net earnings. If, as claimed, they are able to procure better management, a tax upon gains will uniformly reflect the effects of such management. And the same principle holds true of every advantage said to inhere in the magnitude of a business.

As we have said, the statute does not purport to levy a tax on incomes. Plainly it does not in fact do so. A merchant having a gross business of $1,000,000, but a net loss, must pay a greater tax than one who has a gross of $400,000, and realizes a substantial net profit. The record discloses such a situation. In the year 1930 24,186 merchants were subject to the tax. Two of these, whose gross sales amounted to 8 per cent of the gross sales of all merchants, would have paid, but for the interlocutory injunction

entered by the court below, more than half of the total tax due by all those subject to the impost. The payment by one of them would have been about $124,000, or $18,000 in excess of the total tax paid by the 24,163 merchants who reported $362,000 of gross sales, and of whom 24,128 had sales totaling less than $400,000; and this taxpayer had in Kentucky in that year a net income of approximately $172,000. The figures for 1931 and 1932 exhibit a like disparity. In the latter year the company last mentioned, though having sales in Kentucky amounting to $11,447,611, would, after payment of the tax, have shown a net loss of over $9,000. To assert that a law, thus operating, reasonably equates the exaction to net income is to ignore the facts.

The appellees say there is no showing that the tax in its actual operation is unduly burdensome or harmful to any of the appellants or amounts to confiscation of their property. The assertion is irrelevant to the issue of inequality, and is, moreover, contradicted by the record. In the case of one plaintiff whose sales in Kentucky in 1930 were over $14,500,000, in 1931 over $13,400,000 and in 1932 over $11,400,000, the net profits in the same state, after deducting the sales tax, would have been in 1930, $48,677, in 1931, $39,358, and 1932 would have shown a loss of $9,023. In the light of this demonstration, it is difficult to follow the argument that the constitution of Kentucky as construed by her courts is a shield against any tax law imposing an excise, the effect of which is to extinguish all profits, when we are told by appellees in the next breath, that this very statute has been upheld by the Supreme Court of Kentucky against constitutional attack.[7] But if that court had not spoken on the subject, these appellants are not to be denied relief under the Fourteenth Amendment, by resort to a forecast of possible amelioration of their situation by the state courts.

Ignoring the glaring inequalities of burden resulting from the statute, the appellees tell us that if and when the load becomes too heavy upon any taxpayer he may with confidence invoke the Fourteenth Amendment.[8] The position seems to be that different

[7]See *Moore* v. *State Board of Charities and Corrections*, 239 Ky. 728.

[8]By Public Act No. 24, Laws of 1933, Vermont imposed a graduated gross sales tax increasing from ⅛ of one per cent on sales of from fifty thousand to one hundred thousand dollars to four per cent on sales above two million dollars. A levy of a similar sort applied in Kentucky, as shown by the facts

principles govern various forms of taxation, and that what has been held with respect to the unrestricted power of a legislature to determine the amount to be exacted by other forms of taxation has no application to an excise. We are unaware of any such distinction in logic and the authorities sanction none. Every taxing law must pass the constitutional test applied by the courts to the method of imposition, but the measure of the impost rests in the discretion of the legislature.

To condemn a levy on the sole ground that it is excessive would be to usurp a power vested not in the courts but in the legislature and to exercise the usurped power arbitrarily by substituting our conceptions of public policy for those of the legislative body. In *Veazie Bank* v. *Fenno,* 8 Wall. 533, a tax of ten per cent on the notes of state banks was upheld although it "drove out of existence every State bank of circulation within a year or two after its passage." See *Loan Association* v. *Topeka,* 20 Wall. 663, 664. In *Knowlton* v. *Moore,* 178 U. S. 41, in sustaining an excise tax this court said, "if a lawful tax can be defeated because the power which is manifested by its imposition may when further exercised be destructive of it would follow that every lawful tax would become unlawful, and therefore no taxation whatever could be levied." (P. 60.) See also, *Magnano Company* v. *Hamilton,* 292 U. S. 40; *Fox* v. *Standard Oil Co. of New Jersey,* 293 U. S. —. Once the lawfulness of the method of levying the tax is affirmed, the judicial function ceases. He deludes himself by a false hope who supposes that if this court shall at some future time conclude the burden of the exaction has become inordinately oppressive, it can interdict the tax.

The suggestion is made that the *ad valorem* property tax heretofore laid on Kentucky merchants bears more heavily upon the little dealer than upon his bigger competitor, as the real estate and stock of merchandise of the former is greater in proportion to the business done than is the case with the latter. This fact may indeed be a proper reason for adjusting the tax burden so as better to reflect the fruits of the enterprise; but it can afford no excuse

proved in the present record, would have deprived many merchants in various tax brackets of all net income from their stores. We were informed at the argument that this statute has been held unconstitutional by a court of first instance.

for an arbitrary and unequal imposition as between persons similarly circumstanced. The record fails to show that an income tax or a flat tax on sales would not accomplish the desired end. The adoption of laws of the latter description by many of the states is a practical confirmation of the view that they are effective measures.[9]

The appellees refer to certain decisions of this court, but none of them rules this case. Those claimed to be particularly pertinent will be briefly noted.

In *Clark* v. *Titusville*, 184 U. S. 329, the tax levied consisted of a flat fee exacted for a license which entitled the merchant to conduct business for the ensuing year. The lowest fee was $5.00 for a merchant who during the year preceding that covered by the license had made sales not in excess of $1,000. A $10.00 fee applied to one who had sales between $1,000 and $2,500, a $15.00 fee to one having sales between $2,500 and $5,000, a $25.00 fee to one whose sales were between $5,000 and $10,000, and so on to a fee of $100.00 for the seller of $60,000 worth or more. It is important to note the grounds of attack. One was that the classes were so defined that a merchant with sales of $2,499 would pay at one rate and another with sales of $2,501 would pay at a higher rate; that a merchant whose sales were $1,001 would pay the same fee as one whose sales were $2,499. In overruling this objection the court relied upon the principle that some injustice is bound to result from any general rule of classification, and equal protection demands only reasonable uniformity in dealing with parties similarly circumstanced. A second objection was that the percentage of tax to sales was greater in the lower than in the higher brackets

[9]Arizona, Laws, 1933, ch. 18; California, Laws, 1933, c. 1020; Georgia, Code 1930, Supplement, Act of 1929, § 993(316); Illinois, Act of June 28, 1933, Laws, 58th Gen. Assembly, p. 924; Indiana, Burns Ind. Stats., 1933, ch. 26, § 64-2601; Iowa, ch. 82, Laws 45th Gen. Assembly, Extra Sess., § 37ff; Kentucky, ch. 25, Ky. Acts, Special Sess., 1934; Michigan, Public Acts, Sess. 1930, No. 167; Mississippi, G. L. 1934, ch. 119; Missouri, Laws, Extra Sess. 1934, p. 155; New York, Cahill's Consol. Laws, 1933 Supp., ch. 61, Art. 17, § 390, p. 144; North Carolina, Sess. 1933, ch. 445, p. 768; Ohio, Page's Ohio General Code, § 5546-1, p. 859; Oklahoma, First Spec. Sess. 1933, c. 196, p. 456; Pennsylvania, Act Aug. 19, 1932, Special Sess. 1932, § 3, p. 92; South Dakota, Laws, 1933, § 184; Utah, Laws, 1933, c. 63 as amended by c. 20, Second Special Session, 1933; Washington, Laws, 1933, c. 191, p. 869; West Virginia, Act of May 26, 1933, Extra Session, ch. 33, p. 219.

—that is, that a merchant selling goods for $60,000 or more paid a less percentage of his sales by way of tax than the smaller merchant who sold only $1,000 worth of goods. The objection was unavailing, because the tax did not purport to be fixed upon a percentage of sales. The purpose was to charge a larger license fee to a larger business. Any tax measured by a fixed and uniform percentage of gross sales would impose a heavier burden on the taxpayer having the greater volume of sales. The excise here involved is not of that sort, the sum exacted from the merchant doing the larger business being not only greater in gross amount, but larger in proportion to sales, than that demanded of his smaller competitor.

In *Metropolis Theatre Co.* v. *Chicago*, 228 U. S. 61, a licensing ordinance provided for a greater license to be paid by theatres charging a higher rate for tickets than was exacted from those charging lower rates. This court sustained the classification upon the ground that the distinction between the sorts of theatres classified obtains in every large city of the country; and said (p. 69): "It will immediately occur upon the most casual reflection that the distinction the theatre itself makes is not artificial and must have some relation to the success and ultimate profit of its business. In other words there is a natural relation between the price of admission and revenue, some advantage certainly that determines the choice. The reason for it must therefore be substantial, and if it be so universal in the practice of the business it would seem not unreasonable if it be adopted as the basis of governmental action." The case falls within the principle that even a small difference in the method of conducting business may be availed of by government in imposing different taxes. It furnishes no support for a tax upon the sales of merchants at rates varying per sale or per dollar with the amount of their respective gross sales.

In several recent cases[10] we sustained the classification of chain stores for taxation at rates higher than those applicable to single stores, and graduated upward on each store as the total number of units in one ownership increased. We found this classification reasonable because of advantages incident to the conduct of mul-

[10] *State Board of Tax Commissioners* v. *Jackson*, 283 U. S. 527; *Louis K. Liggett Company* v. *Lee*, 288 U. S. 517; *Fox* v. *Standard Oil Co. of New Jersey*, No. 69, Oct. T. 1934, decided January 14, 1935.

tiple stores and obvious differences in chain methods of merchandising as contrasted with those practised in the operation of one store. The instant cases present a classification of quite another kind. The Kentucky statute ignores the form of organization and the method of conducting business. The taxable class is retail merchants, whether individuals, partnerships or corporations; those who sell in one store or many; those who offer but one sort of goods and those who through departments deal in many lines of merchandise. The law arbitrarily classifies these vendors for the imposition of a varying rate of taxation, solely by reference to the volume of their transactions, disregarding the absence of any reasonable relation between the chosen criterion of classification and the privilege the enjoyment of which is said to be the subject taxed. It exacts from two persons different amounts for the privilege of doing exactly similar acts because the one has performed the act oftener than the other. We hold the act unconstitutional, and reverse the judgment.

So ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

Nos. 454, 455, 456 and 457.—October Term, 1934.

454	The Stewart Dry Goods Company, Appellant, *vs.* John B. Lewis, et al.	On Appeals from the District Court of the United States for the Western District of Kentucky.
455	Fred Levy, et al., Appellants, vs. John B. Lewis, et al.	
456	J. C. Penney Company, Appellant, *vs.* John B. Lewis, et al.	
457	The Kroger Grocery & Baking Company, Appellant, *vs.* John B. Lewis, et al.	On Appeal from the District Court of the United States for the Eastern District of Kentucky.

[March 11, 1935.]

Mr. Justice Cardozo, dissenting.

The prevailing opinion commits the court to a holding that a tax upon gross sales, if laid upon a graduated basis, is always and inevitably a denial of the equal protection of the laws, no matter how slight the gradient or moderate the tax.

In the view of the majority, the relation between the taxpayer's capacity to pay and the volume of his business is at most accidental and occasional. In the view of the legislature of Kentucky and of its highest court (*Moore* v. *State Board of Charities and Correction,* 239 Ky. 729), the relation, far from being accidental or occasional, has a normal or average validity, attested by experience and by the judgment of trained observers. The one view discovers in the attempted classification an act of arbitrary preference among groups essentially the same. The other perceives in the division a sincere and rational endeavor to adapt the burdens of taxation to the teachings of economics and the demands of social justice.

A theory readily intelligible, whether it be sound or unsound, underlies the adoption of the graduated levels. Economically,

the theory is that there is a minimum of size for business units below which efficiency is less on the average than expansion would tend to make it; that there are intermediate levels within which efficiency is subject on the average to progressive development; and that there is an ultimate level beyond which efficiency, even if promoted, goes forward more slowly and at a diminishing ratio. Socially, the theory is that just as in taxes upon income or upon transfers at death, so also in imposts upon business, the little man, by reason of inferior capacity to pay, should bear a lighter load of taxes, relatively as well as absolutely, than is borne by the big one. For the purposes of retail business, the first or less efficient class is identified by the Kentucky statute with merchants whose gross sales are $400,000 or less; the six intermediate classes begin at that point and end with a million dollars; the final class is made up of those whose sales are over a million. For the first class the effective rate is 1/20 of 1 per cent; for the last it gradually approaches, though it can never quite reach 1 per cent, this by reason of the fact that the taxpayer in the higher brackets gets the benefit of the application of the lower rates to those parts of the gross sales that fall within the lower levels.

For many years Kentucky taxed her retail merchants upon the basis of property or capital employed within the state. Tolman, *The Gross Sales Tax in Kentucky,* 10 Tax Mag. 89, 112. The tax thus apportioned bore heavily upon the small retailer in comparison with the large one. This was so for several reasons developed with full statistics by students of taxation. Tolman, *loc cit, supra,* citing Government of Kentucky, *Report of the Efficiency Commission of Kentucky,* vol. II, p. 232, and Martin & Patton, *"Operations of Real Estate Tax in Lexington, Ky."*, (Bureau of Business Research, University of Kentucky, MS.). Perhaps the chief reason is the rapidity of turnover in large scale enterprises, the effect of this mobility being to reduce the value of the property that must be kept on hand at tax day as well as at other times. Tables in the record bear witness in a striking way to the resulting inequality. Upon the basis of a property tax a merchant with sales of $10,000,000 was found to pay less than one-half as much tax per dollar of sales as did a merchant whose sales were $150,000 or less. Cf. Tolman, *loc. cit., supra;* also Statutes of Kentucky, § 4189-2. More concretely, Kroger, one of the petitioners, with gross sales of many millions, paid a tax upon the old basis of only 137/1000 of one per cent in proportion to its sales in comparison with an

average of 934/1000 of one per cent paid by the 16,535 merchants whose sales were less than $400,000 annually. Tolman, *loc. cit., supra.* Kentucky is not chargeable with oppressive discrimination in superseding such a method of taxation by one more nearly equal in its burdens.

The choice of a new method made it necessary for the legislature to strike a balance of advantage. Tolman, *op. cit., supra,* at p. 90; Haig and Shoup, *The Sales Tax in the American States,* Columbia University Press (1934), p. 159 *et seq.* For a time there was a suggestion of a tax on chain stores only, but a lower federal court had held that method to be unlawful (38 F. (2d) 652), and the decision of this court to the contrary (*State Board of Tax Commissioners* v. *Jackson,* May, 1931, 283 U. S. 527), had not yet been announced. To be sure there was the possibility of a tax upon gross sales at a flat rate without graduated levels, but a burden so imposed might be subject to new objections. In the view of serious students of the problem, a flat tax upon gross sales is not always shifted to the consumer. It is often absorbed more or less by the seller, for a time, even if not permanently, to prevent the falling off of sales. National Industrial Conference Board, *General Sales or Turnover Taxation* (1929), pp. 8, 9, *et seq.;* Buehler, *Recent Developments of the General Sales Tax,* 36 Journal of Pol. Econ. 83, 92, 93. Such at least is the teaching of a school of economists, though the subject is one as to which the learned are divided.[1] At times absorption is accomplished by a reduction of the price even when in form the amount of the tax has been added to the bill. Haig & Shoup, *op. cit., supra,* p. 29, 31 *et seq;* Buehler, *General Sales Taxation* (1932), pp. 194, 195. An impressive body of opinion is back of the view that in so far as the tax is not passed to the consumer the flat rate bears more heavily on the small business than on the large one. This tendency is corrected when the tax is imposed on a graduated basis. One of the consequences of such a tax is to make the shifting of the burden easier for those who pay the lower rates than for those who pay the higher ones. For that reason the flat rate is thought to be less efficient than the graded one as an instrument of social justice. The large dealer, it is said, occupies, both absolutely and relatively, a position of economic superiority by reason of the volume of his busi-

[1]The problem is discussed by Stone, J., with a reference to many treatises on finance, in his dissenting opinion in Indian Motocycle Co. *v.* United States, 283 U. S. 570, 581.

ness. In that view, to make his tax heavier, both absolutely and relatively, is not arbitrary discrimination, but an attempt to proportion the payment to capacity to pay and thus to arrive in the end at a more genuine equality. By the statute in controversy the Commonwealth of Kentucky is aligned with that position. It is not the function of a court to make itself the arbiter between competing economic theories professed by honest men on grounds not wholly frivolous. *Otis* v. *Parker,* 187 U. S. 606, 609. Responsibility for economic wisdom has been laid upon the legislature. There is finality in its choice, even though wisdom may be lacking, unless choice can be found to be so void of rationality as to be the expression of a whim rather than an exercise of judgment.

The question then is whether there is rationality in the belief that capacity to pay increases, by and large, with an increase of receipts. Certain it is that merchants have faith in such a correspondence and act upon that faith. A witness for the petitioners tells us: "The policy prevailing throughout the United States, so far as retail merchandising department stores are concerned, is to get as large a volume as possible with a small percentage of profit, allowing the volume to produce the net profit." If experience did not teach that economic advantage goes along with larger sales, there would be an end to the hot pursuit for wide and wider markets. Official statistics in Kentucky confirm the impulse of her merchants, an impulse shared with merchants everywhere. Tables prepared by a witness on the basis of returns to the State Tax Commission show that persons and corporations whose sales were over $1,000,000 had net earnings between $125,000 and $400,000; those with sales between $600,000 and $800,000 had net earnings of $35,000 to $60,000; those with sales between $200,000 and $450,000 had net earnings of $5,000 to $34,000, with the exception of one concern which was conducted at a loss; and those with smaller sales had net earnings ranging from $10,000 to nothing. This does not mean that an increase of gross sales in one business brought the same increase of net earnings as an increase of gross sales in every other business. It does not mean that larger sales brought net earnings in a mounting ratio, relatively as well as absolutely. It does mean, however, that on the whole, net earnings in a business were higher when sales were large than they were in the same business when sales were comparatively small. In brief there is a relation of correspondence between capacity to pay and the amount of business done. Exceptions, of course, there are.

The law builds upon the probable, and shapes the measure of the tax accordingly.

It is no answer to say that as between one business and another, or even as between one person and another engaged in the same business, there will be varying rates of return upon the amount of the investment. This is true also of a tax on net income. Net earnings of $100,000 may represent for one man a return on a capital of $2,000,000 and for another a return on a capital of double that amount, yet the tax will be the same for each. So also it is no answer to say that in the administration of this statute two merchants whose sales are very large are subject to as heavy a tax as many thousands of merchants whose sales are in the lowest brackets. One might as well compare the federal income tax of a banker whose net earnings are in the millions with that of a thousand clerks who by reason of exemptions are to pay no tax whatever. The comparison proves nothing unless it be the obvious fact that taxpayers are few when the count is at the highest level. Once more, it is no answer to say that though capacity to pay is enlarged on the average by an increase of the sales, there are times when sales increase and yet the outcome is a loss. No loss has been suffered by any of the petitioners, unless it be in one instance as the result of inefficiency, and so the findings show. In so far as the statute fails to make allowance for the contingency of loss, it is certainly not arbitrary in its operation as to those realizing a gain, and they will not be heard to complain that it is arbitrary as to others. *Hatch* v. *Reardon,* 204 U. S. 152, 160; *Keeney* v. *New York,* 222 U. S. 525, 536; *Hendrick* v. *Maryland,* 235 U. S. 610, 621; *Oliver Iron Co.* v. *Lord,* 262 U. S. 172, 180. But the result will not be changed if their standing be assumed. The law has regard in these matters, not to invariable sequences, but to probabilities and tendencies. "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." *Metropolis Theatre Co.* v. *Chicago,* 228 U. S. 61, 69. "The fact that a better taxing system might be conceived does not render the law invalid." *Salomon* v. *State Tax Commission,* 278 U. S. 484, 491. At the very least, an increase of gross sales carries with it an increase of opportunity for profit, which supplies a rational basis for division into classes, at all events when coupled with evidence of a high degree of probability that the opportunity will be fruitful.

Many a pertinent analogy reinforces this conclusion. The tax

upon a long chain of stores is often at a higher rate than the tax upon a short one (*State Board of Tax Commissioners* v. *Jackson, supra*), yet it may happen that in lean years, still more in financial crises, the greater the number of stores, the less the actual gain. *Fox* v. *Standard Oil Co.*, January 14, 1935, — U. S. —. The presence of such a possibility does not make the graduation wrongful. The theatre charging a high price for tickets of admission may be taxed at a higher rate than one whose admission price is low. A showing that the revenue of the high priced theatres is less than that of some of the others will not cause the tax to fail. *Metropolis Theatre Co.* v. *Chicago, supra.* McKenna, J. sagely pointed out in that case that the choice between high and low prices had been made by the theatre itself and made in response to its own conception of advantage. A conception good enough for the taxpayer was thought to be good enough for the government. So here, under the challenged statute. Larger and larger sales are sought for by business and sought for with avidity. They are not the products of whim and fancy. They represent a conception of probabilities and tendencies confirmed by long experience. The conception is no more arbitrary in the brain of a government official than it is in the mind of a company director.

The striving to expand being so general, there is no occasion for surprise at the discovery of a relation between profit and expansion when expansion is kept within the bounds of moderation. In tracing that connection it will not do to compare the profits of one line of business with those of a different one viewed in isolation. Many factors enter to make one kind of enterprise more gainful than another. Cf. Tolman, *op. cit., supra,* at p. 112. Moreover, the rule is undoubted that different occupations may be taxed in different ways. *Bell's Gap R. Co.* v. *Pennsylvania,* 134 U. S. 232, 237; *Stebbins* v. *Riley,* 268 U. S. 137, 142; *Ohio Oil Co.* v. *Conway,* 281 U. S. 146, 159; *Union Bank* v. *Phelps,* 288 U. S. 181. Comparison must be between large and small enterprises in the same line of business, or in many lines of business viewed in combination. This comparison being made, large sales will be found in the main to have the advantage over small ones. There are those who hold that growth may be so large as to make the business clumsy and inefficient, destroying unity of management, but enterprises swollen to that extent are not the common run that fix the patterns of a statute. It is significant that graduation stops according to the plan of the Kentucky statute before size becomes inordinate.

In what has been written the effort has been to show that enhancement of the gross sales has a tendency in respect of the average business enterprise to increase capacity to pay by making the gains larger than they would be if sales were small. This, if it has been made out, will serve without more to sustain the separation into classes that is now under attack. *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283, 293, 296; *Knowlton* v. *Moore,* 178 U. S. 41, 54. But statistics are not lacking to give color to a broader claim. The studies of the Harvard Bureau of Business Research show (Bulletins 74, 78, 83 and 85) that despite occasional aberrations gross sales have a direct bearing on the ratio of net gain to sales and on the ratio of net gain to net worth.[2] In brief there is not only an increment of profit expressed in terms of dollars, but an increment also when the profit is expressed as a percentage. How far the teachings of these tables are to be credited as accurate, it is not for us to say. *Williams* v. *Mayor,* 289 U. S. 36, 42; *O'Gorman & Young* v. *Hartford Fire Insurance Co.,* 282 U. S. 251, 257. They are confirmed by economists of standing who testified for the state. Opposed are other scholars, also men of high repute, who have studied the results of large scale enterprises and small ones, and on the basis of that study advance a different doctrine. They find that the high percentages of profit are more likely to be earned when capital and sales are moderate.

[2]Bulletin 74 deals with the operations of department stores for 1927. One set of tables includes stores whose sales are in excess of a million dollars. They are divided into four classes (one million to two million; two million to four million; four million to ten million; ten million and over). Referring to these classes, the report says (p. 10): "While noticeable differences appeared in net profit for stores grouped according to volume of sales, these differences were even greater in the case of total net gain both as a percentage of net sales and as a percentage of net worth. In each instance these figures varied directly with the volume of sales, and a distinctly more favorable showing was made by the larger firms." Another set of tables includes stores whose sales were under a million dollars. Among these the most favorable net profit showing was that of the group with volume of sales between one quarter and one half million. Between half a million and a million, the ratio of increase declined. Even there, however, the showing was more favorable than for stores under a quarter of a million, where the average was one of loss. Bulletins 78, 83 and 85 state the operations for later years with results not greatly different. Even in years of loss, the percentage of loss had in the main a tendency to be lower as the volume of the sales increased. "It is quite clear that the larger stores operated on a distinctly more satisfactory basis than the smaller stores, and that success as measured by earnings varies directly with size." Bulletin 85, p. 8.

Epstein, *Industrial Profits in the United States,* pp. 45, 46, 131, 132. On the other hand, they are not hostile to the doctrine that on the average the net earnings of a business increase absolutely, though not proportionately, as the sales increase in volume.[3] Even as to percentages, the lawmakers of Kentucky were at liberty to reach their own conclusion in the face of these conflicting judgments pronounced by men of learning. If their conclusion is not arbitrary, it is not for us to set them right.

The studies back of these statistics are instructive not merely as to results but also as to causes. Harvard Bureau of Business Research, Bulletin 85, p. 9. Sales on a large scale are accompanied, it seems, by differences of method as well as differences of quantity. Some of the attendant advantages are matters of common knowledge. The big shops having ample capital can get the best locations. This is a form of advertising, productive of good will. The big shops can practise economies impossible for small ones. In particular they can make their purchases in bulk and hence at cheaper prices. The big shops acquire a prestige that makes customers eager to buy of them. Here and there they can even charge a little more than others, at least for high priced goods, or goods not wholly standardized, and the buyer will ignore the difference. If they happen to be department stores, they stimulate a customer to buy at one shop without the bother of going elsewhere. If they happen to be chain stores, they have other methods of attraction. Even management tends to be more efficient unless the business becomes unwieldy by reason of its size. Bulletin 85, *supra.* The president of the Kroger Company tells us: "Kroger trains its men, having regular training schools and diplomas." As already pointed out the scheme of the Kentucky statute puts a stop to graduation before size becomes immoderate. From all this it comes about that many avenues of profit closed to the little dealer are open to his big competitor.

The framers of a system of taxation may properly give heed to convenience of administration, and in the search for that good may content themselves with rough and ready compromises. Elaborate machinery, designed to bring about a perfect equilibrium between benefit and burden, may at times defeat its aim through

[3]The prevailing opinion in effect concedes "that averaging the results of the concerns making the reports it is true 'generally speaking,' as the court below put it, that profits increase with sales."

its own elaboration. A crippling result of the decision just announced will be to restrict the choice of means within bounds unreasonably narrow. Hereafter in the taxation of business a legislature will be confined, it seems, to an income or profit tax if it wishes to establish a graduated system proportioning burden to capacity. But profits themselves are not susceptible of ascertainment with certainty and precision except as the result of inquiries too minute to be practicable. The returns of the taxpayer call for an exercise of judgment as well as for a transcript of the figures on his books. They are subject to possible inaccuracies, almost without number. Salaries of superintendence, figuring as expenses, may have been swollen inordinately; appraisals of plant, of merchandise, of patents, of what not, may be erroneous or even fraudulent. In the words of a student of the problem, "statements of profits are affected both by accounting methods and by the optimistic or pessimistic light in which the future is viewed at the time when the accounts are made up." Epstein, *op. cit., supra,* p. 5. These difficulties and dangers bear witness to the misfortune of forcing methods of taxation within a Procrustean formula. If the state discerns in business operations uniformities and averages that seem to point the way to a system easier to administer than one based upon a report of profits, and yet likely in the long run to work out approximate equality, it ought not to be denied the power to frame its laws accordingly.

For answer to all this the thrust will not avail that "it is difficult to be just and easy to be arbitrary." The derogatory epithet assumes the point to be decided. There is nothing arbitrary in rescuing a vast body of taxpayers from the labor and expense of preparing elaborate reports, at best approximately accurate. There is nothing arbitrary in rescuing a government from the labor and expense of setting up the huge and unwieldly machinery of an income tax department with a swarm of investigators and accountants and legal and financial experts. To frame a system of taxation in avoidance of evils such as these is no act of sheer oppression, no abandonment of reason, no exercise of the general will in a perverse or vengeful spirit. Far from being these or any of them, it is a pursuit of legitimate ends by methods honestly conceived and rationally chosen. More will not be asked by those who have learned from experience and history that government is

at best a makeshift, that the attainment of one good may involve the sacrifice of others, and that compromise will be inevitable until the coming of Utopia.

The argument is made that the principle of graduation, once it has gained a lodgment, may be extended indefinitely, with the result that in some other statute the rate for the upper levels, instead of being confined as it is here to something less than one per cent, may be ten per cent or twenty, thus wiping out profits when business is done on a large scale. A sufficient answer may well be that no such act is now before us; but if this answer be inadequate, another is at hand. The more effective answer is that under the law of Kentucky the danger is illusory. There is no need to consider in respect of an excise upon sales whether the doctrine of *Magnano Co.* v. *Hamilton*, 292 U. S. 40, and *Fox* v. *Standard Oil Co., supra*, could be invoked successfully to uphold a destructive measure of taxation if the standard of validity were to be looked for in the Fourteenth Amendment and not in any other law. The significance of whatever distinctions there may be will be weighed when the event arises. For the present it is enough to say that under the constitution of Kentucky as interpreted by repeated decisions of her highest court, no tax law in the nature of an excise will be upheld if its effect is so drastic as to extinguish profits altogether. *Fiscal Court of Owen County* v. *Cox Co.*, 132 Ky. 738; *City of Louisville* v. *Pooley*, 136 Ky. 286; *Sperry & Hutchinson* v. *Owensboro*, 151 Ky. 389. Because of those decisions we refused only recently to sustain a statute of Kentucky imposing a prohibitory tax upon the sale of oleomargarine (*Glenn* v. *Field Packing Co.*, 290 U. S. 177, affirming 5 F. Supp. 4), though in *Magnano Co.* v. *Hamilton, supra*, a like tax, adopted by the state of Washington, was held to be consistent with the constitution of the nation. The relevant provisions of the Kentucky constitution and of the explanatory judgments of her courts are written by implication into the Kentucky tax act as if put there in so many words. The act is to be interpreted as if it said: "The tax hereby imposed is not to be collected if the result will be to wipe out the profits of a business conducted with ordinary efficiency, or to reduce the profits to a level unreasonably low." Such an extinguishment of profits is not the outcome of the tax when the act is applied to the business of these petitioners, and so

the court below has found.[4] Such can never be the outcome either under this act or any other as long as the constitution of Kentucky continues what it is today.

The case has thus far been considered almost wholly without reference to the precedents. When these are examined, the conclusion is even clearer. To dwell upon the chain store decisions is needless. *Board of Tax Commissioners* v. *Jackson, supra; Fox* v. *Standard Oil Co., supra; Liggett Co.* v. *Lee*, 288 U. S. 517. They are too recent to be forgotten. Classification in those cases ran athwart the lines of profit, yet it was none the less sustained. There is no magic, however, in the catchword of a "chain". In cases not so recent, other forms of business enterprise have been subjected to graduated taxes on the basis of size alone without reference to profits. Thus, in *Clark* v. *Titusville*, 184 U. S. 329, a license tax was laid upon wholesale and retail merchants, the rate for each class varying progressively with the amount of the gross sales. The court upheld the classification as one reasonably related to capacity to pay. In *Metropolis Theatre Co.* v. *Chicago, supra,* already summarized in this opinion, a tax upon theatres proportioned to the cost of tickets was upheld against the contention of the taxpayer that the price of tickets was unrelated to the profits of the venture. In *Pacific American Fisheries* v. *Alaska*, 269 U. S. 269. a tax had been laid on salmon canneries at graduated levels, the percentage of the tax increasing with the number of cases packed. It was pressed that the tax discriminated against large canneries in favor of small ones. The argument was dismissed with the remark that "classification of taxes by the amount of the corpus taxed has been sustained in various connections heretofore." Cf. *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217, 228; *Dow* v. *Beidelman*, 125 U. S. 680, 691; *Chicago, Burlington & Quincy R. Co.* v. *Iowa*, 94 U. S. 155, 164; *C. & O. R. Co.* v. *Conley*, 230 U. S. 512, 522; *Spreckels Sugar Refining Co* v. *McClain*. 192 U. S. 397; *Hope Gas Co.* v. *Hall*, 274 U. S. 284; *Citizens' Tele-*

[4] A loss of $9,023 would have been suffered by one of the petitioners if the tax had been paid in 1932, but the finding is that for that year the business was conducted without reasonable skill, and that with a change of the methods of management the loss was turned into a profit. At most the operations of that year might call under the Kentucky decisions for a modification of the judgment. The petitioners seek an injunction that will annul the statute altogether.

phone Co. v. *Fuller*, 229 U. S. 322; *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245; *Brown-Forman Co.* v. *Kentucky*, 217 U. S. 563; *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688. See also *Louisville Gas Co.* v. *Coleman*, 277 U. S. 32, 43, 44, which brings the precedents together. Other cases could be added.

In fine, there may be classification for the purpose of taxation according to the nature of the business. There may be classification according to size and the power and opportunity of which size is an exponent. Such has been the teaching of the lawbooks, at least until today.

I am authorized to state that Mr. Justice BRANDEIS and Mr. Justice STONE join in this opinion.